BETTER TO KILL THAN TO MAIM: THE CURRENT STATE OF MEDICAL MALPRACTICE WRONGFUL DEATH CASES IN TEXAS

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I. INTRODUCTION

Imagine a man in the prime of his life. Let us call him Tyler Williams. Tyler is a thirty-year-old in middle management in a major bank, making $50,000 a year. He has a wife and two young children.

One day, Tyler goes into his local hospital for a routine surgery. Due to a tragic mistake made by his doctor, Tyler is paralyzed from the neck down and is unable to work another day of his life. He sues his doctor and wins his case. In addition to his past and future medical expenses, he receives

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his lost wages for the rest of his life. Assuming Tyler would have worked for thirty-five years until retirement, he would have made around $1.75 million.

Tyler and his family would probably also receive up to the $250,000 cap on non-economic damages for such items as loss of consortium, pain and suffering, and disfigurement. Excluding medical costs then, Tyler will receive a $2 million judgment.

Now let us change the scenario. Tyler goes in for a somewhat risky surgery and dies during the operation. It turns out that the doctor had an extra drink or two from the hospital-sponsored open bar during a lunch presentation before he went in to do the surgery. Tyler's grieving widow hires an attorney who files a suit against the doctor and the hospital.

The jury, outraged at the gross negligence of the doctor and the complicity of the hospital, awards $5 million in actual damages and $10 million in punitive damages. Justice is seemingly served, and a message is sent to others in the medical profession.

However, this is not the end of the story. Additional statutory caps enacted specifically for medical malpractice wrongful death claims kick in and knock the entire award down to $1.5 million, exclusive of Tyler's medical expenses before he died, an award that is $500,000 less than the previous scenario.

Do you still think justice is served? It may not be, but this is the scenario that could play out under the current law in Texas. This Comment will examine the history of damage caps in medical malpractice situations, look at the history of tort reform in Texas, including changes in the law made by the recently enacted House Bill 4, to examine how a seeming anomaly in the law developed, and then see if such a system can stand constitutional scrutiny.

II. HISTORY OF WRONGFUL DEATH IN TEXAS

Starting at the beginning, no common law cause of action exists for wrongful death in Texas or indeed in any of the 50 states.[1] The reason for this seeming anomaly dates back to the English common law. In 1808, Lord Ellenborough handed down the decision in *Baker v. Bolton*.[2] In that decision, he held that, "in a civil Court, the death of a human being could

[1] Marmon v. Mustang Aviation, Inc., 430 S.W.2d 182, 186 (Tex. 1968).

[2] (1808) 170 Eng. Rep. 1033, 1033 (K.B.).

not be complained of as an injury."[3] Thus, the essential holding in that case is that any cause of action a victim has dies with him.[4]

This decision was due in part to the old English Felony Merger Rule.[5] Common law did not allow a civil recovery for an act that constituted both a tort and a felony, because the punishment for a felony was death of the felon and forfeiture of his property to the Crown.[6] Thus, after punishment, there was nothing left which would satisfy a judgment for a civil claimant.[7] However, long after the Felony Merger Rule had been abrogated, its reasoning remained and the wrongful death cause of action was still absent in British common law.

This ruling was justifiably widely criticized as creating a perverse incentive: it was better under the law to kill someone rather than to injure them.[8] In 1846, the British Parliament responded to critics by passing Lord Campbell's Act, which abrogated that harsh common law rule by establishing a new cause of action in which a beneficiary designated by the statute could recover losses as a result of death of a close loved one.[9]

However, this is not the end of the old common law rule. The holding in *Baker v. Bolton* was applied throughout the United States as a general rule since the colonies and then newly minted states inherited the common law, but not the statutory law, from England.[10] Texas, on the other hand, was never a British possession, so it did not automatically inherit this decision.[11] Nevertheless, Texas did voluntarily adopt the common law of England using a rule of decision in 1840.[12] This rule of decision adopts only those decisions that were consistent with the laws and Constitution of Texas.[13] Because at this time England had not yet passed Lord Campbell's

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[3] *Id.*

[4] *Id.*

[5] Moragne v. States Marine Lines, Inc., 398 U.S. 375, 382 (1970).

[6] *Id.*

[7] *Id.*

[8] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 127, at 495 (W. Page Keeton ed., West Publ'g Co. 1984) (1941).

[9] Fatal Accidents Act (Lord Campbell's Act), 1846, 9 & 10 Vict., c. 93 § 2 (Eng.), *reprinted in* 2 STUART M. SPEISER, RECOVERY FOR WRONGFUL DEATH app. A. at 643−44 (2d ed. 1975).

[10] *See Moragne*, 398 U.S. at 384.

[11] *See* Gulf C. & S.F. Ry. Co. v. Beall, 91 Tex. 310, 42 S.W. 1054, 1055 (Tex. 1897).

[12] Mark D. Clore, *Medical Malpractice Death Actions: Understanding Caps, Stowers, and Credits*, 41 S. TEX. L. REV. 467, 473−74 (2000).

[13] *Id.* at 474.

Act, the statutory wrongful death cause of action did not come over and was thus not recognized in Texas.[14]

This principle has been recognized in several early Texas cases.[15] In response to these court rulings, the Texas Legislature realized the injustice of letting the common law rule stand and passed the first wrongful death statute in 1860, which was largely based on Lord Campbell's Act.[16] Of course, there have been many subsequent amendments and limitations to that original act.[17]

III. DAMAGE CAPS IN TEXAS LAW, RATIONALE AND OPERATIVE EFFECTS

A. 4590i/MLIIA

The first round of tort reform started in the mid 1970s.[18] In response to complaints about rising malpractice premiums, the legislature formed and appointed the Texas Medical Professional Liability Study Commission headed by W. Page Keeton, former Dean of the University of Texas Law School, to study the issue of rising medical malpractice insurance rates.[19] The Keeton Commission took extensive testimony and at the end of the process issued a report, popularly known as the Keeton Report.[20]

The Keeton Report recommended a plan for early identification of unmeritorious claims through negotiation, mandatory screening boards to encourage early settlements and to filter out nuisance suits, and a pre-suit notice requirement of sixty days.[21]

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[14] *Id.*

[15] Galveston, Harrisburg, & San Antonio R.R. Co. v. Le Gierse, 51 Tex. 189, 199 (1879).

[16] Act approved Feb. 2, 1860, 8th Leg., R.S., ch 35, 1860 Tex. Gen. Laws 32, *reprinted in* 4 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, 1394–95 (Austin, Gammel Book Co. 1898); March v. Walker, 48 Tex. 372, 375 (1877).

[17] *See infra* Part III.

[18] Michael S. Hull, et al., *House Bill 4 and Proposition 12: An Analysis with Legislative History Part One: Background and Overview*, 36 TEX. TECH L. REV. 1, 3 (2005).

[19] *See* Darrell L. Keith, *The Texas Medical Liability and Insurance Improvement Act—A Survey and Analysis of Its History, Construction and Constitutionality*, 36 BAYLOR L. REV. 265, 267−68 (1984).

[20] *Id.* at 268.

[21] Melissa Lyn McLeod Hamrick, Comment, *The MLIIA: Bad Medicine and Bad Law Is a Costly Combination for Texas Minors With Medical Death Claims*, 3 TEX. WESLEYAN L. REV. 123, 135−36 (1996).

Much of the Keeton Report's recommendations were passed by the legislature in 1978 in the Medical Liability and Insurance Improvement Act (MLIIA) and codified in the then-new Article 4590i.[22] The stated goals of MLIIA were to reduce the frequency and severity of health care liability claims, decrease the costs of malpractice insurance, protect providers from liability through the availability of affordable insurance, and ensure public access to affordable health care.[23] The Act accomplished these goals by including a cap on non-economic damages, changing the collateral source rule, shortening the statutes of limitations on minors, and altering numerous other provisions all related to medical malpractice suits.[24]

The specific provision limiting damages was a damage cap of $500,000, adjusted for inflation and applied to both non-economic damages and all economic damages except medical expenses.[25]

In response to a challenge brought to MLIIA, the Texas Supreme Court held in *Lucas v. United States* that the damage caps on personal injury causes of action stemming from medical malpractice violated the Open Courts provision of the Texas Constitution.[26] Thus, the area of injury caused by medical malpractice was uncapped once again. Later decisions by the court also struck down the statute of limitations on minors.[27]

However, in a later case, the Texas Supreme Court explicitly refused to strike down the damage caps as they applied to wrongful death causes of action.[28] The Court held that the Texas Legislature was within its power to limit damage awards for statutory, as opposed to common law, causes of action.[29]

But MLIIA did not only affect the damages calculations to the then-existing wrongful death statute, it also created a separate statutory cause of action for wrongful death caused by medical malpractice.[30] The question after tort reform for the courts was if the new statute was a separate and independent cause of action from the general wrongful death statute.

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[22] *Id.* at 136−37

[23] *Id.* at 137.

[24] Hull, *supra* note 18, at 4.

[25] *Id.*

[26] *See generally* 757 S.W.2d 687 (Tex. 1988).

[27] *See infra* Part IV for discussion on these cases.

[28] *See* Rose v. Doctors Hosp., 801 S.W.2d 841, 848 (Tex. 1990).

[29] *Id.* at 845−46.

[30] Hamrick, *supra* note 21, at 142.

The Texas Supreme Court, in *Bala v. Maxwell*, interpreted that Article 4590i applied to death claims arising out of medical malpractice and thus preempted the wrongful death statute.[31] Subsequent courts have said that the rationale for preemption is found in the explicit statutory language in MLIIA that Article 4590i applied notwithstanding any other law.[32] Thus, Article 4590i alone, with all of its limitations and caps, applies to wrongful death actions that arise out of medical malpractice.[33]

B. House Bill 4

The most recent effort at tort reform came as the latest in a series of efforts to deal with medical malpractice costs that spread over the better part of two decades.[34] In 1987, the Texas Legislature returned to the issue of tort reform and amended the law on punitive damages and municipal liability.[35] In 1995, the legislature additionally required pre-suit review of medical malpractice claims in an effort to stop the flow of frivolous lawsuits.[36]

The final effort culminated in 2003, with the Medical Malpractice and Tort Reform Act of 2003, commonly known as House Bill 4.[37] Concerns about affordability of medical care, rising insurance premiums, and mounting jury verdicts led to the politicians' involvement in the issue, with Governor Rick Perry making tort reform one of the planks in his successful 2002 re-election campaign.[38]

The legislature took up the issue in 2002, referring the issue to several special committees for further study and bill drafting.[39] The work was principally done by the Senate Special Committee on Prompt Payment of

[31] Bala v. Maxwell, 909 S.W.2d 889, 892 (Tex. 1995) (per curiam).

[32] *See* Johnston v. United States, 85 F.3d 217, 223 (5th Cir. 1996); *Bala*, 909 S.W. 2d at 893.

[33] Baptist Mem'l Hosp. Sys. v. Arredondo, 922 S.W.2d 120, 121 (Tex. 1996).

[34] Hull, *supra* note 18, at 4−5.

[35] *Id.* at 4.

[36] *Id.* at 4−5.

[37] *See* Tex. H.B. 4, 78th Leg., R.S. (2003) (as filed).

[38] *See* Press Release, Office of Governor Rick Perry, Gov. Rick Perry Says Texas Must Address Medical Lawsuit Abuse Crisis (Apr. 4, 2002), *available at* http://www.governor.state.tx.us/divisions/press/pressreleases/PressRelease.2002-04-04.5823.

[39] Hull, *supra* note 18, at 12 (these committees include the House Committee on Insurance, the Senate Finance Committee, and the Senate Special Committee on Prompt Payment of Health Care Providers).

Health Care Providers, which was popularly called the Nelson Committee since it was chaired by Senator Jane Nelson.[40]

The Nelson Committee produced a final report in November 2002 which indicated that increasing and excessive litigation and jury verdicts were central factors in the steep rise of medical malpractice premiums.[41] The Nelson Report further called for immediate action to reverse these increases in the 2003 Legislative session.[42]

After much debate and negotiation, the Texas Legislature passed House Bill 4 and House Joint Resolution 3, which was an amendment to the Texas Constitution.[43]

House Bill 4 enacted a number of substantive changes that cut across the spectrum of tort liability in Texas. Among other provisions, House Bill 4 included:

- A hard $250,000 cap on non-economic damages in all medical malpractice cases; [44]
- a limit of attorney contingency fees;
- periodic payment of future damages;
- reform of the collateral source rule;
- restoration of the 1978 statute of limitations for minors;
- limits on liability for providers rendering charity care;

[40] *Id.*

[41] *See* Tex. S. Special Comm. on Prompt Payment of Health Care Providers, 78th Leg., Interim Report, at 2.4 (Nov. 2002), *available at* http://www.senate.state.tx.us/75r/senate/commit/c950/Downloads/PromptPay.pdf.

[42] *Id.* at 2.22.

[43] Hull, *supra* note 18, at 7; H.J. of Tex., 78th Leg., R.S. 316 (2003) (H.J.R. 3 read for the first time in the House); *see also infra* Part IV.B for a further discussion of this Constitutional change and its implications for judicial review.

[44] In personal injury/death cases, damages fall into two categories: economic and non-economic damages. Economic damages encompass such items that are more easily ascertained such as loss of income, lost earning capacity, and medical expenses. Non-economic damages, on the other hand, compensate the defendant for items that are not as easy to quantify. Items that fall under the umbrella of non-economic damages include compensation for pain, suffering, mental anguish, disfigurement, loss of enjoyment of life, etc. *See* Golden Eagle Archery, Inc. v. Jackson, 116 S.W.3d 757, 763 (Tex. 2003).

- procedural reforms to reduce frivolous suits; and
- higher burdens of proof in cases involving emergency care.[45]

In addition, House Bill 4 expanded and included new definitions to eliminate clever plaintiffs' attorneys from couching their medical malpractice cases in ways to avoid the limitations.[46]

Among that laundry list, the damage caps are the cornerstone of the attempt at reform and at the same time the most controversial.[47] The caps in House Bill 4 were an attempt to return to the spirit of the limits that were originally placed on medical malpractice cases in the 1970s, but which were then wholly or partially overturned by the Texas Supreme Court.[48]

These new damage caps were codified in the Civil Practice and Remedies Code in Sections 74.301 through 74.303.[49] These sections reflected a three-pronged approach at dealing with medical malpractice verdicts.

- A straight statutory damage limit of $250,000 for all non-economic damages;
- A second, alternative statutory limit linked to insurance requirements that was to be operable in the event that the first cap was held to be unconstitutional; and
- A codification of the remnants of the previously enacted caps in wrongful death and survival actions.[50]

Section 74.301 of the Texas Civil Practice and Remedies Code is the straight statutory damage limit of $250,000 for all non-economic damages

[45] *Id.*

[46] Michael S. Hull, et al., *House Bill 4 and Proposition 12: An Analysis with Legislative History Part Three: Detailed Analysis of the Medical Liability Reforms*, 36 TEX. TECH L. REV. 169, 175 (2005).

[47] *Id.* at 215.

[48] *See infra* Part IV.

[49] TEX. CIV. PRAC. & REM. CODE ANN. §§ 74.301−.303 (Vernon 2006); The Medical Malpractice & Tort Reform Act of 2003, 78th Leg., R.S., ch. 204, § 10.01, secs. 74.301−303, 2003 Tex. Gen. Laws 847, 873−75.

[50] Hull, *supra* note 46, at 215.

in medical malpractice cases.[51] This is the primary cap on damages that, in a departure from article 4590i, is not indexed for inflation.[52] It allows for a varied amount to be recovered based on whether the defendant is a physician, a health care provider, or a health care institution.[53]

The statute also holds for a strict $250,000 cap on non-economic damages for actions against all physicians and health care providers in subsection (a).[54] Subsection (b) contains a strict $250,000 cap applied to each health care institution that is a defendant.[55] Finally, subsection (c) applies when there is more than one health care institution involved in the litigation.[56] In that case, the plaintiff can recover a maximum total of $500,000 in non-economic damages against all the health care institutions for any single case.[57]

These statutory limits set up a best-case scenario for the plaintiff where the maximum amount recoverable for non-economic damages is $750,000.[58] The best-case scenario would be in a case against a doctor and two or more health care institutions where the maximum amount recoverable would be $250,000 from the doctor and $500,000 from the health care institutions.[59]

Section 74.302 contains the secondary caps that would apply if Section 74.301 was found to be unconstitutional.[60] Section 74.302(a) includes the same damage caps that are found in the previous section, 74.301.[61] However, subsections (b) through (d) make it clear that these caps are contingent on certain amounts of insurance being held.[62] The amount of insurance required varies on whether the defendant is a doctor, a health care

[51] TEX. CIV. PRAC. & REM. CODE ANN. § 74.301.

[52] Hull, *supra* note 46, at 215.

[53] *Id.*

[54] TEX. CIV. PRAC. & REM. CODE ANN. § 74.301(a).

[55] *Id.* § 74.301(b).

[56] *Id.* § 74.301(c).

[57] *Id.*

[58] The legislative history suggests this interpretation of the statute. In debate on the House floor, the sponsor of H.B. 4 talked about negotiations between the House and the Senate leading to the final version of the bill. In a dialogue with Representative Talton, Representative Nixon went through a few scenarios to fully illustrate the mechanics of how the caps worked based on who is sued. *See* Hull, *supra* note 46, at 229; *see also* H.J. of Tex., 78th Leg., R.S. 6040 (2003).

[59] *See* Hull, *supra* note 46, at 229−30.

[60] TEX. CIV. PRAC. & REM. CODE ANN. § 74.302(a).

[61] Hull, *supra* note 47, at 233−34.

[62] *Id.* at 234.

provider, or a health care institution.[63] In addition, these amounts are to increase over time.[64]

This provision is modeled after the Charitable Immunity and Liability Act of 1987.[65] The so-called Charity Cap has never faced constitutional challenge and has been law for over fifteen years.[66] Section 74.302 takes a similar approach to the Charity Cap by requiring a sliding scale of financial responsibility on the part of physicians and other health care providers.[67]

While the specific Charity Cap scheme has never been challenged, the Texas Supreme Court, in *Cox v. Thee Evergreen Church*, mentioned in dicta that it looked favorably on such a caps-for-coverage approach.[68] Such an approach encourages providers to maintain insurance and promotes higher actual recovery for claimants.[69]

Finally, Section 74.303 is the provision on wrongful death and survival actions.[70] This statute includes a strict $500,000 cap on all damages, including economic and exemplary damages, per claimant, regardless of however many physicians, health care providers, or health care institutions are defendants.[71] The only exception from the cap is found in subsection (c), which excepts medical expenses either past, present, or future from the damage cap.[72] Subsection (b) allows for the cap to be tied to the Consumer Price Index, retroactively dated to the original cap in 1977.[73] This means the cap will be somewhat above $1.5 million currently.[74]

House Bill 4 left the key provisions of this cap in place from the 1978 tort reform.[75] However, House Bill 4 did make two important additions.[76] First, it included punitive damages in the $500,000 cap.[77] Second, it

[63] *Id.* at 235.
[64] *Id.*
[65] *Id.* at 236.
[66] *Id.*
[67] *Id.*
[68] *See* 836 S.W.2d 167, 173 n.10 (Tex. 1992).
[69] Hull, *supra* note 46, at 236.
[70] TEX. CIV. PRAC. & REM. CODE ANN. § 74.303 (Vernon 2006).
[71] *Id.*
[72] TEX. CIV. PRAC. & REM. CODE ANN. § 74.303(c).
[73] *Id.* § 74.303(b).
[74] Hull, *supra* note 46, at 242.
[75] *Id.* at 241.
[76] *Id.*
[77] *Id.* at 241−42.

applied the cap on a per claimant basis.[78] This means that $500,000 is the maximum awarded to each person who claims damages as a result of the death of another, changing the focus from a per-defendant basis.

Given the history of how the 1978 caps fared before the Texas Supreme Court, the legislature wanted to ensure that its damage caps enshrined in House Bill 4 were not invalidated.[79] To fully secure that end, the legislature passed House Joint Resolution 3.[80] H.J.R. 3 was a constitutional amendment designed to give the legislature clear authority to enact limits on non-economic damages.[81]

This approach was modeled after the successful amending of the Constitution to effectuate the 1987 tort reform on behalf of municipalities. Subsequent to the amendment being approved by the voters, the Texas Supreme Court in *City of Tyler v. Likes* held that a constitutional amendment that gives the legislature clear authority to restrict certain common-law causes of action effectively creates an exception to the open courts provision of the Texas Constitution.[82] H.J.R. 3 was passed by the requisite two-thirds majority in both the House and the Senate and was submitted for the voters' approval and passed by the required fifty-percent-plus-one in the form of Proposition 12.[83]

C. Result of the Piecemeal Approach to Tort Reform

Given that brief, yet varied, history of tort reform in Texas, it is easy to understand how Texas law arrives at the seemingly incongruous result that the hypothetical in the introduction reaches. However, at the same time, history shows us the legislature also has made very puzzling policy choices in this arena.

Sections 74.301 and 74.303 are differently structured since they come from different attempts at tort reform. Section 74.303 is one of the few holdovers from the 1978 tort reform effort, as it was not declared unconstitutional by the Texas Supreme Court.[84] At the time it was enacted,

[78] *Id.* at 241.

[79] *Id.* at 236–37.

[80] Tex. H.R.J. Res. 3, 78th Leg., R.S. (2003) (engrossed version).

[81] Hull, *supra* note 46, at 236–37.

[82] 962 S.W.2d 489, 503 (Tex. 1997).

[83] TEX. CONST. art. III., § 66.

[84] *See* Rose v. Doctors Hosp., 801 S.W.2d 841, 848 (Tex. 1990).

it worked in accord with the other damage caps instituted by the 1978 legislature.[85]

Section 74.301, on the other hand, is a fresh attempt at damage caps outside of wrongful death that seeks the same goals as the 1978 tort reform, but is not based on it.[86] Instead, the model for House Bill 4 is the California Medical Injury Compensation Reform Act, which has different caps and exceptions than does the 1978 Medical Liability and Insurance Improvement Act (MLIIA).[87]

Since this is the case, it would be understandable that the legislature simply added in the old surviving wrongful death provision in making the sweeping 2003 changes, not realizing the differences it would make. However, that cannot be the case, as the legislature did not leave that statute untouched, as it did other areas of MLIIA. Instead, what the legislature did was update the definitions and included all exemplary damages in the already questionable damage cap.[88] This is puzzling since exemplary damages are already capped elsewhere.[89] Why would the legislature feel the necessity to make a second cap of exemplary damages specifically for wrongful death cases?

In addition, the legislation makes clear that the wrongful death cap is an aggregate cap on all damages.[90] Thus, section 74.303 will apply secondarily to any cap on non-economic damages.[91] Therefore, any damage award will be limited by applying the non-economic damage cap in section 74.301, and then will further be limited by applying the total cap of section 74.303.[92] It seems like the legislature has gone out of its way to specifically limit the damages in cases where the ultimate harm has been done: that of the deprivation of human life.

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[85] TEX. REV. CIV. STAT. ANN. arts. 4590i §§ 11.02−05 (Vernon 2006).

[86] Hull, *supra* note 46, at 218−19.

[87] *See* The Medical Malpractice & Tort Reform Act of 2003: Hearings on Tex. H.B. 4 Before the House Comm. on Civil Practices, 78th Leg., R.S. 12-27 (Feb. 12, 2003).

[88] TEX. CIV. PRAC. & REM. CODE ANN. § 74.303(a) (Vernon 2006).

[89] *See id.* § 41.008. All awards of punitive damages, whether in a medical malpractice suit or otherwise, in Texas are subject to a cap. The legislature has limited plaintiffs to the greater of two times the amount of economic plus the amount of non-economic damages up to $750,000 or $200,000. This is a more stringent requirement than the 10:1 punitive to non-punitive award ratio the U.S. Supreme Court has seemingly required to not go above. *See generally* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003).

[90] Hull, *supra* note 46, at 243.

[91] *Id.*

[92] *Id.*

IV. CONSTITUTIONAL CHALLENGES?

This seeming inequality set in state law by statute is not the end of the analysis. Although the legislature has acted, as briefly mentioned above, the judiciary still has the power to review their actions. Damage caps and tort reform are one of the hot topics in the public debate and thus there is a lot of case law on the subject of their constitutionality from a variety of sources.[93]

The challenges to the damage caps come in two forms: challenges based on the Open Courts provision of the Texas Constitution and challenges based on the equal protection clause.[94] The case law in Texas has evolved over the years and the trajectory is instructive on predicting the answer to this question.

A. Early Texas Cases

1. *Waggoner v. Gibson*[95]

Waggoner v. Gibson is a case that illustrates the early disfavor by Texas courts to legislative damage caps.[96] In this case, John Waggoner was admitted to Presbyterian Hospital in Dallas for non-emergency surgery on his right knee.[97] In the operating room, Dr. Gibson administered an anesthetic.[98] After the operation began, Waggoner's breathing ceased and he experienced cardiac arrest.[99] After being resuscitated in six to ten minutes, Waggoner remained in a coma for several months and was left

[93] *See, e.g.*, Rose v. Doctors Hosp., 801 S.W.2d 841, 843−44 (Tex. 1990).

[94] Several cases, most notably *Lucas v. United States* and *Waggoner v. Gibson*, have addressed due process claims as well the equal protection and open courts challenges in dealing with the medical malpractice damage caps, but the due process analysis in these cases is secondary to equal protection and open courts arguments. Accordingly, this section of the Comment focuses on the principal parts of the opinions that have shaped the law in this area. As the opinions discuss equal protection and open courts more so than due process, I will focus on those two arguments and the courts' response to those arguments.

[95] 647 F. Supp. 1102 (N.D. Tex. 1986).

[96] *Id.* at 1105−08.

[97] *Id.* at 1103.

[98] *Id.*

[99] *Id.* at 1104.

with irreversible damage to his brain and nervous system, leaving him totally disabled.[100]

Through his father acting as his guardian, Waggoner filed suit against the doctor and the hospital claiming negligence and seeking substantial damages in excess of $800,000.[101] However, under the caps then in place (MLIIA), Waggoner's recovery would have been limited to $500,000.[102]

In reaching its decision, the Dallas federal court found that the legislative goals supporting the cap were not legitimate.[103] Because there was no rational basis behind the damage cap, the court struck down the cap based as a violation of the Equal Protection Clause of both the Texas and United States Constitutions since the cap impermissibly discriminated between classes of tort victims: those seriously injured and those non-seriously injured.[104] The court also struck it down based on the open courts provision of the Texas Constitution.[105]

2. *Lucas v. United States*[106]

Lucas v. United States is the seminal case that struck down the tort reform efforts stemming from the 1978 damage caps.[107] Lucas was a fourteen-month-old infant who was taken to an Army hospital for an injection which was negligently administered and eventually led to a permanent paralysis.[108] The case started in the federal court system where the district court found for Lucas' family and awarded damages above the

[100] *Id.*

[101] *Id.* at 1103 & n.1.

[102] *Id.* at 1103.

[103] *Id.* at 1105. The District Court found persuasive the holding of three Texas Court of Appeals cases: Detar Hosp., Inc. v. Estrada, 694 S.W.2d 359 (Tex. App.—Corpus Christi 1986, no writ) (striking down damage caps of MLIIA as a violation of equal protection guarantees of both the Texas and U.S. Constitutions as well as the Open Courts Provision of the Texas Constitution); Malone & Hyde, Inc. v. Hobrecht, 685 S.W.2d 739 (Tex. App.—San Antonio 1985, no writ) (striking down the damage caps of MLIIA, relying on the holding of the court in Baber); Baptist Hosp. of Se. Tex. v. Baber, 672 S.W.2d 296 (Tex. App.—Beaumont 1984, writ ref'd n.r.e.) (striking down the damage caps of MLIIA as a violation of equal protection since it discriminated between seriously injured and non-seriously injured plaintiffs without correspondingly eliminating non-meritorious cases).

[104] *Waggoner*, 647 F. Supp. at 1105–07.

[105] *Id.* at 1107–08.

[106] 757 S.W.2d 687 (Tex. 1988).

[107] *Id.* at 692.

[108] *Id.* at 688.

statutory limits, holding that they did not apply to hospitals operated by the United States.[109]

The Fifth Circuit held that article 4590i did apply to hospitals operated by the United States, but did not come to a ruling on whether the limits were consistent with the Texas Constitution and certified the case to the Texas Supreme Court for resolution of that issue.[110]

The Texas Supreme Court then held that the caps violated the open courts provision of the Texas Constitution.[111] The court applied the traditional two-part test for an alleged violation of the open courts provision of the constitution as handed down in *Sax v. Votteler*:

> In analyzing the litigant's right to redress, we first note that the litigant has two criteria to satisfy. First, it must be shown that the litigant has a cognizable common law cause of action that is being restricted. Second, the litigant must show that the restriction is unreasonable or arbitrary when balanced against the purpose and basis of the statute.[112]

In making its decision, the court found that both prongs were satisfied.[113] First, victims of medical malpractice had long had a common law cause of action to sue for injuries caused by negligence.[114] Thus the first prong was satisfied easily. The battle came on the second prong on whether the damage caps were unreasonable or arbitrary.[115] In striking

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[109] *Id.*

[110] *Lucas v. United States* is a landmark case for reasons other than the constitutionality of damage caps. It was the first case taken as certified by a federal appellate court. The Texas electorate approved a constitutional amendment in 1985 vesting jurisdiction in the Texas Supreme Court to answer questions from federal appellate courts. The Fifth Circuit certified the questions on the constitutionality of the damage caps, and Lucas was the first case the Supreme Court, by majority vote, accepted. Lucas was given the billing as the petitioner since he was arguing that the statute was unconstitutional, despite the fact that the United States was the appealing party. *Id.* at 687.

[111] *Id.* at 690. The Open Courts Provision of the Texas Constitution reads, "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." TEX. CONST. art. I, § 13.

[112] 648 S.W.2d 661, 666 (Tex. 1983).

[113] *Lucas*, 757 S.W.2d at 690.

[114] *Id.*

[115] *Id.* at 691.

down the caps, the court held the caps for injuries were both arbitrary and capricious.[116]

The court held that it was arbitrary since there was no adequate substitute for the severely injured plaintiff as there would be in a worker's compensation scenario.[117] The court agreed with the logic of the Illinois Supreme Court that the societal benefit of lower insurance would not offset that loss. "'This *quid pro quo* does not extend to the seriously injured medical malpractice victim and does not serve to bring the limited recovery provision within the rationale of the cases upholding the constitutionality of the Workmen's Compensation Act.'"[118]

The court also held that the caps were unreasonable when balanced against the purposes and bases of the statute.[119] The court found that the impact of the caps on actual insurance rates was speculative at best. It cited to an independent report as well as the equivocal language in the report and statute itself.[120] The court noted that "'adoption of certain modifications in the medical, insurance, and legal systems . . . *may or may not have an effect* on the rates charged by insurers for medical professional liability coverage.'"[121]

3. *Wheat v. United States*[122]

Wheat v. United States was a follow-up Fifth Circuit case to *Lucas*. The facts of the case are one of the more tragic ones, yet seemingly typical in a medical malpractice case that results in large jury verdicts which in turn implicate the damage caps.[123]

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[116] *Id.*

[117] *Id.*

[118] *Id.* (quoting Wright v. Cent. Du Page Hosp. Ass'n, 347 N.E.2d 736, 742 (1976)).

[119] *Lucas*, 757 S.W.2d at 691.

[120] MICHEAEL SUMNER, THE DOLLARS AND SENSE OF HOSPITAL MALPRACTICE INSURANCE 9 (Aft Books 1979).

[121] *Lucas*, 757 S.W.2d at 691 (quoting TEX. REV. CIV. STAT. ANN. art. 4590i, § 1.02(a)(12) (Vernon 2006)).

[122] 860 F.2d 1256 (5th Cir. 1988).

[123] The jury verdict in the lower court was $6.7 million in damages apportioned equally between the military hospital and the private physician; the full amount of which was awarded since the trial court held the damage caps unconstitutional. The trial court was somewhat casting out into unchartered legal territory since the *Lucas* case had yet to be decided by the Texas Supreme Court. *Id.* at 1258.

In the case, Shilla Wheat endured a four-year battle with undiagnosed cervical cancer. Mrs. Wheat's problems first started in a U.S. hospital on Fort Hood where a routine pap smear revealed an early warning sign of cervical cancer.[124] Despite the results, no further tests were performed to determine if Mrs. Wheat did indeed have cancer.[125] In fact, Mrs. Wheat returned repeatedly to the hospital complaining of abnormal bleeding and abdominal and pelvic pain.[126]

Frustrated with the hospital's inability to control the symptoms Mrs. Wheat turn to Dr. Harold Wood, a private physician.[127] Dr. Wood performed a hysterectomy on Mrs. Wheat, which caused the malignancy to accelerate.[128] A pathology report confirmed Mrs. Wheat was suffering from Stage II-B cervical cancer, but Dr. Wood neither informed Mrs. Wheat of the cancer nor treated her for it.[129] Despite the severe emotion distress and physical pain Mrs. Wheat experienced, the doctors failed to explain or diagnose the pain and continued to explain the pain was merely psychological.[130] After four years of suffering, Mrs. Wheat lapsed into renal failure, was forced to relinquish custody of her child, and spent the last six months of her life in a convalescent home.[131]

The Fifth Circuit Court of Appeals took all of one paragraph to establish the unconstitutionality of the damage caps.[132] The court summarily recounted the history of the *Lucas* case and declared that because of the Open Courts provision of the Texas Constitution, there were no longer statutory limits on liability.[133] The court reached this decision without even discussing the fact that the cause of action was a wrongful death one, since Mrs. Wheat died from the medical malpractice.[134] It instead simply assumed that the damage caps were equally unconstitutional as applied to

[124] *Id.* at 1257.
[125] *Id.*
[126] *Id.* at 1257–58.
[127] *Id.* at 1258.
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.* at 1259.
[133] *Id.*
[134] *Id.*

common law and statutory causes of action and continued on with its analysis of whether the damages were excessive.[135]

4. *Rose v. Doctors Hospital*[136]

Lucas and *Wheat* were not the final word on the subject of damage caps. The follow-up Texas Supreme Court case to *Lucas* came two years later in *Rose v. Doctors Hospital*. The Texas Supreme Court was faced with the same issue, the constitutionality of the damage caps, except this time it was in the wrongful death arena.[137] That distinction proved all the difference, however, as the court did not extend the reasoning in *Lucas* to strike down the caps in *Rose*.[138]

The case had a somewhat convoluted history, but the basics are that Rex Rose was admitted to Doctors Hospital and consequently died the next day.[139] The widow and parent brought a wrongful death suit against the hospital, claiming that Rex died from a fatal overdose of morphine.[140]

In its holding, the court reiterated that an open courts challenge only applies when there is a common law right of action that has been infringed on by the legislature.[141] That makes the earlier discussion of the old English common law relevant.[142] Because the fact that there is no wrongful death cause of action by common law, an open courts challenge to any legislative action on the wrongful death statute is a losing argument.[143] Following this holding and a short discussion on equal protection, the court declined to strike down the damage caps that were in place for wrongful death actions sounding in medical malpractice.[144]

It is clear from the progression of cases that the Texas judiciary has shifted its opinion on damage caps moving from hostility to favoring them. Since there is no previous precedent striking down wrongful death damage caps, the courts were free to express their approval of the caps without

[135] *Id.*

[136] 801 S.W.2d 841 (Tex. 1990).

[137] *Id.* at 842.

[138] *Id.*

[139] *Id.* at 843.

[140] *Id.*

[141] *Id.* at 848.

[142] *See supra* Part II.

[143] *Rose*, 801 S.W.2d at 845.

[144] *Id.* at 845–46.

running afoul of stare decisis.[145] And with the advent of Proposition 12, the non-wrongful death cases striking down damage caps were effectively overruled.[146] Thus, Texas is now a jurisdiction squarely in the forefront of being cap-friendly.

B. Effect of Proposition 12 and Rose *Decision*

The operative effect of both Proposition 12 and the Texas Supreme Court's decision in *Rose v. Doctors Hospital* makes it difficult to conceive of how any challenge of the wrongful death caps based on the Texas Constitution could be successful.

The *Rose* decision makes it clear that an open courts challenge will not work since a well-recognized common law right of action is not being infringed upon.[147] Wrongful death is a vehicle created by the legislature and can be constrained as much as the legislature sees fit.[148]

Proposition 12 forecloses all other options as it gives the legislature the constitutional right to set limitations on medical malpractice verdicts.[149] Thus, even if a provision of the Texas Constitution would ordinarily apply to strike down the damage caps, the legislature has insulated itself from this remote possibility by enshrining its right to set caps in the Texas Constitution itself.[150]

However, there is a small window around Proposition 12. The constitutional amendment gives the legislature the power to place a cap on non-economic damages.[151] In our beginning scenario, economic damages, such as lost wages, are capped as well. Thus, there seems to be room for an equal protection challenge.[152]

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[145] *Id.*

[146] *See infra* Part IV.B.

[147] *Rose*, 801 S.W.2d, at 845−46.

[148] *Id.*

[149] Hull, *supra* note 46, at 236−37.

[150] *Id.*

[151] TEX. CONST. art. III, § 66.

[152] Constitutional Amendment or not, the case law makes it clear that open courts will never work for a wrongful death claim since it is not a well-recognized common law cause of action. This is despite Mark Clore's intriguing argument in the South Texas Law Review on a constitutional right to a wrongful death cause of action. *See* Clore, *supra* note 12, at 473−76. Seeing as it has been seven years since its publication and no court has picked up on his argument, it is assumed that courts have not gone with his interpretation, and an open courts challenge is

The path for such a challenge has already been laid out in the *Lucas* dissent.[153] The provisions of House Bill 4 in question create two classifications.[154] It draws a distinction between medical malpractice claimants who are injured and medical malpractice claimants who have been killed.[155] This legislative classification arguably does not affect a fundamental right or a suspect class, so it only needs to be rationally related to a legitimate state interest in order to pass constitutional muster.[156]

The courts in Texas have turned away equal protection challenges to medical malpractice damage caps in general, holding that limiting damages is rationally related to the goal of the legislature to roll back the medical insurance rates.[157] However, in those cases, the classification was between medical malpractice claimants and other tort claimants.[158]

As noted above, if an equal protection challenge were to be mounted specifically against the wrongful death statute, the line would be drawn between medical malpractice claimants. So the analysis would be: is limiting wrongful death claimants to less of a potential recovery that those claimants who have been merely injured by medical malpractice rationally related to a legitimate state interest?

The obvious question then is what legitimate state interest is served by putting further caps on medical malpractice wrongful death claimants? It is difficult to conceive that it would somehow significantly lower insurance rates by putting additional economic damage restrictions on wrongful death cases, especially since the difference between a dehabilitating medical malpractice case in which the full amount of lost wages are recoverable and a wrongful death medical malpractice case in which the amount of lost wages are, in some cases, severely restricted is simply a matter of degree.

simply not an arrow in the quiver of an attorney seeking to circumvent the wrongful death damage caps.

[153] Lucas v. United States, 757 S.W.2d 687, 694–95 (Tex. 1988) (Gonzales, J., dissenting).

[154] Tex. H.B. 4, 78th Leg., R.S. (2003) (as filed).

[155] *Id.*

[156] Some articles have argued that it affects the Seventh Amendment right to a jury trial, but that argument, once again, is a novel one. Furthermore, the Seventh Amendment has yet to be incorporated as to apply to the states. See the article by Larry Wright and Matthew Williams for a discussion on how the Seventh Amendment might be a fundamental right that would qualify for strict scrutiny. *See* James L. "Larry" Wright & M. Matthew Williams, *Remember the Alamo: The Seventh Amendment of the United States Constitution, the Doctrine of Incorporation, and State Caps on Jury Awards*, 45 S. TEX. L. REV. 449, 516–18 (2004).

[157] Rose v. Doctors Hosp., 801 S.W.2d 841, 846 (Tex. 1990).

[158] *Id.*

The *Rose* court did include a small discussion on equal protection in that case, but it simply stated that tort reform was a legitimate state interest and the caps effectuated that interest.[159] The cursory analysis in that opinion does not give much guidance to the scenario at hand. Indeed, that case is arguably distinguishable from the present scenario.

The equal protection challenge in the *Rose* case is between classifications of two groups: one with no caps and with caps. Certainly initial caps can be argued to be rationally related to keeping medical insurance rates low.

However, after H.B. 4 and H.J.R. 3, the classifications would no longer be between no caps and caps, but between caps and further caps. Once again, what is the legitimate state interest in imposing additional limitation on claimants who have already suffered a tremendous blow: the loss of a loved one and their future income stream?

Given the right fact pattern and a sympathetic court, it is conceivable that such a challenge could be successful. Granted, success would not be lifting the caps entirely off and having a judgment as big as the jury would award. Instead, it would look like equalizing the amount of a judgment between someone seriously injured and someone who dies as a result of medical malpractice.

Let us see how this would play out when applied to the scenario in the introduction. If an equal protection challenge were to be successful, then the cap on economic damages would be lifted and only the cap on non-economic damages would be left. For Tyler Williams, this would mean that while his family's recovery for pain and suffering would be limited to $250,000, exemplary damages would be limited to $4,250,000[160], and Tyler's family could count on his future income stream of $1,750,000.

Such a result may not be ideal from a plaintiff's perspective, it would still respect the purpose and goals behind tort reform of holding down

[159] *Id.*

[160] The exemplary damages calculation of $4,250,000 was arrived at using the cap in section 41.008 of the Texas Civil Practices and Remedies Code. TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (Vernon 2007). The statute provides that exemplary damages are limited to two times the amount of economic damages plus the amount of non-economic damages found by the jury not to exceed $750,000. In this case, the amount of economic damages is $1,750,000 (once again excluding medical costs), which would be doubled to $3,500,000. Then, presuming the jury found at least $750,000 worth of non-economic damages before the cap kicked in, that would add together to $4,250,000.

damages while compensating the family and punishing the hospital and doctor for their actions.

V. CONCLUSION

It is said that history has a habit of repeating itself. With the latest efforts at tort reform in House Bill 4, we have moved back in time to 19th century England when the *Baker v. Bolton* decision was handed down. Once again, it is cheaper for a doctor to kill a patient than it is to seriously injure him. With the constitutional amendment and the decisions by the Texas Supreme Court giving the legislature a carte blanche to amend the wrongful death statute, the only option to rectify the injustice is the one that faced the British Parliament in 1846: to pass a bill to remove the perverse incentive in the law, and give the families of the victims who die due to medical malpractice the justice they deserve.