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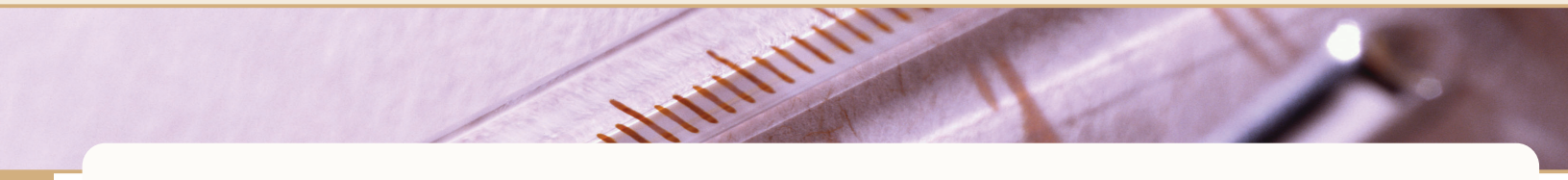
HEALTHCARE NOTES
MAY 2004



RECENT DECISION SHOULD NOT IMPACT LIMITATION ON LIABILITY

The Louisiana Supreme Court recently ruled that the cap on damages in cases against the State of Louisiana, as provided in La. R. S. 13:5106(B)(2), applied "per plaintiff" for the wrongful death of any one person. In that case, the Supreme Court upheld the jury verdict and awarded separate $500,000 caps in wrongful death damages to *each* parent of a teenager killed in a motor vehicle accident at an intersection controlled by DOTD. Lockett v. State, DOTD, 2004 WL 345726. The Supreme Court reasoned that the language in the statute could be read as providing that the total amount recoverable in connection with *any one individual claim* for wrongful death of any one person could not exceed $500,000. Alternatively, the provision could mean that the total amount recoverable in connection with *all claims* for the wrongful death of any one person could not exceed $500,000.

The court concluded that the Legislature's purpose in passing the statute limiting damages against the state was to protect the public fisc and found that the legislative intent did not clearly require a "per death victim" construction over a "per plaintiff" construction. The court stated that the Legislature could have worded the statute to restrict the total amount recoverable to one cap for all claims. The court found both the "per plaintiff" and the "per death victim" constructions to be equally plausible. Since all beneficiaries in the same dominant class could bring their own wrongful death action for the death of the same person and could individually recover general damages in excess of $500,000, the legislative intent of protecting the public fisc could be met by applying the cap to each plaintiff's general damage award. The Supreme Court interpreted the statute in favor of the beneficiaries and, on that basis, held that La. R. S. 13:5106(B)(2) allowed for multiple $500,000 caps in wrongful death actions in accordance with a "per plaintiff" construction.

Some concern has been raised as to whether this ruling will impact the cap applied to medical malpractice claims. However, the courts have previously ruled in medical malpractice cases that one cap applies to both wrongful death and survival actions– that is, the cap is applied on a "per victim" basis rather than on a "per plaintiff" basis. *See* Conerly v. State, 97-0871 (La. 7/8/98), 714 So. 2d 709. It is unlikely that this decision and the cases following it would be overturned as a result of the decision in *Lockett*.

Although the Supreme Court has not directly addressed the issue of whether one cap applies to both a wrongful death and a survival action under the Medical Malpractice Act, the Supreme Court has so held under the Medical Liability for State Services Act and, by analogy, should follow that ruling in a case involving a private health care provider.

In Conerly v. State, the Supreme Court held that the Malpractice Liability for State Services Act ("MLSSA"), which governs state health care providers, does not allow for separate caps for wrongful death and survival action claims. Similar to the situation presented in *Lockett*, the supreme court found the provision susceptible of several meanings, such that the statute could provide for a single cap for each individual action (i.e., for a wrongful death action and a survival action) which arises from an act of medical malpractice, or a single cap for each wrongful death action brought by each claimant, or a single cap for all actions by all claimants. Since the statute was ambiguous, the court looked to the legislative intent in enacting the MLSSA. The court concluded that the Legislature intended that a claimant suing under the MLSSA should not recover more than a claimant suing under the Medical Malpractice Act, governing private health care providers, when the same circumstances were present. Therefore, the Supreme Court implied that the Medical Malpractice Act also provided for one cap for wrongful death and survival action claims.

The Medical Malpractice Act ("MMA"), La. R. S. 40:1299.42(B)(1), provides that "The total amount recoverable for all malpractice claims for injuries to or death of a patient, exclusive of future medical care and related benefits as provided in R. S. 40:1299.43, shall not exceed five hundred thousand dollars plus interest and cost." This language differs from that provided in La. R. S. 13:5106(B)(2), which was at issue in Lockett v. State. In fact, the language in this statute tracks the wording suggested by the supreme court in *Lockett* which the Legislature could have used in amending La. R. S. 13:5106(B)(2) to clarify its intent that the "total amount recoverable in all claims" was $500,000, thereby making one cap apply to all claims.

The Louisiana Supreme Court has ruled definitively that only one cap applies to a medical malpractice case involving one patient and one injury, even if there are multiple liable defendants. *See* Turner v. Massiah, 94-2548 (La. 6/16/95), 656 So. 2d 636. In that case, there was only one, indivisible injury to one plaintiff; therefore, only one cap applied. However, in Batson v. South Louisiana Medical Center, 1999-0232 (La. 11/19/99), 750 So. 2d 949, the Louisiana Supreme Court held that the Medical Liability for State Services Act, La. R. S. 40:1299.39, does not foreclose the possibility that a plaintiff could recover more than one cap for multiple injuries resulting from multiple acts of malpractice. La. R. S. 40:1299.39 is the counterpart to the Medical Malpractice Act for private health care providers and contains a similar limitation on general damages of $500,000. The *Batson* court found that the language in La. R. S. 40:1299.39(F) did not limit a plaintiff to a single recovery of $500,000 without regard to the number of acts of malpractice performed against him. The Supreme Court held that the MLSSA did not prohibit multiple statutory caps for multiple acts of negligence which produce separate and independent damages.

In summary, the Louisiana Supreme Court has ruled that only one cap applies under the Medical Malpractice Act in a case involving multiple private health care providers where there is but one indivisible injury. However, in a case involving separate and divisible injuries to one patient as a result of separate acts of malpractice by separate state health care providers, the Supreme Court held that separate caps apply. The Supreme Court has also held that only one cap applies under the Medical Liability for State Services Act in a case involving both a survival action and a wrongful death action. In all likelihood, the Supreme Court would reach a similar conclusion under the Medical Malpractice Act for private health care providers.

It is unlikely that the Supreme Court would overrule its earlier jurisprudence with regard to medical malpractice actions, in light of the recent ruling in *Lockett*, to find that multiple caps applied on a "per plaintiff" basis rather than a "per victim" basis. This conclusion is strengthened, since the pertinent language in La. R. S. 40:1299.42(B)(1) closely tracks the wording suggested by the supreme court in *Lockett* which the Legislature could have used in amending La. R. S. 13:5106(B)(2) to clarify its intent that one cap applied to all claims.

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DID YOU KNOW?

- That effective July 1, 2004, per a National Coverage Decision, the Medicare Program will cover electromagnetic therapy for wound treatment, which will be identical to the coverage for electrical stimulation for wound treatment. Medicare will reimburse either one covered electrical stimulation therapy or one electromagnetic therapy for treatment of a wound;

- That the Centers for Medicare and Medicaid Services ("CMS") has added dentists, podiatrists and optometrists to the list of physicians who may opt out of Medicare?

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