Medmal damage caps only hurt real suits, not frivolous ones

Stuart Ratzan
Daily Business Review
February 24, 2012

Stuart Ratzan

The Florida Supreme Court recently heard **oral argument** in the medical malpractice case McCall v. U.S. Michelle McCall died after childbirth at a military hospital. Her family filed the suit in federal court under the Federal Tort Claims Act. The judge found that the death was a result of medical malpractice and awarded damages to her husband and child. Because the Florida Legislature passed a law in 2003 capping damages in medical malpractice cases, the judge was forced to reduce the damage award by $1 million.

On appeal to the 11th U.S. Circuit Court of Appeals, the family argued that the Legislature defied the U.S. Constitution and the Florida Constitution by capping non-economic damages in medical malpractice cases. The 11th Circuit held the district court correctly applied the cap and the cap did not violate the U.S. Constitution. But the court deferred to the Florida Supreme Court on four questions: Whether the cap violates the state constitution's guarantee of separation of powers, the right to trial by jury, the right of access to the courts and the right to equal protection.

The Supreme Court, and Justice Barbara J. Pariente in particular, seemed concerned about whether a wrongful death case under the FTCA was the right vehicle to challenge the constitutionality of the law because, first, wrongful death cases are creatures of statute, and second, a right-to-jury-trial constitutional challenge seems non sequitur when applied to a bench trial under the FTCA.

This concern with regard to wrongful death cases contradicts precedent. The court has applied Florida's equal protection clause to broaden the scope of a previous medical malpractice wrongful death damage cap in St. Mary's Hospital v. Phillipe.

Nor did the court grasp the equal protection argument, concerned that the federal court already ruled on the issue. But the 11th Circuit certified the question to the Supreme Court — it specifically wanted the court to address the equal protection issue.

And equal protection is a compelling argument here for a number of reasons.

First, the cap is an aggregate cap and must be shared by all survivors. This discriminates against family members of large families. In fact, the Florida Supreme Court already found this type of cap statute to be unconstitutional in St. Mary's Hospital v. Phillipe. In that wrongful-death medical-malpractice case, the court addressed the equal protection challenge to an aggregate cap (another statute relating to pre-suit arbitration caps, Florida Statute 766.207(7)(b)) and determined that an aggregate cap is an equal protection violation and held that the cap had to apply equally to each claimant.

Second, the cap irrationally segregates wrongful death survivors from less-harmed victims of medical malpractice. This means the smaller, less serious injuries may get full compensation, while those who have lost a mother, spouse or child will receive less than full recovery.

Third, the cap irrationally treats medical malpractice death victims differently from all other wrongful death victims. A mother who dies in a car accident gets better protection than one who dies due to medical neglect.

Next, on the access-to-courts argument, no one made the realistic point: limiting non-economic damages in catastrophic cases limits the amount of potential recovery. Therefore, it limits the amount of money available to pay a contingency fee lawyer — the only type of lawyer most medical malpractice plaintiffs can afford. Most medical malpractice cases — incredibly expensive and risky to begin with — become less and less appealing to lawyers. This is the tort reformers' plan: limit damages to eliminate cases by limiting the incentive plaintiffs' lawyers have for taking them.

Finally, the court was concerned about the applicability of the plaintiff's arguments to a wrongful death case in an FTCA context. But what about the applicability of the government's arguments? What does the alleged "compelling state interest" in providing affordable medical malpractice insurance to physicians have to do with doctors working for the U.S. military on an Air Force base?

The arbitrary nature of the damage cap is evident in the size of the cap. If the legislature was acting with precision to address a crisis, what basis was there for the cap it enacted? Was it adhering to the evidence presented, or instead, following a policy of political expediency, fulfilling a tort reform agenda?

Damage caps are not a solution for frivolous lawsuits. Frivolous cases are not worth anything, they usually go nowhere, and they are a waste of time. Catastrophic cases, on the other hand, are the target of damage caps.

The Legislature had no right to decide, in 2003, what Ms. McCall's death is worth years before it happened. A federal judge is eminently more qualified to assess the damages. So is a jury. Our constitution should protect the judicial system from the overbearing, politically charged legislature. This is a separation-of-powers issue, not only a right-to-trial-by-jury issue.

Damage caps are not the reason for stability in the medical malpractice premium markets. Insurance companies use the market cycles as opportunities to propagate the myths of runaway juries, frivolous lawsuits and greedy trial lawyers as the causes of rate increases. Then, they benefit from legislation that does nothing but enhance insurance profits. When will we learn?

Stuart Ratzan is a shareholder of Ratzan Law Group in Miami. His practice includes personal injury and commercial litigation in state and federal courts throughout the U.S.