



Nevada's Med Mal Tort Reform: Will It Survive Constitutional Scrutiny?

By Brett A. Carter and George Hand

Politics aside, it is irrefutable that Nevada State citizens lost significant rights as a result of medical malpractice tort reform. Assembly Bill 1 (AB1) disbanded the med-mal screening panel and in its place came strict filing requirements, damage limitations, and statute of limitation reductions. AB1 took effect October 1, 2002. Two years later, a majority percentage of those citizens voted for and passed the further restrictive Keep Our Doctors in Nevada Initiative, or KODIN.

As a result of the medical malpractice tort reform passed in Nevada, a person injured through a health care provider's negligence may recover economic damages (past and future medical expenses and lost income or opportunity), but is limited to recovering \$350,000 in non-economic damages (pain and suffering). NRS 41A.035. In addition, collateral benefits, such as payments made by health care insurers, may qualify as an offset. NRS 42.021 This same statute also provides for periodic payments of a judgment should the defendant so elect.

In addition to capping an individual's recovery, claims of malpractice must be filed with the court as early as one year from the date of injury or death, whereas before, there had been a two-year time limit, with a four-year statute of repose. NRS 41A.097. From the date of discovery, therefore, an individual has one year to deal with one's injury or the grief and loss of a family member, ask questions, decide to investigate, gather records, choose an attorney, convince an attorney to take a case with capped damages and capped attorney's fees, have the attorney complete the record gathering process, review the case, hire an expert, obtain an expert affidavit, and file the complaint. Although much more complicated than the pre-litigation process of a simple automobile collision, for example, the statute of limitations period for medical malpractice is half as long.

Additionally, unlike most other cases of negligence, a person claiming injury or death as the result of medical malpractice must first consult and obtain a supporting affidavit from an expert who practices or has practiced in an area that is substantially similar to the type of practice engaged in at the time of the alleged malpractice. NRS 41A.071. The expert need opine that the health care provider both fell below the standard of care and caused injury or death. Failure to meet

this expert requirement will result in dismissal. Nevertheless, claims arising out of foreign substances unintentionally left within the body, explosion or fire, unintended burns, injuries during treatment to body parts not directly involved, and surgical procedures performed on the wrong patient, organ, limb or part of a patient's body, do not require a supporting affidavit. NRS 41A.100.

The question presented in this article is whether these "reforms" pass constitutional muster.

Challenges to tort reform legislation across the country

Nevada is not alone. A number of other states have passed legislation in response to a perceived "medical malpractice crisis." There have been constitutional challenges to damages caps, with mixed results. Additionally, there have been several successful challenges to the requirements for precertification of the claim.

Successful challenges to caps have been based on three main grounds: 1) caps violate the constitutional right to jury trial; 2) caps violate the separation of powers doctrine; and 3) caps deprive litigants of due process. Additionally, challengers have argued that caps violate the right to equal protection and access to the courts, and violate bans on special legislation.

The most recent cases wherein caps were struck down originated from Georgia and Illinois. Since 2005, Georgia had in place a cap of \$350,000 on non-economic damages in medical malpractice cases. In *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218 (Ga. 2010), the Georgia Supreme Court declared the cap unconstitutional. The court found that the cap on non-economic damages violated the plaintiff's constitutional right to a trial by jury.

Before the Illinois legislature enacted its latest tort reform measure, the Illinois Supreme Court had twice ruled that caps on non-economic damages were unconstitutional. In *Wright v. Central Du Page Hospital Ass'n*, 347 N.E. 2d 736 (Ill. 1976), medical malpractice caps were struck down. In *Best v. Taylor Mach. Works*, 689 N.E. 2d 1057 (Ill. 1997), the court found that the caps on damages violated the separation of powers doctrine and infringed on the authority of the judiciary. Despite these previous rulings from its highest court,

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in 2005, the Illinois legislature placed non-economic medical malpractice liability caps on physicians (\$500,000) and hospitals (\$1,000,000). Ill. Civ. Proc. Code § 2-1706.5. But, in *Lebron v. Gottlieb Memorial Hosp.*, 930 NE 2d 895 (Ill. 2010), the statute, like its predecessors, was again struck down. The court held that the law impermissibly restricted decisions that should be reserved for judges and juries, and therefore violated the separation of powers clause in the state constitution. The *Lebron* decision is the third time the Illinois Supreme Court has found medical malpractice caps unconstitutional.

Caps on medical malpractice liability damages have also been struck down as an unconstitutional deprivation of the right to a jury trial in Alabama, North Dakota, Oregon, and Washington. See *Moore v. Mobile Infirmiry Ass'n*, 592 So.2d 156 (Ala. 1991); *Arneson v. Olson*, 270 N.W. 2d 125 (N.D. 1978); *Lakin v. Senco Products, Inc.*, 987 P.2d 463 (Or. 1999); *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989). In New Hampshire, caps were rejected as a violation of the equal protection clause. *Brannigan v. Usitalo*, 587 A.2d 1232 (N.H. 1991). Ohio found caps to be a violation of due process. *State of Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (Ohio 1999). In South Dakota, the highest court found caps to violate both the right to due process and the right to jury trial. *Knowles v. United States*, 544 N.W.2d 183 (S.D. 1996).

Nevertheless, challenges to damages caps have not been uniformly successful. In *Evans v. State*, 56 P.3d 1046 (Alaska 2002), for example, Alaska upheld a damages cap despite facial challenges based on six provisions of the Alaska Constitution, including the rights to a jury trial, equal protection, due process, and access to the courts, plus challenges based on the separation of powers and a ban on "special legislation." Similarly, California upheld its damages cap in *Fein v. Permanente Medical Group*, 695 P.2d 665 (Cal. 1985). Colorado rejected a right to jury trial challenge in *Garhart v. Columbia/HealthOne, L.L.C.*, 95 P.3d 571 (Colo. 2004), finding the Colorado Constitution only guaranteed a jury trial in criminal cases. The *Garhart* court also rejected a separation of powers challenge. And in Florida, a cap was held to not violate the right to trial by jury, the due process, or the equal protection clause. *University of Miami v. Escharte*, 618 So.2d 189 (Fla. 1993).

State constitutional challenges have also been rejected in Idaho, Indiana, Maryland, Minnesota, Nebraska, Utah, Virginia, and Wisconsin. See *Kirkland v. Blaine County Medical Center*, 470 P.3d 1115 (Idaho 2000) (special legislation, jury trial); *Johnson v. St. Vincent Hospital*, 404 N.E.2d 585 (Ind. 1980) (due process, equal protection, jury trial); *Murphy v. Edmonds*, 601 A.2d 102 (Md. 1992) (equal protection); *Schweich v. Ziegler*, 463 N.W.2d 722 (Minn 1990) (equal protection); *Gourley v. Nebraska Methodist Health System, Inc.*, 663

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N.W.2d 43 (Neb. 2003) (due process, equal protection, special legislation, jury trial); *Judd v. Drezga*, 103 P.3d 135 (Utah 2004) (jury trial, separation of powers); *Etheridge v. Medical Center Hospitals*, 376 S.E. 2d 525 (Va. 1989) (jury trial, due process, separation of powers, equal protection); *Guzman v. St. Francis Hospital*, 623 N.W.2d 776 (Wis.Ct.App. 2000) (jury trial, separation of powers doctrine, due process). Additionally, challenges to various state damages caps have survived federal constitutional scrutiny as well. See *Smith v. Botsford General Hospital*, 419 F.3d 513 (6th Cir. 2005) (determining Michigan damages cap does not violate right to jury trial or right to equal protection); *Hoffman v. United*, 767 F.2d 1431 (9th Cir. 1985) (upholding California damages cap); *Fed. Express Corp. v. United States*, 228 F. Supp. 2d 1267 (D.N.M. 2002) (upholding New Mexico cap).

In several states, there have been successful challenges to the requirement for a certificate of merit for a medical malpractice claim. In *Putman v. Wanatchee Valley Medical Center, P.S.*, 216 P.3d 374 (Wash. 2009), Washington's certificate requirement was rejected as a violation of the right to access the courts and of the separation of powers. Arkansas, Mississippi, and Ohio similarly invalidated their respective state's certificate and affidavit requirements. *Summerville v. Thrower*, 253 S.W.3d 415 (Ark. 2007); *Wimley v. Reid*, 991 So.2d 135

(Miss. 2008) (invalidating a statute that required the plaintiff's attorney to submit a certificate that he or she has consulted a medical expert prior to filing); *Hiatt v. S. Health Facilities, Inc.*, 626 N.E.2d 71 (Ohio 1994) (invalidating a statute requiring the plaintiff's attorney in a medical malpractice action to submit an affidavit attesting that he or she had requested a copy of the medical records).

Constitutional vs. unconstitutional: what side will Nevada end up on?

Like the U.S. Constitution, the Nevada Constitution contains a guarantee of equal protection, access to courts, and a right to a jury. Article 4, Section 21 of the Nevada Constitution requires that all laws be "general and of uniform operation throughout the State." "Legislative classifications must apply uniformly to all who are similarly situated, and the distinctions which separate those who are included within a classification from those who are not must be reasonable, not arbitrary." *Barnes v. Dist. Court*, 748 P. 2d 483 (Nev. 1987). Section 3 of Article I of the Nevada Constitution provides, "The right of trial by Jury shall be secured to all and remain inviolate forever. . . ."

In addition to the \$350,000 non-economic cap on damages, as mentioned earlier, Nevada requires a plaintiff to first obtain an affidavit of merit before filing a complaint. In *Barnes*, the Nevada Supreme Court struck down as unconstitutional a statute requiring an indigent litigant, as a precondition to obtaining a waiver of filing fees, to obtain a certificate of an attorney that the indigent's cause of action or defense had merit. The state argued that the legislative purpose was to spare the state the burden of financing frivolous lawsuits and that filing fees would also assist in offsetting the operating expenses of the court system. The court agreed that these are legitimate state interests; however, it pointed out that the statute may also operate to screen out meritorious actions that would otherwise be filed by persons who cannot afford, or are otherwise precluded from obtaining, the required certificate of an attorney. The Court explained:

Because NRS 12.015 may operate to preclude the filing of meritorious actions by indigent persons, we conclude that the classification scheme created by the statute is arbitrary and irrational. The statute is too broad in its sweep. We conclude, therefore, that by conditioning the waiver of filing fees on an indigent's ability to obtain the certificate of an attorney that the indigent's cause of action or defense has merit, NRS 12.015 violates the equal protection guarantees contained in the Nevada and United States Constitutions. See *Lindsey*, 405 U.S. at 79, 92 S.Ct. at 877.

748 P.2d at 487.



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Minimizing or otherwise avoiding frivolous lawsuits was one intention of the legislature when passing the affidavit requirement portion of Nevada's medical malpractice reform. *Barnes*, therefore, provides precedent on how Nevada weighs the rational basis and constitutionality of its laws. Indeed, the affidavit of merit requirement in *Barnes* could not even survive the lowest level of scrutiny—the "rational basis" test.

Nevada's medical malpractice reform laws could also be declared unconstitutional by preventing a person's right to court access and conflicting with court rules—a violation of the separation of powers. In NRS 41A.071, the legislature enacted procedural issues that are within the domain of the judiciary. Procedural rules found in NRCP 3 ("notice" pleading), NRCP 9 ("special matters"), and NRCP 16.1, as well as other court rules, grant and manage the ability of litigants to conduct discovery and provide for expert disclosure requirements. If the affidavit requirement of NRS 41A.071 is determined to irreconcilably conflict with the procedural court rules, then the statute may violate the separation of powers. Unduly burdening the right of medical malpractice plaintiffs to conduct discovery may violate their right to access the courts. So too, imposing a one-year statute of limitation may be just as difficult a burden.

In the end of a trial of medical malpractice case, a jury reaches a verdict. Verdict means to speak the truth. Jurors determine the extent and amount of damages of most medical malpractice cases. However, this determination will not control if the amount decided by our peers exceeds the imposed caps on damages. Many states have chosen to leave this decision within the province of the jury. The Nevada Supreme Court will undoubtedly one day need to decide whether one or more of these medical malpractice reform laws violate our rights to a jury, access to the courts, due process, and equal protection. Until that time, eight people get charged several times a day across our Silver State with the duty of reaching a fair and impartial decision.

Like it or not, "fair and impartial" has a limit, at least for now. **G**

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