STATE BAR OF MICHIGAN Fall 2000

NEGLIGENCE LAW SECTION QUARTERLY

The Official Newsletter of the State Bar of Michigan Negligence Law Section Victor L. Bowman, Chair

Contents

FROM THE CHAIR

Victor L. Bowman

I am honored to have been elected to serve as Chairperson for the Negligence Law Section for the upcoming Bar year. The roster of the officers and Council persons for this year are as follows: David Getto, Vice-Chairperson, Timothy Knecht, Secretary, Judith Suskind, Treasurer.The Council persons are: Paula Cole, Peter L. Dunlap, Lynn Foley, Thomas Hay, Richard Holmes, Bernie Mendell, Barbara Patek, Thomas Peters and Robert Siemion.Our ex-officio member is Past-President, Tim Donovan and the Commissioner Liason is John Feikens.The Council looks forward to another great year working on behalf of the Section. We encourage all members of our Section to write, call or e-mail any member of the Council with questions, comments or concerns.It is my intent to follow through with the numerous projects that the Negligence Section has ongoing during the Bar year. We will continue our efforts in instituting an effective lobbying effort on behalf of the Section. On January 21, 2001 from 5:00 p.m. to 7:00 p.m., a reception for incoming attorney legislatures is scheduled in Lansing, Michigan at the Parthanon Restaurant. All Council members and general members of the Section are welcome.Planning for the Annual Spring Seminar and our Annual meeting in September is ongoing. The Las Vegas seminar will be held May 3-6, 2001 at the new Aladdin Hotel. This right of spring passage tradition is always well received, well worth your time and participation. The World of Travel is serving as our travel agent for this seminar. Please contact Ms. Ellen Prebelich at (248)203-0022 for further details on travel arrangements.In addition to the Section"s memorial scholarships in the names of James Tuck and David Martin for students excelling in negligence law, the Council intends to create a new scholarship which will be awarded to students exhibiting outstanding trial advocacy skills at all five Michigan law schools. Please accept the wishes of the Council for a happy, healthy, safe and prosperous New Year.

Victor L. Bowman

Negligence Law Section Seminar

Las Vegas

Look for more information on page7!

DAMAGES CAPS:
Is it Constitutional to Limit the Amount the Plaintiff Recovers in Medical Malpractice Cases?

In Michigan, the amount of non-economic damages a plaintiff can recover in a medical malpractice case is limited by statute. MCLA 600.1483(1); MSA 27A.1483(1). In 1994, the two-tiered cap on non-economic damages adopted by the state legislature became effective. Since that time, practitioners have struggled to deal with application of the caps to actual cases. Not surprisingly, the question of whether such caps are constitutional has been a key point of contention between plaintiffs and defendants at the trial court level. To date, some trial judges have upheld the caps while others have ruled them unconstitutional. Unfortunately, the appellate courts have not yet resolved the issue. Given the importance of the debate over the constitutionality of damages caps to negligence law practice in our state, we asked a legal scholar and a tort practitioner to discuss and debate the issue for the point/counterpoint section of our publication.

The opinions expressed in the *Negligence Law Quarterly* are those of the authors. Send correspondence and material for publication to:

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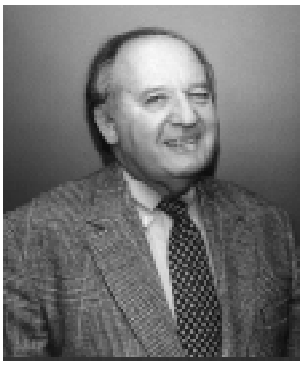
Point

By Professor Robert A. Sedler



As lawyers we are accustomed to seeing the United States and Michigan Constitutions being used in litigation to challenge the validity of legislation and other governmental action. We expect the Courts to find that in some cases the challenged law or governmental action is violative of limits that the Constitution places on the legislative and executive branches. But our Constitutions also reflect values that should guide and inform the legislative and executive branches as they exercise the powers that are entrusted to them by the Constitution. It is my submission that the provisions of Michigan law capping damages for noneconomic loss in medical malpractice cases raise serious constitutional questions under the equal protection clause of the Michigan Constitution.[1] More importantly, regardless of how the Michigan courts ultimately resolve the constitutional questions when presented to them in actual litigation, the constitutional values embodied in the Michigan equal protection clause provide powerful arguments against retaining these caps on recovery of damages for noneconomic loss that are now a part of Michigan law.[2]

For constitutional purposes, the right to recover damages for personal injuries, while a very important individual right, is not a fundamental right. So, the rational basis test applies to the equal protection challenge. Under that test, a classification is violative of equal protection when it is arbitrary and not reasonably related to the advancement of a legitimate governmental interest.[3] In practice, a court's decision in a case presenting an equal protection challenge to a legislative classification can be explained in terms of a three-step analysis. (It should be noted, however, that this is an after-the-event explanation. The three-step analysis is usually not articulated as such in the courts' decisions).

The first step is to identify the favored and disfavored groups produced by the legislative classification. The second step is to determine whether the favored and disfavored groups are similarly situated with respect to the purpose of the underlying legislation. If they are not similarly situated, there is no discrimination and so no equal protection violation.

Assuming that they are similarly situated with respect to the purpose of the underlying legislation, the third and most important step is to determine whether there is a sufficient independent justification for the classification and the resulting differential treatment of the similarly situated groups. There are two components to the matter of sufficient independent justification: (1) the interest that the classification is designed to advance; and

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(2) the ends-means fit, that is, how effectively the classification succeeds in advancing the purpose for which it was made. Under the rational basis test, the interest advanced by the classification must be a legitimate one, and the classification must be reasonably related to the advancement of that interest. Where the classification is not reasonably related to the advancement of that interest, it is arbitrary and so violative of equal protection. To put it another way, a classification is violative of equal protection when it is objectively unreasonable. A classification is objectively unreasonable when the court concludes either that the purpose for which the classification was purportedly made turns out not to be a legitimate one or when it is clear from the facts that the classification will not advance the purpose for which it was purportedly made.[4]

> "…the constitutional values embodied in the Michigan equal protection clause provide powerful arguments against retaining these caps on recovery of damages for noneconomic loss that are now a part of Michigan law."

The cap on recovery of damages for noneconomic loss imposed on victims of medical malpractice by MCL 600.1483 discriminates against victims who suffer catastrophic noneconomic loss (noneconomic damages in excess of $280,000/$500,000) in two ways. First, and most importantly, it discriminates between victims of medical malpractice who suffer catastrophic noneconomic loss and other tort victims who suffer catastrophic noneconomic loss, such as those injured in automobile accidents or in on premises accidents. The favored group is the other tort victims who suffer catastrophic noneconomic loss, since they receive full compensation for their noneconomic loss. The disfavored group is medical malpractice victims suffering catastrophic noneconomic loss who, because of the cap, do not receive full compensation for their noneconomic loss. The cap also has the effect of discriminating between two categories of medical malpractice victims. The favored group is victims with noneconomic loss of $280,000 or less, who get full recovery for their noneconomic loss. The disfavored group is catastrophic victims with noneconomic loss in excess of the capped amount, who do not get full recovery for their noneconomic loss.

> "The cap does not accomplish the purpose for which it was purportedly imposed. It does not have any measurable effect at all on medical malpractice insurance premiums or on the overall cost of health care. It amounts to nothing more than a "windfall" for health care providers over medical malpractice victims."

At both levels of discrimination it is clear that the favored and disfavored groups are identically situated with respect to the purpose of the underlying tort law. At the first level, both groups have suffered catastrophic noneconomic loss and have the same need to recover full compensation for their noneconomic loss. At the second level, both groups have suffered some degree of noneconomic loss. The victims who have suffered noneconomic loss in an amount below the cap get full compensation for their noneconomic loss while the victims who have suffered catastrophic noneconomic loss above the cap do not get full compensation for their noneconomic loss.This being so, the classification between the groups of identically situated victims is unconstitutional if it is objectively unreasonable, that is, if, under the facts, the classification can be shown not to be reasonably related to the advancement of a legitimate governmental interest.

The argument here would be that the cap on recovery of damages for noneconomic loss imposed on victims of medical malpractice by MCL 600.1483 is objectively unreasonable, because under the facts, it can be shown that the classification is not reasonably related to the advancement of the interest for which it was purportedly made. The statute is silent as to the purpose for imposing the cap, so the courts will hypothesize a purportedly legitimate purpose. Obviously, if the purpose were simply to prefer health care providers over medical malpractice victims by giving them a "windfall" from liability for catastrophic noneconomic loss, the purpose would not be a legitimate one, and the classification would violate equal protection. The conventional purpose purportedly advanced by limitations on tort recovery in medical malpractice cases is that the limitation will reduce medical malpractice insurance premiums and the overall cost of health care generally.

There is strong evidence indicating that the cap will not succeed in accomplishing this purpose. When the Michigan legislature imposed the cap in 1995 and for some years previously, all the available evidence demonstrated that limiting recovery for noneconomic loss in medical malpractice cases would have no measurable effect at all on medical malpractice insurance premiums or on the overall cost of health care. This is because (1) paid out damages awards constitute only a small part of total medical malpractice insurance premiums costs, and (2) relatively few individuals will suffer noneconomic damages in excess of the amount of the cap, here $280,000/$500,000.

This point has long been recognized by the courts of those other states which have held that for this reason, a cap or other restrictions on tort recovery in medical malpractice cases violates the equal protection or other provisions of the state constitution. See, e.g., Carson v Maurer, 120 NH 925; 424 A2d 835 (1980); Moore v Mobile Infirmary Association, 592

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So2d 156 (Ala 1991).[5] In the latter case the court discussed at length a 1987 study conducted by the United States General Accounting Office, which found that none of the tort reforms had a major effect on the cost of malpractice insurance and that damages awards in total comprised but a fraction of the cost of medical malpractice insurance.[6]

In light of the evidence that the legislative classification and the resulting discrimination against medical malpractice victims due to the cap is not reasonably related to the advancement of the purpose for which the classification was purportedly made, it can be contended that the classification is objectively unreasonable, and so violative of the equal protection provision of the Michigan Constitution.

The Michigan courts may or may not accept the constitutional argument when it is presented to them in actual litigation. It is clear, however, that the imposition of caps on recovery of damages for noneconomic loss in medical malpractice cases is inconsistent with the constitutional values embodied in the Michigan equal protection clause. The caps discriminate both between victims of medical malpractice who suffer catastrophic noneconomic loss and other tort victims who suffer catastrophic noneconomic loss, and between medical malpractice victims with noneconomic loss of $280,000 or less and medical malpractice victims with noneconomic loss in excess of the cap. The cap does not accomplish the purpose for which it was purportedly imposed. It does not have any measurable effect at all on medical malpractice insurance premiums or on the overall cost of health care. It amounts to nothing more than a "windfall" for health care providers over medical malpractice victims. A respect for the constitutional values embodied in the Michigan equal protection clause should persuade the Michigan Legislature to eliminate entirely any caps on recovery for noneconomic loss in medical malpractice cases.

Robert A. Sedler *is a Distinguished Professor of Law and Gibbs Chair in Civil Rights and Civil Liberties at Wayne State University in Detroit, where he teaches the courses in Constitutional Law and Conflict of Laws. Prior to coming to Wayne State in 1977, he was Professor of Law at the University of Kentucky in Lexington. Professor Sedler received his A.B. degree from the University of Pittsburgh in 1956 and his J.D. degree from the same University in 1959.*

Endnotes

1 Const 1963, art 1, sec 2.

2 The provisions of Michigan law capping damages for noneconomic loss in medical malpractice cases are similar to the provisions capping damages for noneconomic loss in products liability cases. While the arguments against capping damages for noneconomic loss are similar in both situations, a discussion of the caps in products liability cases is beyond the scope of the present article.

3 Doe v. Michigan Department of Social Services, 439 Mich 650; 487 NW2d 166 (1992); Shavers v. Attorney-General, 402 Mich 554; 267 NW2d 72 (1978).

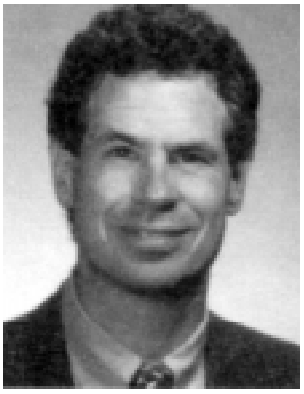
4 Michigan Supreme Court cases striking down legislative classifications under the rational basis test include the following: Manistee Bank v. McGowan, 394 Mich 655 (1975) (guest statute); Reich v State Highway Department, 386 Mich 617 (1972) (60 day notice of claim for governmental tortfeasors); Blue Cross and Blue Shield of Michigan v Milliken, 422 Mich 1 (1985) (restriction on BCBSM's ability to enter into administrative service only contracts, while no restrictions were imposed on ability of commercial insurers to enter into such contracts); Alexander v. City of Detroit, 392 Mich 30; 219 NW2d 41 (1974). In Delta Charter Twp v. Dinolfo, 419 Mich 253; 351 NW2d 831 (1984), the Court invalidated on due process grounds a zoning ordinance narrowly defining a "single family," which prevented unmarried individuals from living together. The Court could have used an equal protection analysis as well. The result of the decision is that the Court effectively held that the distinction between related and unrelated individuals with respect to the right to live in the same household was objectively unreasonable.

5 For other cases holding unconstitutional restrictions on recovery in medical malpractice cases, see e.g., Lee v. Gaufin, 867 P.2d 572 (Utah 1993); Knowles v. United States, 544 NW2d 183 (South Dakota 1996); Hoem v. Wyoming, 756 P.2d 780 (Wyo.1988); Arenson v. Olson, 270 NW2d 125 (N.D.1978); Lucas v. United States, 757 SW2d 687 (Tex.1988).

6 The study was conducted by the General Accounting Office at the request of Congress, which wanted to know what effect various tort reform laws had on medical malpractice insurance. The GAO issued its findings in 1986 and 1987 through a series of public reports. The study found that none of these tort reforms had a major effect on the cost of medical malpractice insurance. It also found that the damages awards in total comprised but a fraction on the cost of medical malpractice insurance. 592 So.2d at 166-67. The court also discussed similar studies that corroborated the GAO's conclusions. Id. at 167-8. The Court then stated as follows: "We conclude that the correlation between the damages cap and the reduction of health care costs to the citizens of Alabama is, at best, indirect and remote. Although there is evidence of a connection between damages caps and the size of medical malpractice claims filed, the size of claims is merely one of a host of factors bearing on the cost of malpractice insurance. Even more significantly, the cost of malpractice insurance ranks near the bottom of the list of expenses incurred by health care providers. Consequently, the size of claims against health care providers represents but one among many elements composing the costs of malpractice premiums, which, in turn, represents only a small component of the total burden borne by health care consumers . . . . It clearly appears that [the law], by balancing the direct and palpable burden placed upon catastrophically injured victims of malpractice against the indirect and speculative benefit that may be conferred on society, represents an unreasonable exercise of the police power [and so violates equal protection]." Id. at 168-9.

Counterpoint

By Timothy H. Knecht, Esq.
and Alina Brodsky, Esq.



INTRODUCTION

As trial lawyers, the closest most of us come to a constitutional question is a discussion of current events. The Gore/Bush post-election battle provided the world with a glimpse at the scope of constitutional law. In the world of a trial lawyer, constitutional law remains an esoteric field reserved for appellate lawyers and scholars.

Caps on non-economic damages in medical malpractice cases have made both plaintiff and defense lawyers involved in these cases pull our heads out of the sand and at least think about the question of constitutionality as it applies to those caps. From a defense perspective, we argue that the caps are constitutional. There are strong arguments in favor of the constitutionality of these caps.

Because the question of the constitutionality of these caps has not yet even reached the appellate level in Michigan, we must look to other states to support the argument of constitutionality. For example, the California Legislature placed a $250,000.00 cap on non-economic damages in medical malpractice cases. The California Supreme Court in deciding both equal protection and due process challenges to the Statute, held it constitutional on the due process format. The Court held it was well established that plaintiffs do not have a vested right in a particular measure of damages.

Thus, the Legislature has broad authority to modify the nature of damages. Without a procedural or substantive due process violation under the rational basis test, on the equal protection front, there was no violation under the rational basis test where a relationship existed between the limit on damages and the Legislative desire to control a proven malpractice crisis. [1]

The California Legislature, like the Michigan Legislature, enacted the cap Statute as a response to rising costs for medical malpractice insurance which posed a problem for the California HealthCare system. The Court held that placing a ceiling on economic damages was rationally related to a legitimate objective of reducing the cost of medical malpractice insurance which would help control overall HealthCare costs. The Court noted that other states had placed limits on all damages in medical malpractice cases, economic and non-economic.

MICHIGAN LAW

Michigan Courts, historically, have begun their constitutional analysis by recognition of the principle that a state retains broad discretion to create legislation which includes classification of economic and social welfare.[2] Michigan Courts have held the strict scrutiny test applies where inherently suspect classes are created. Inherently suspect classes include race, natural origin, alienage or when a fundamental right is affected. The substantial relationship test applies where a quasi-suspect class such as gender or mental capacity is created. The rest of the classifications, including social or economic, are viewed under the rational basis test.[3] Certainly cap legislation is economic legislation. The proper test for such legislation is whether the legislation bears a reasonable relationship to the permissible legislative objective. This reasonable relationship test is utilized under both Equal Protection and Due Process analyses.[4]

Even those of us who are trial lawyers remember the basic constitutional principle that a legislative scheme is given a presumption of constitutionality. [5] We also know that when a Statute is alleged to violate Equal Protection, a court should consider the provisions of the whole law, as well as its object and policy.[6]

Michigan's cap legislation is part of 1993 PA 78. According to House and Senate Legislative analyses, the Act was enacted for the general purpose of addressing the problems of and widespread dissatisfaction with the Michigan Medical Liability System, specifically the availability and affordability of medical care in the face of spiraling costs.[7] Our appellate court has already held that the State unquestionably has a legitimate interest in securing adequate and affordable HealthCare for its residents.[8] To determine, then, that the non-economic damage caps are constitutional, we need to look for several different areas.

Equal Protection and Due Process challenges have to be analyzed. Under Equal Protection, the courts consider the entire law as well as its object and policy. Challenged legislation is presumed constitutional. Economic and social welfare classifications are permissible. There has to be a rational relationship between the legislation and a permissible legislative objective. Specifically, a classification that has a rational basis is not invalid because it results in some inequity.[9]

> "The fact that there are may be some inequity does not invalidate the Statute. The legislative intent is to control costs. Placing a cap on non-economic damages does not eliminate non-economic damages. This Legislature has determined the caps set fair compensation for non-economic damages…. By this analysis, the caps pass the rational basis test under Equal Protection."

It is very easy to perceive and argue that an inequity is created by the caps given the fact that some people will have a greater and

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some people will have a lesser amount of economic damages. The fact that there are may be some inequity does not invalidate the Statute. The legislative intent is to control costs. Placing a cap on non-economic damages does not eliminate non-economic damages. This Legislature has determined the caps set fair compensation for non-economic damages. The Legislature reasonably assumes caps on damages will lower medical malpractice insurance premiums and consequently will reduce the overall costs of medical treatment. By this analysis, the caps pass the rational basis test under Equal Protection.

Under the Due Process challenge, a plaintiff in a medical malpractice case would have to argue deprivation of a property right. Courts in other jurisdictions have held medical malpractice victims do not have a fundamental right to recover damages.[10] Michigan caps do not eliminate damages but only limit non-economic damages. Under Michigan law, the test to determine whether a Statute violates the due process clause where a fundamental right is not involved is essentially the same as in an Equal Protection analysis, that is, whether there is a rational relationship between the legislation and a legitimate governmental interest or objective.[11]

CONCLUSION

The cap legislation was passed by the Michigan Legislature in 1993 and became effective in early 1994. More than six (6) years have passed and a constitutional challenge has not yet reached the appellate court system. Various circuit court decisions have held the cap legislation constitutional.[12] Out in the trenches, cases which likely involve the applicability of the caps, including questions of which cap may apply, are routinely settled, often just to avoid the question. Trial lawyers apparently are more tolerant of uncertainty than is our current stock market.

Timothy H. Knecht *is a partner at Cline, Cline & Griffin, P.C., in Flint, Michigan, where he represents doctors and hospitals in medical malpractice cases. He is a graduate of the Detroit College of Law. He is currently secretary of the Negligence Law Section.* ***Alina Brodsky*** *is a recent graduate of Kent Law School in Chicago, where she is a member of the Illinois bar. She is clerking with Cline, Cline & Griffin, P.C. while preparing for the Michigan bar exam.*

Endnotes

1 Fein v Permanente Medical Group, 695 P2d 665 (1985).
2 Dandridge v Williams,397 US 471 (1970).
3 People v Pitts, 222 Mich. App. 260 (1997).
4 Davey v Detroit Auto Inter-Insurance Exchange, 414 Mich.1 (1982).
5 Shavers v Kelley, 402 Mich. 554, 612 (1978).
6 Frame v Nehls, 452 Mich. 171 (1996).
7 House Legislative Analysis, SB 270, HB 4033. HB 4403, HB 4404, April 20, 1993.
8 Bissell v Kommareddi, 202 Mich App. 578 (1993).
9 Neal v Oakwood Hosp. Corp., 226 Mich App. 701 (1997).
10 Knowles v United States, 829 F.Supp. 1147 (D.S.D.1993).
11 Shavers v Kelley, 402 Mich. 554, 612 (1978).
12 Stern v Sinai Hospital, (Oakland County Circuit Court, #96-523566-NH); Henico V Oakwood Hosp., (Wayne County Circuit Court, #95-506016-NH 1997); Pruden v Hayes Green-Beach Memorial Hospital, (Eaton County Circuit Court, #96-117*NH, 1997).

Legislative Update

Richard P. Duranczyk

As the State Legislature ended its 1999-2000 session, a handful of bills affecting negligence law were passed into law including:

***HB 5063**, which is intended to restore liability for medical malpractice to all university health care professionals, was signed into law by Governor Engler on Tuesday, October 24, 2000. The law takes effect immediately and applies to a cause of action arising on or after the effective date of Public Act 318 of 2000.

*** HB 5672** would extend government immunity to law enforcement activities under certain narrow circumstances when the government is reimbursed by private entities for on duty law enforcement officers.

*** SB 1170** amends the Revised Judicature Act to prohibit a person from bringing an action for damages on a wrongful birth, wrongful life or wrongful pregnancy claim. The prohibition do not apply to a civil action for damages for an intentional or grossly negligent act or omission. The bill's provision would apply to causes of action arising on or after the date the bill takes effect.

*** HB 5066** creates the "the Structured Settlement Protection Act" and establishes in statute a procedure by which a court must approve the sale of a party's structured settlement rights. The law takes effect immediately as Public Act 330 of 2000.

* **HB 5689** amends the Public Health Code and provides for certain duties and conditions when nursing homes uses bed rails for one of its residents.

In addition, a bill which would have established qualified immunity for all health care providers and dentists who provide uncompensated non-emergency care and a bill which would have extended "Good Samaritan" immunity to physician's assistants failed to pass by the end of session. Legislation will probably be reintroduced when the new legislative begins next year.

CENTER RIGHT PAGE:

Las Vegas—Seminar

Advertisement

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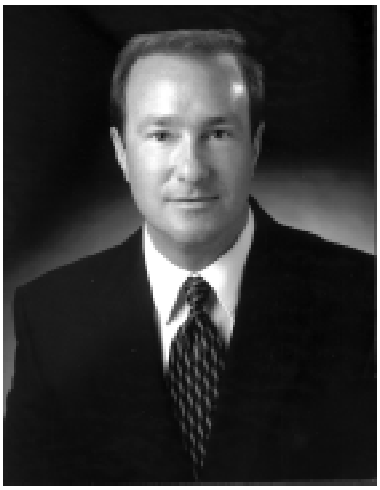
Birth Injury Expert Causation Testimony and American College of Obstetricians and Gynecologists (ACOG) Technical Bulletin 163

By Russell Gregory



Birth trauma cases typically involve claims of brain injury. The injuries are often quite severe, and correspondingly the stakes are high. Accordingly, these cases are vigorously prosecuted and defended.

In such cases, a great deal of time is spent analyzing medical literature regarding causation of perinatal (birth-related) brain injury. Countless volumes have been written on the subject, in various fields of medicine (perinatology, neonatology, pediatric neurology, etc.). A document published in 1992, however, by the American College of Obstetricians and Gynecologists (ACOG), has gained particular notoriety in the birth injury litigation community. This document, Technical Bulletin No. 163, Fetal and Neonatal Neurologic Injury, has become the pillar of causation defense in birth trauma litigation.

Basically, TB 163 asserts this: Brain injury *cannot* be attributed birth-related events unless the following four elements are present in the immediate newborn period:

1. Profound umbilical artery metabolic or mixed acidemia (pH less than 7.00);
2. Persistence of an Apgar score of 0-3 for longer than five minutes;
3. Neonatal neurologic sequela, e.g., seizures, coma, hypotonia; and
4. Multi-organ system dysfunction, e.g., cardiovascular, gastrointestinal, hematologic, pulmonary, or renal.

(For ease of reference hereinafter, the four items listed above will be referred to as low pH, low Apgars, seizures, and multiorgan dysfunction, respectively).

Regarding attributing brain injury to perinatal events, the bulletin states that "*all* of the following criteria (listed above) *must* be present before a plausible link can be made". Page two, emphasis added. In cases where all four criteria are not met, the defense asserts TB 163's mandatory language as definitive that the claimed brain injury could not have resulted from birth. This assertion is sometimes made via Motion for Summary Disposition under the *Davis-Frye* doctrine, requiring that causation expert testimony be supported by "recognized scientific knowledge."[1]

Much has been written vehemently questioning both the scientific support for, and the motive behind promulgating, TB 163.[2] It is not the focus of this writing whether TB 163 was properly substantiated or motivated. This expose' addresses only whether there is literature support for the proposition that perinatal brain injury can occur without some or all of the purported sine qua non factors listed above. If so, this suffices to meet the "recognized scientific knowledge" test of admissibility. *Anton, supra*, footnote.[1]

Low pH

Absent adequate oxygen, tissue cells use glucose for metabolism. Glucose metabolism produces lactic acid as a by-product. This acid, released into the blood stream, produces a drop in the blood pH (acidosis).

Whether and to what extent a measurable drop will occur depends upon how much lactic acid is produced, and when relative to the pH measurement the production occurs (allowing time for the lactic acid to move from cells into the blood stream). These factors will be influenced by the timing and severity of the oxygen deprivation. Likewise, a given fetus' tolerance for lack of oxygen will vary according to many factors, including gestational age, prior stresses, infections, metabolic rates, heredity, etc.

All of these factors are sliding scale parameters. It is not surprising, therefore, that "most neonates with hypoxic-ischemic encephalopathy (brain injury from lack of oxygen) are *not* acidotic at birth."[3] Indeed, "*normal* umbilical cord acid-base and blood gas values (normal pH) may be obtained from a fetus that *dies* as long as ten minutes before birth".[4] Thus, there appears to be recognized literature support for the proposition that low pH is not requisite.

"…American College of Obstetricians and Gynecologists (ACOG), …Technical Bulletin No. 163, Fetal and Neonatal Neurologic Injury, has become the pillar of causation defense in birth trauma litigation. Basically, TB 163 asserts this: Brain injury cannot be attributed to birth-related events unless the following four elements are present in the immediate newborn period: [low pH, low Apgars, seizures, and multiorgan dysfunction]."

Low Apgars

Newborn Apgar scores measure functions controlled by the brain **stem** (tone, reflex irritability, respiratory effort, color, heart

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rate), not the higher lobes of the brain. Thus, babies born with higher lobes of the brain missing can have good Apgar scores. Decreased fetal circulation which adequately perfuses (provides blood flow to) the brain stem, but inadequately perfuses the distal-most portions of the brain's arterial tree (the watershed), spares the brain stem, notwithstanding injury to those distal-most perfused brain centers. It is not surprising, therefore, that "newborn infants with perinatal hypoxic injury to higher centers may retain brain stem function and have reasonable Apgar scores,"[5] and "asphyxia can exist in an apparently vigorous baby."[6] Thus, there is literature support that low Apgars are not requisite.

"Most importantly to the evidentiary issue, it has been concluded that acute fetal hypoxic-ischemic injury occurs even without any of the four alleged requisite factors."

Seizures

Neonatal seizures due to hypoxia ischemia (inadequate oxygen and blood flow) are most thought to be due to brain swelling. Volpe notes that, unlike the adult brain, the newborn brain appears to be increasedly resistant to brain swelling from hypoxic-ischemic insult. Thus, he states, "it is reasonable to ask whether brain swelling (and thus consequent seizure activity) with hypoxic-ischemic injury is a consistent feature in the human newborn with perinatal asphyxia."[7]

Notably, even where seizure activity does exist, it is often subtle and missed in newborns.[8] There is thus recognized scientific knowledge that documented seizures are not requisite. (Moreover, note that TB 163 considers not only seizures a fulfillment of this category, but other indications of diminished neurological status as well, including mere decreased tone.)

Multiorgan System Dysfunction

Multiorgan system dysfunction occurs when blood flow, as a brain-saving bodily response, is preferentially shunted to the brain, sparing the brain at the expense of less vital organs. At this point, it is quite clear and undisputed in the literature that acute (near the time of birth) significant diminished fetal cardiac output will injure the brain before the shunting mechanism and/or other-organ injury therefrom occurs.[9] Thus, there is recognized scientific knowledge that multiorgan dysfunction is not requisite.

"Whatever one's orientation, it appears undeniable that there is "recognized scientific knowledge" that diminished fetal brain blood flow during labor and delivery may result in permanent, severe neurologic injury absent the four TB 163 parameters."

Brain Injury Absent

THE FOUR ALLEGED REQUISITE FACTORS

Findings such as those indicated above, rendering the alleged requisite factors non-requisite, have caused preeminent publishing physicians to conclude that these four factors are simply not appropriate measuring sticks to determine whether perinatal hypoxic-ischemic brain injury has occurred. Korst, et al., note as follows:

"Despite their valiant efforts, we were unable to show **a plausible link** between these criteria and intrapartum fetal CNS (central nervous system) injury."[10]

Thus, it has been determined that:

"(C)urrently used indicators to define permanent fetal brain injury (the four TB 163 parameters) are not valid."[11]

Most importantly to the evidentiary issue, it has been concluded that acute fetal hypoxic-ischemic injury occurs even without any of the four alleged requisite factors.[12]

Note that these authors include Dr. Gilbert Martin, Editor-In-Chief of the Journal of Perinatology, and Dr. Jeffrey Phelan, Perinatology Editor of this leading perinatology journal. Note also that the majority of references herein are to the top authors and publications in their respective fields.

Of course, it makes intuitive sense that focal and multi-focal brain injuries (e.g., watershed injuries) will not produce global neonatal dysfunction. As Schifrin points out, "(b)ecause ischemia to the brain and other organs (that is, localized asphyxia), not systemic global asphyxia, appears to be the major precursor of human fetal injury, it seems unreasonable to insist upon systemic fetal asphyxia at any time to validate the timing or mechanism of fetal injury."[13] Thus, Schifrin concludes, "(n)or can we use the absence of one or more of these signs to exclude perinatal asphyxia as the cause of injury."[14]

Conclusion

It should be noted that this writer has been on both sides of the fence, defending and prosecuting birth trauma cases. Whatever one's orientation, it appears undeniable that there is "recognized scientific knowledge" that diminished fetal brain blood flow during labor and delivery may result in permanent, severe neurologic injury absent the four TB 163 parameters. Thus, expert causation testimony in this regard is admissible.

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ENDNOTES

1. For a discussion of this doctrine and its application, with relevant case citations, see Anton v State Farm, 238 Mich. App.673, 607; NW2d 123 (1999) .Notably, Anton demonstrates that recognition of an assocation in a medical or a scientific publication suffices to meet the "recognized scientific knowledge" test for admissibility of causation testimony.
2. Goodlin, R.C., M.D., *Do Concepts of Causes and Prevention of Cerebral Palsy Require Revision?* Am. J. of Obstet. and Gynecol., Vol. 172, No. 6, June 1995; Tilson, J.L., J.D., *Exposing Manufactured Scientific Literature*, MTLA Quarterly, Summer 1994, pgs. 12-16. Morgan, M.D., J.D., *Obstetrical Medical Malpractice*; Bartemus, J., J.D., ACOG 163 (*Fetal and Neonatal Neurological Injury): Fact or Myth?* (Outline of perinatal conference presentation).
3. Schifrin, B.S., M.D., *Antenatal Fetal Assessment: Overview and Implications for Neurologic Injury and Routine Testing*, Clinical Obstetrics and Gynecology, Vol. 38, No. 1, pgs. 132-41, 1995, J.B. Lippincott Co. (emphasis added), citing Low, J.A., M.D., *The Role of Blood Gas and Acid-Base Assessment in the Diagnosis of Intrapartum Fetal Asphyxia*, Am. J. Obstet. Gynecol., 1989, 159: 1235-40.
4. Nakamura, K.T., M.D., Smith, B.A., M.D., Erenberg, A, M.D., Robillard, J.E., M.D., *Changes in Arterial Blood Gases Following Cardiac Asystole During Fetal Life*, Obstetrics and Gynecology, Vol. 70, No. 1, July 1987, at p. 17 (emphasis added).
5. Schifrin, B.S., M.D. *The ABC'S of Electronic Fetal Monitoring*, Journal of Perinatology, Vol. XIV, No. 5, 1994, at p. 397.
6. Danforth's Obstetrics and Gynecology, 7th Ed., 1994, at p. 124.
7. Volpe, J.J., M.D Neurology of the Newborn, 3d Ed., 1995, at p. 279.
8. Fenichel, G.M., M.D. Clinical Pediatric Neurology: A Signs and Symptoms Approach, 3d Ed., 1997, Chapter 1, pg. 1, ("seizures in newborns, especially those who are premature, are poorly organized and difficult to distinguish from normal activity."); Creasy & Resnik, Maternal-Fetal Medicine: Principles and Practice, 3d Ed., 1994, at p. 1166 (". . . the true incidence (of neonatal seizures) maybe obscured by the fact that in many infants, the manifestations are extremely subtle and may not be recognized."); Volpe, supra, at p. 178 (". . . many electrographic seizures are not accompanied by clinically observable alterations in neonatal motor or behavioral function; this finding suggests that the total number of neonatal seizures may have been underestimated in the past."), and p. 179 (". . . the clinical manifestations of certain neonatal seizures are readily and frequently overlooked. . . ").
9. Phelan, J.P., M.D., Ahn, M.O., M.D., Ph. D., M.P.H., Korst, L, M.D., Martin, G.I., M.D., and Wang, Y., M.D., Ph. D., *Intrapartum Fetal Asphyxial Brain Injury With Absent Multiorgan System Dysfunction*, J. Of Maternal-Fetal Medicine, 7:19-22 (1988) ("These acute injuries, associated with a prolonged fetal heart rate deceleration, may be linked to severely decreased cardiac output and hypotension that caused vulnerable portions of the brain to be injured before other organs."); Vannucci, R., M.D., The Central Nervous System, Neonatal-Perinatal Medicine, Fanaroff and Martin at p. 887 ("Occasionally, newborns who have suffered asphyxia severe enough to produce brain damage do not exhibit symptoms, signs or laboratory evidence of multi-focal organ injury. Typically, such infants are those who have sustained a short-lived (minutes) but near total asphyxia secondary to acute abruption of the placenta, umbilical cord prolapse, or other disturbance. Severe cardiovascular depression with systemic hypotension (shock) and total body ischemia, including brain ischemia, rapidly ensues. Because the systemic hypotension is immediate and profound, a redistribution of blood flow from non-vital (heart, brain) organs does not occur. Accordingly, the brain bears the brunt of the injury, even in the absence of ischemic changes in other organs."); Pasternak, J.F., M.D., Gorey, M.T., M.D., *The Syndrome of Acute Near-Total Intrauterine Asphyxia in the Term Infant*, Pediatric Neurology, May 1988, 18 (5): 391-98 (stating that the higher metabolic rate of the brain compared with other organs explains the injury to the brain while the other organs are spared).
10. Korst, L.M., M.D., et al., *Can Persistent Brain Injury Resulting From Intrapartum Asphyxia Be Predicted by Current Criteria?* Perinatal-Neonatal Medicine, Vol. 2, 1997. pgs. 286-93, emphasis added.
11. Korst, L.M., M.D., Phelan, J.P., M.D., Wang, Y, M.D., Martin, G.I., M.D., Ahn, M.O., M.D., *Acute Fetal Asphyxia and Permanent Brain Injury: A Retrospective Analysis of Current Indicators*, Journal of Maternal-Fetal Medicine, May-June, 1999, 8 (3): 101-06 ("Severely neurologically impaired neonates with evidence of intrapartum asphyxia failed to consistently satisfy the four criteria for attributing their brain injury to the intrapartum period (citation). Individually, each of these criteria has been criticized (citation), yet the authors of the intrapartum asphyxia criteria emphasize that these criteria taken together should more accurately identify those neonates injured during the birth process (citation). As before in a heterogeneous population (citation), ACOG Technical Bulletin No. 163 (citation) was *not* found to be valid in an acute intrapartum asphyxial model." pgs. 104-05, emphasis added).
12. Id, at p. 104, Fig. 1.
13. Schifrin, supra, (ABC'S) at p. 401.
14. Id.

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Michigan Supreme Court

Proximate Cause Is A Jury Question Where Plaintiff Alleged Aggravation Of Symptoms From Pre-Existing Brain Tumor Due To Head Trauma Sustained In Auto Collision

The plaintiff filed an auto negligence lawsuit after being involved in a rear-end collision. Defendant admitted liability but sought a directed verdict on issue of whether the accident was a proximate cause of the symptoms the plaintiff experienced after the collision due to a pre-existing brain tumor. The trial court denied the defendants' directed verdict motion and permitted the jury to resolve the proximate cause issue. The jury found in favor of the plaintiff and awarded him damages in the amount of $175,000. Defendants sought judgment notwithstanding the verdict on the same grounds but the motion was denied by the trial judge. On appeal, the trial court's ruling was reversed in a 2-1 decision. The majority held that the accident was not the legal cause of the plaintiff's symptoms nor was it the cause in fact of his injuries. The plaintiff filed an application for leave to appeal and it was granted. Subsequently, the Supreme Court reversed the Court of Appeals' ruling and remanded the case to the trial court. In a per curiam opinion, the Supreme Court concluded that the majority had failed to apply correctly the principle that "a tortfeasor takes a victim as the tortfeasor finds the victim." In so ruling, the Court affirmed that "regardless of the pre-existing condition, recovery is allowed if the trauma caused by the accident triggered symptoms from that condition." Further, the Court concluded that "the medical testimony at trial would clearly have permitted the jury to conclude that the trauma caused by the accident precipitated the symptoms", and "thus, the jury could have found from the evidence that the accident caused by the driver's negligence was the cause in fact of the plaintiff's injury." As for legal cause, the Supreme Court similarly held that "it was clearly foreseeable that a result of the driver's negligence in causing an auto accident could be physical injury, including head trauma, to an occupant of the other vehicle, and even more importantly, "the fact that this particular plaintiff was unusually vulnerable to head injuries does not relieve the defendants of responsibility for those damages."

Wilkinson v Lee, 463 Mich 388, 617 NW2d 305 (2000).

Court of Appeals

Chiropractor Has No Duty To Refer Patient To Another Medical Professional For Treatment Or To Recognize and Diagnose Patient's Cardiac Symptoms

The plaintiff first sought treatment with defendant chiropractor with complaints of recurring headaches as well as numbness in her arms and hands. After taking x-rays and a history, the defendant chiropractor concluded that the plaintiff was suffering from pain due to a cervical spine injury she sustained twenty years earlier. The defendant treated the plaintiff for pain over the next two months. Subsequently, the plaintiff experienced severe pain and sought treatment in an emergency room. She was released with instruction to follow-up with her chiropractor and a neurologist. Shortly thereafter, the plaintiff returned to the defendant chiropractor where she complained of pain in her chest and both arms. The defendant concluded her pain was related to her prior cervical spine injury and treated her with adjustments. Within a few months, her complaints of pain having subsided, she was voluntarily released from his care. Months later, she complained of pain to her husband who returned home from work early and found her slumped on the couch. She was rushed to the hospital where she was pronounced dead. The cause of death was myocardical infarction. A wrongful death action was filed against the defendant chiropractor, alleging that he committed medical malpractice when he failed to detect the plaintiff's cardiac problems. The trial court denied defendant's motion for summary disposition and concluded that the defendant owed a duty to the plaintiff to diagnose her non-chiropractic ailments and to refer her to another medical practitioner for treatment. On appeal, the trial court's ruling was reversed by the Court of Appeals which held that there is no duty for a chiropractor to refer a patient to another medical professional for treatment. Further, the Court concluded that a chiropractor similarly had not duty to recognize and diagnose a patient's heart problems.

Braford v O'Connor Chiropractic Clinic, 2000 WL 1836018 (Mich App).

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Accounting Malpractice Claim Accrues on Date Defendant Discontinued Professional Accounting Services And Not Date When Plaintiff Suffered Damages Due to Accounting Malpractice

The plaintiff insurance company filed an accounting malpractice lawsuit against defendants alleging that it was harmed because it relied on financial audits prepared by the defendants to determine that a contractor was qualified to obtain performance and surety bonds for ten construction projects. When the contractor failed to make the payments, the plaintiff was required to make them under the terms of the bonds. The trial court granted summary disposition to the defendants based on the accountant liability act. The Court of Appeals reversed the trial court based on its conclusion that the accountant liability act did not apply to the plaintiff's cause of action because the insurance company's claims were a vested right that accrued before the effective date of that statute. On appeal, the Supreme Court vacated the Court of Appeals decision in part and remanded for further discussion of the accrual of the plaintiff's claim against the defendants. In particular, the Supreme Court instructed the Court of Appeals that consideration of whether the accountant liability act should be applied retroactively was unnecessary if the plaintiff's cause of action did not actually accrue until after the new statute took effect. Further, the Court noted that accrual under Section 5827 of the Revised Judicature Act requires that the plaintiff have suffered damages. On remand, the Court of Appeals reconsidered its opinion and concluded that Section 5838 of the RJA, which provides that a professional malpractice claim accrues on the date the defendant discontinues professional services, applied to the case at bar. In other words, the Court of Appeals rejected the argument that the claim accrued under Section 5827 of the RJA when the plaintiff suffered damages as a result of the malpractice. As a third-party beneficiary, the plaintiff's claim, according to the Court of Appeals, accrued at the same time that the contractor's claim for accounting malpractice against defendants would have accrued—the date the accountant stopped providing professional services to the contractor. Because the defendants discontinued professional services "as to the matters out of which the malpractice claim arose" before the effective date of the accountant liability act, the Court of Appeals reaffirming its holding that the accountant liability act had no effect on the plaintiff's claims.

Ohio Farmers v Shamie, 2000 WL 1679057 (Mich App).

***Holmes v Mich Capital Med Center*, 242 Mich App 703 (2000)**

Medical Malpractice Lawsuits Where Complaint Was Filed Without Affidavit of Merit Dismissed Based on Retroactive Application of Court of Appeals' Ruling in *Scarsella v Pollak*.

***Staff v Marder*, 242 Mich App 521, 619 NW2d 57 (2000)**

Parties in Medical Malpractice Case Cannot Stipulate to Disregard the Requirements Under the Court Rules For Providing Notice to Non-Parties.

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