

## Louisiana Law Review

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Volume 60 | Number 2  
Winter 2000

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### Repository Citation

Emily Townsend Black Grey, *The Medical Malpractice Damages Cap: What is Included?*, 60 La. L. Rev. (2000)  
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## COMMENTS

### The Medical Malpractice Damages Cap: What is Included?

Louisiana Revised Statutes 40:1299.42(B)(1)<sup>1</sup> provides for a damages cap which limits the liability of qualified health care providers for injuries which result from their malpractice. An individual physician may be held liable only for an amount up to \$100,000, and a plaintiff's recovery is limited to a total of \$500,000 (the Patient's Compensation Fund pays up to \$400,000 of that amount). Following an introduction to the Louisiana Medical Malpractice Act and Louisiana Revised Statutes 40:1299.42(B)(1), this comment will examine the appropriateness of applying the liability cap to three types of claims: loss of consortium claims, vicarious liability claims, and claims for an exclusively economic injury. The Louisiana Supreme Court has never directly addressed the application of the damages cap to these three types of claims.

#### I. INTRODUCTION TO THE MEDICAL MALPRACTICE ACT AND LOUISIANA REVISED STATUTES 40:1299.42(B)(1)

In the early 1970s, the institution of medical malpractice suits increased dramatically, capturing national attention and causing concern in Louisiana about the "medical malpractice crisis."<sup>2</sup> Insurance companies then made an alarming announcement: it was no longer profitable to provide malpractice insurance because the unpredictability of the amount of claims "made it difficult if not impossible to predict future liability verdicts and thus to assess appropriate premiums that would allow a reasonable profit."<sup>3</sup> In Louisiana, four medical malpractice insurance companies<sup>4</sup> abandoned this market altogether, leaving only two providers<sup>5</sup> in the state in 1975.<sup>6</sup> Between the remaining two providers, insurance premiums increased at rates as high as 300% over the few years leading up to 1975, and in that year, both of the remaining insurers considered leaving Louisiana.<sup>7</sup>

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1. La. R.S. 40:1299.42 (Supp. 1998).
2. Robin S. Shapiro et al., *A Survey of Sued and Nonsued Physicians and Suing Patients*, AMA, October 1989 (nationally, "80% of all medical malpractice lawsuits between 1935 and 1975 were filed after 1970"); Supplemental Memorandum in Support of Defendant's Motions for Summary Judgment at 7, *Butler v. Flint Goodrich Hosp.*, 607 So. 2d 517 (La. 1992) (No. 92-0559) (In Louisiana, for those insured by St. Paul Insurance Co., payment for malpractice claims doubled from 1973 to 1974 and doubled again in 1975. The frequency of claims increased from 84 claims in 1968 to 384 claims in 1974. In 1968 there was one claim for every 20 doctors while in 1974 there was one claim for every 6 doctors. The average payout per claim increased from \$4,883.00 in 1968 to \$10,137.00 in 1974.).
3. Frank M. McClellan, *Medical Malpractice: Law, Tactics, and Ethics* 79-80 (1994).
4. Aetna Ins. Co., Travelers Ins. Co., Commercial Union Ins. Co., and Insurance Co. of America.
5. Hartford Ins. Co. and St. Paul Fire & Marine Ins. Co.
6. Supplemental Memorandum in Support of Defendant's Motions for Summary Judgment at 7, *Butler v. Flint Goodrich Hosp.*, 607 So. 2d 517 (La. 1992) (No. 92-0559).
7. *Id.*

When state legislatures around the country closely examined medical malpractice insurance premiums, they responded by enacting statutes "in an effort to alleviate the problems felt by doctors with malpractice litigation."<sup>8</sup> The Louisiana Legislature enacted the Medical Malpractice Act in 1975, which set a limit on damages for medical malpractice claims at \$500,000.<sup>9</sup> One of the reasons was because, as of 1975, there had never been a malpractice judgment or settlement in Louisiana above the \$500,000 level.<sup>10</sup>

In 1992, the Louisiana Supreme Court upheld the Act in *Butler v. Flint Goodrich*,<sup>11</sup> stating: "Overall, the Louisiana Medical Malpractice Act represents a reasonable but imperfect balance between the rights of victims and those of health care providers. It does not violate the state or federal constitutions."<sup>12</sup> Although this is the only case in which the Louisiana Supreme Court held the act constitutional, in *Chamberlain v. State*,<sup>13</sup> the court again mentioned *Butler* without overruling or discommending it:

We recently addressed the constitutionality of a similar statutory measure placing a ceiling on medical malpractice liability in *Butler v. Flint Goodrich Hospital of Dillard University*. . . . There, we upheld the legislature's power to enact a ceiling on liability of private health care providers . . . over constitutional challenges based on the equal protection and access to court provisions.<sup>14</sup>

This portion of the case provides more authority for the constitutionality of the Medical Malpractice Act.

In the Medical Malpractice Act, the Louisiana Legislature provided for the patient's compensation fund ("PCF")<sup>15</sup> and for a statutory cap on damages by enacting Louisiana Revised Statutes 40:1299.42(B) which limits a patient's recovery from qualified health care providers.<sup>16</sup> The legislature's purpose in

8. Paul C. Weiler et al., *A Measure of Malpractice: Medical Injury, Malpractice Litigation, and Patient Compensation* 7 (1993).

9. La. R.S. 40:1299.37-.48 (1992 and Supp. 1999).

10. Supplemental Memorandum in Support of Defendant's Motions for Summary Judgment, at 7, *Butler v. Flint Goodrich Hosp.*, 607 So. 2d 517 (La. 1992) (No. 92-0559).

11. 607 So. 2d 517 (La. 1992), *cert. denied*, 508 U.S. 909, 113 S. Ct. 2338 (1993).

12. *Butler*, 607 So. 2d at 521.

13. 624 So. 2d 874, 879 (La. 1993).

14. *Id.* (citations omitted). *See also* *Payne v. New Orleans Gen. Hosp.*, 627 So. 2d 221, 223 (La. App. 4th Cir. 1993) (*Chamberlain* provides authority for the validity of the holding in *Butler* because the Louisiana Supreme Court specifically mentioned it without overruling it or disapproving it); *Moody v. United Nat'l Ins. Co.*, 657 So. 2d 236, 237-38 (La. App. 5th Cir. 1995) ("We find that the statutory cap is constitutional. . . . [T]he *Butler* case appears to have put an end to the constitutional attacks against the limitation provisions of the Medical Malpractice Act"). *But see* *Whitnell v. Silverman*, 686 So. 2d 23 (La. 1996) (which questions the constitutionality of the cap in dicta).

15. La. R.S. 40:1299.44 (Supp. 1999).

16. La. R.S. 40:1299.42(B) (1992) provides:

(1) 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.

enacting the Medical Malpractice Act, and especially Louisiana Revised Statutes 40:1299.42(B) was to provide for affordable health care by preventing tremendous liability and excessive insurance premiums. Chief Justice Dixon has stated that "the \$500,000 limitation on recovery of Louisiana Revised Statutes 40:1299.42(B)(1) substantially furthers a legitimate state purpose. In order to prevent hospital closures, significant restriction of physician practices, and substantial rapid increases in health care costs, control of medical malpractice insurance premiums was determined to be necessary."<sup>17</sup>

While the cap on damages provides protection to physicians from large general damage awards, it excludes damages awarded for "future medical care and related benefits."<sup>18</sup> Future medical care and related benefits are defined as "all reasonable medical, surgical, hospitalization, physical rehabilitation, and custodial services and includes drugs, prosthetic devices, and other similar materials reasonably necessary in the provision of such services, after the date of the injury."<sup>19</sup> Although the statute *excepts* "future medical care,"<sup>20</sup> in a seeming contradiction, the Louisiana Supreme Court has interpreted this category of damages to *include* "all past, present, and future medical and related care services necessitated by a qualified health care provider's malpractice—not just what is usually thought of as 'future' medical needs."<sup>21</sup> The purpose for the exclusion of this category of damages from the cap was to provide malpractice victims with "a speedy, convenient, and inexpensive administrative remedy for . . . actually incurred medical expenses without limit. . . . The legislation aims to remedy . . . the damage cap's harsh tendency to prune recovery inversely to the injury; and it evinces legislative preference for an administrative medical relief program over simply raising the cap. . . ."<sup>22</sup>

Although excluded from the statutory cap on damages, recovery of future medical expenses should not have a significant impact on malpractice premiums because future medical expenses in excess of the statutory cap are paid by the Patient Compensation Fund.<sup>23</sup> Importantly, doctors, not insurance companies, pay the surcharge to the patient's compensation fund in order to become "qualified

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(2) A health care provider qualified under this Part is not liable for an amount in excess of one hundred thousand dollars plus interest thereon accruing after April 1, 1991, for all malpractice claims because of injuries to or death on any one patient.

(3) (a) Any amount due from a judgment or settlement or from a final award in an arbitration proceeding which is in excess of the total liability of all liable health care providers, as provided in Paragraph (2) of this Subsection, shall be paid from the patient's compensation fund pursuant to the provisions of R.S. 40:1299.44(C).

(b) The total amounts paid in accordance with Paragraphs (2) and (3) of this Subsection shall not exceed the limitation as provided in Paragraph (1) of this Subsection.

17. *Williams v. Kushner*, 549 So. 2d 294, 308 (La. 1989) (Dixon, J., dissenting).

18. La. R.S. 40:1299.42(B)(1) (1992).

19. La. R.S. 40:1299.43(B)(1) (1992).

20. La. R.S. 40:1299.42(B)(1) (1992) (emphasis added).

21. *Kelty v. Brumfreed*, 633 So. 2d 1210, 1217 (La. 1994) (emphasis added).

22. *Id.* at 1216-17.

23. La. R.S. 40:1299.43 (1992).

health care providers." For instance, in 1998, a general practitioner would have paid a \$28,000 surcharge to the Patient Compensation Fund. Any increase in the price of the surcharge due to the Patient Compensation Fund will be paid by the doctor himself. The exclusion of future medical expenses will only affect the amount of the surcharge a doctor must pay into the Patient Compensation Fund (PCF). Therefore, excluding this specific category of damages does not conflict with the purpose behind limiting the amount of recoverable damages in malpractice cases, because, although the health care provider pays the PCF surcharge, the PCF has a significant role in lowering malpractice insurance premiums.

In addition to future medical expenses, another limitation on the coverage of the medical malpractice damages cap is that it protects only claims for "malpractice."<sup>24</sup> Acts or omissions by doctors which do not fall within the definition of "malpractice" are not covered by the liability cap, nor does the PCF cover these types of acts. In Louisiana, actions against a qualified health care provider for injuries resulting from defective furniture<sup>25</sup> or a slip and fall accident<sup>26</sup> on the premises of a physician or hospital are not covered. In some cases, plaintiffs have found it advantageous to have a particular act found outside the scope of "malpractice" for purposes of avoiding the requirement of going before the Medical Review Panel.<sup>27</sup>

However, for purposes of a greater amount of recovery, finding an act or omission is not "malpractice" may be more harmful than helpful to a plaintiff. Suppose a plaintiff is injured in a manner that is not "malpractice," and his claim is no longer subject to the statutory cap on liability. Neither is the Patient

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24. La. R.S. 40:1299.42(B)(1) (1992). See *Sewell v. Doctors Hosp.*, 600 So. 2d 577 (La. 1992); *Frank L. Maraist & Thomas C. Galligan, Louisiana Tort Law*, § 21-3(e), at 468 (1997). "Malpractice" is defined in La. R.S. 40:1299.41(8) (Supp. 1998):

(8) 'Malpractice' means any unintentional tort or any breach of contract based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient, including failure to render services timely and the handling of a patient, including loading and unloading of a patient, and also includes all legal responsibility of a health care provider arising from defects in blood, tissue, transplants, drugs and medicines, or from defects in or failures of prosthetic devices, implanted in or used on or in the person of a patient.

25. *Sewell v. Doctors Hosp.*, 600 So. 2d 577 (La. 1992) (Where the patient was injured by a collapsing hospital bed, the Medical Malpractice Act's liability cap was inapplicable because there was no "malpractice").

26. *Stapler v. Alton Oshner Med. Found.*, 525 So. 2d 1182 (La. App. 5th Cir. 1988); *Head v. Erath Gen. Hosp.*, 458 So. 2d 579 (La. App. 3d Cir. 1984), writ denied, 462 So. 2d 650 (La. 1985). But see *Marsella v. Monmouth Med. Ctr.*, 540 A.2d 865 (1988) (The court held a hospital visitor's recovery was limited to the statutory amount in a slip and fall accident. However, the case was decided under N.J. Stat. Ann. § 2A:53 A-10 (1997) which provides that the Act is remedial in nature and should be liberally construed to afford immunity for furtherance of the public policy of protection of charitable hospitals. In addition, N.J. Stat. Ann. § 2A:53 A-10 (Supp. 1997) limits recovery for injury "as the result of any one accident," (emphasis added) whereas La. R.S. 40:1299.42(B)(2) (Supp. 1998) limits the "total amount recoverable for all malpractice claims") (emphasis added)).

27. See *Price v. City of Bossier City*, 693 So. 2d 1169 (La. 1997); *Hebert v. Federal Express Corp.*, 695 So. 2d 528 (La. App. 4th Cir. 1997); *Baham v. Med. Ctr. of La. at New Orleans*, 674 So. 2d 458 (La. App. 4th Cir. 1996).

Compensation Fund responsible for payment of its part of the plaintiff's claim. However, the plaintiff could sue the physician personally and receive \$800,000, for example, an award which far exceeds the \$500,000 statutory limit. Nevertheless, if the physician is only *insured* for the \$100,000 to which he expects to be exposed and the PCF is not liable for the other \$400,000, after recovering \$100,000 from the physician's insurer, the plaintiff must recover the remaining \$700,000 from the physician personally. When considered in this light, it is preferable for a plaintiff to seek recovery for an act of "malpractice" and have recovery of \$500,000 "guaranteed," so to speak. The alternative is recovering \$800,000 for an act which is not "malpractice." In that case, the plaintiff would only be assured of recovering \$100,000, especially considering the delays involved in a suspensive appeal.

The cap does not include acts or omissions which are not "malpractice," nor does it cover injuries resulting from an act or omission of a person who is not considered a "qualified health care provider"<sup>28</sup> or which injure a person who is not a "patient"<sup>29</sup> for purposes of the act.

These exceptions to the cap are certainly logical but may conflict with the purpose of the damages cap because insurance companies may be liable for more than the physician's \$100,000 usual liability when the physician has purchased a policy with greater coverage. The Louisiana Third Circuit has held that:

[the] advantage is the enhanced prospect of medical personnel staying in Louisiana with the result that medical care will be more available to the citizens of the state. In addition, those injured by medical malpractice will purportedly be better off in that there will be a solvent defendant from which to pursue compensation, at the least \$100,000 from the health care provider and up to an additional \$400,000 from the Fund.<sup>30</sup>

Three areas which *should* be covered under the damage cap provided in Louisiana Revised Statutes 40:1299.42(B)(1) have not been directly addressed by the Louisiana Supreme Court: loss of consortium claims derivative of a malpractice injury, claims of vicarious liability of a physician or hospital, and claims for economic harm without a concurrent injury. These three categories of damages are the focus of this comment.

## II. A SINGLE LIABILITY CAP APPLIES TO LOSS OF CONSORTIUM CLAIMS WHICH DERIVE FROM A PATIENT'S MALPRACTICE INJURY

Loss of consortium claims are recoverable in Louisiana and include loss of society, service, or support.<sup>31</sup> The following categories of persons may recover for

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28. *Boudreaux v. Varnishung*, 713 So. 2d 1192 (La. 1997).

29. *Price v. City of Bossier City*, 693 So. 2d 1169 (La. 1996).

30. *Todd v. Sauls*, 647 So. 2d 1366, 1380 (La. App. 3d Cir. 1994).

31. La. Civ. Code art. 2315: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it. Damages may include loss of consortium, service, and society, and shall be recoverable by the same respective categories of persons who would have had a cause of action for wrongful death of an injured person." See also *Maraist & Galligan, supra* note 24,

the loss of consortium they suffer as a result of an injury to a family member: 1) the spouse and children, 2) parents, 3) siblings, and 4) grandparents.<sup>32</sup> In cases of medical malpractice, the question arises whether one liability cap is applicable to the loss of consortium claim(s) as well as the primary injury, or if there should be a separate cap for each claim. If only one cap is applicable to both the loss of consortium claim and direct victim's claim, how are these claims to be ranked when the damages awarded exceed the damages cap? Although an argument may be made for pro-rated recovery of each claimant's portion of damages from the recoverable \$500,000, "it seems that in a direct victim/consortium case, from a fairness perspective, the direct victim should be entitled to primary recovery of benefits."<sup>33</sup> Although there has been no ruling by the Louisiana Supreme Court on this issue, two Louisiana circuit courts have held that loss of consortium claims and claims for injuries from malpractice are subject to a single liability cap.<sup>34</sup>

It is certainly arguable that loss of consortium is a separate injury, distinct from the injury suffered by the primary victim, and that the loss should be compensated. In such a case, one who suffers the loss of a spouse's companionship and support, for instance, has an injury which is wholly distinct from the physical injury suffered by the spouse himself. However, this argument cannot overcome the statutory language which provides for the damages cap. Louisiana Revised Statutes 40:1299(B)(1) clearly states: "[t]he total amount recoverable for all malpractice claims for injuries to or death of a patient . . . shall not exceed five hundred thousand dollars."<sup>35</sup> While the spouse of a patient may have a valid loss of consortium claim, that claim would not have arisen without the injury to the patient himself. Because the statute provides for a limitation on damages recoverable for injuries to "a patient," the spouse and the patient together cannot recover more for the injuries to "a patient" than the patient could alone.<sup>36</sup> The statute must be interpreted in light of its purpose: to allow for affordable medical care in Louisiana by limiting malpractice insurance premiums.<sup>37</sup> Therefore, the cap should not be extended in ways the legislature did not intend. Allowing plaintiffs to circumvent the statutory damages cap for greater recovery with loss of consortium claims has been rejected by Louisiana circuit courts and should be rejected as a matter of both statutory interpretation and policy.

In *Hollingsworth v. Bowers*,<sup>38</sup> an infant sustained permanent injuries during delivery which prevented the use of his left arm. The trial court awarded the child \$500,000 in general damages and \$250,000 in loss of earning capacity, and the

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§7-2(d), at 154 ("Consortium includes loss of society, service or support; a spouse also may recover for impairment of sexual relations.").

32. See La. Civ. Code art. 2315.1.

33. Marast & Galligan, *supra* note 24, §21-3(e), at 466 n.66.

34. *Hollingsworth v. Bowers*, 690 So. 2d 825 (La. App. 3d Cir. 1996); *Moody v. United Nat'l Ins. Co.*, 657 So. 2d 236 (La. App. 5th Cir. 1995).

35. La. R.S. 40:1299(B)(1) (Supp. 1998) (emphasis added).

36. See *Todd v. Sauls*, 647 So. 2d 1366, 1381 (La. App. 3d Cir. 1994).

37. See *Butler v. Flint Goodrich Hosp.*, 607 So. 2d 517 (La. 1992).

38. 690 So. 2d 825 (La. App. 3d Cir. 1996).

mother \$250,000 for loss of consortium. It held that separate caps should apply for the mother and the child.<sup>39</sup> However, the Louisiana Third Circuit Court of Appeal held that a mother's loss of consortium claim was subject to the same statutory cap as her child's claims and found that the mother's loss of consortium claim was derivative of the child's claim. The court stated that "[b]ecause the right of action in the loss of consortium claim is derived from the primary victim's injuries, recovery is restricted to the policy's per person limits. Therefore, if the injured party exhausts the per person limits, the derivative claim is extinguished."<sup>40</sup> The court here answered affirmatively to the question whether a single damage cap should apply. It also supported the notion that the primary victim should be granted the entire amount of recovery where appropriate, instead of allowing the consortium victim and the direct victim to each recover a percentage of the available \$500,000 according to the amount each would have received without the statutory limitation on damages.

The Louisiana Fifth Circuit, in *Moody v. United National Insurance Company*,<sup>41</sup> concluded that loss of consortium claims of the parents of a 14-year-old child who suffered permanent, irreversible brain damage as a result of malpractice were "derived from the malpractice injury to their son, did not result from separate acts of negligence, and therefore [were] included within the same cap as [the son's] claim."<sup>42</sup> Thus, the court found that \$500,000 is the total amount recoverable for the primary victim *and* those family members who have loss of consortium claims.

Although certainly not equivalent to loss of consortium claims, where there are multiple claimants in a wrongful death action resulting from malpractice, the application of Louisiana Revised Statutes 40:1299.42(B)(1) should be analogous, especially since these are also derivative claims. Therefore, an examination of courts' treatments of those types of claims in Louisiana, as well as the language interpreting the statute, is appropriate to this inquiry into the liability cap and loss of consortium claims.

A third circuit case, *Todd v. Sauls*,<sup>43</sup> involved a survival and wrongful death action filed by a malpractice victim's survivors. The circuit court held that the \$500,000 cap applies per patient, not per claim. In other words, it found that the total, combined recovery for all of the survivors/plaintiffs was limited to \$500,000. It found the language of Louisiana Revised Statutes 40:1299.42(B)(1) clear and unambiguous.<sup>44</sup> In the opinion, that court explained: "To construe the act to mean that the cap is per plaintiff is to misread the act. . . . The clear quantifiers are 'a patient' as well as 'total amount recoverable' and 'all malpractice claims.' Whether there is one or eight plaintiffs is of no moment. The physician's negligence is not

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39. *Id.* at 828.

40. *Id.* at 832.

41. 657 So. 2d 236 (La. App. 5th Cir. 1995).

42. *Id.* at 240.

43. 647 So. 2d 1366 (La. App. 3d Cir. 1994).

44. La. R.S. 40:1299.42(B)(1) (1992): "The total amount recoverable for all malpractice claims for injuries to or death of a patient. . . ." (emphasis added).



multiplied by the number of plaintiffs."<sup>45</sup> This reasoning may be easily analogized to loss of consortium claims because there is the similar problem of the possibility of multiple claimants in those claims as well. Thus, a single liability cap should apply for purposes of loss of consortium claims on the same grounds the court forwarded in *Todd*.

The Louisiana Fourth Circuit has also considered the question presented by multiple claimants and the medical malpractice damages cap in *LaMark v. NME Hospitals*.<sup>46</sup> There, a woman died as a result of malpractice; her husband and four children brought suit. They sought separate damage caps for their claims relating to the death of the wife/mother. The court held that "the statutory limitation was a limitation on the total amount recoverable on all malpractice claims rather than a limitation on each separate claim for a single act of malpractice."<sup>47</sup> Again, the interpretation of the statute for wrongful death actions may easily be adopted for that of loss of consortium because of the similar nature of the claims in that there may be multiple claimants.

The United States Fourth Circuit Court of Appeals has interpreted a similar statute to include the loss of consortium type claim within the damages cap available to the primary victim. In *Starns v. United States*,<sup>48</sup> the Fourth Circuit considered whether the claims of parents whose child was retarded due to negligence of the delivery staff in a federally-operated hospital<sup>49</sup> together with the child's claim for injuries were covered by a single damages cap under Virginia Code section 8.01-581.15.<sup>50</sup> While the district court applied the cap to the child and his parents separately, the Court of Appeals found all claims which arose from the child's injuries were subject to a single damages cap. The court found that the

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45. *Todd*, 647 So. 2d at 1381.

46. 542 So. 2d 753 (La. App. 4th Cir. 1989). *See also* *Shepard v. State Farm Mut. Auto. Ins.*, 545 So. 2d 624 (La. App. 4th Cir. 1989) (the court found for purposes of insurance coverage that: A loss of consortium action is a derivative claim of the primary victim's injuries. The derivative claim does not come into existence until someone else is injured. Because the right of action in the loss of consortium claim is derived from the primary victim's injuries, recovery is restricted to the policy's per person limits. Therefore, if the injured party exhausts the per person limits, the derivative claim is extinguished.).

47. *Moody v. United Nat'l Ins. Co.*, 657 So. 2d 236, 240 (La. App. 5th Cir. 1995).

48. 923 F.2d 34 (4th Cir. 1995), *cert denied*, 502 U.S. 809, 112 S. Ct. 54 (1991). *See also* *Bulala v. Boyd*, 389 S.E.2d 670 (Va. 1990).

49. *Hill v. United States*, 81 F.3d 118, 121 (10th Cir. 1996), says of *Starns*: "the effect of the statutory scheme placed the tort victim in exactly the same position that would have resulted had the victim been injured by any other similarly-situated private party. Furthermore, the government, as tortfeasor, was treated in a precisely analogous fashion to a similarly-situated private tortfeasor."

50. Va. Code Ann. § 8.01-581.15 (Michie 1984):

In any verdict returned against a health care provider in an action for malpractice where the act or acts of malpractice occurred on or after April 1, nineteen hundred seventy-seven which is tried by a jury or in any judgment entered against a health care provider in such an action which is tried without a jury, the total amount recoverable for any injury to, or death of, a patient shall not exceed seven hundred fifty thousand dollars.

(Subsequently, the statutory damage cap was raised to one million dollars. *See* Va. Code Ann. § 8.01-581.15 (Michie 1998)).

parents' claims arose from the child's injuries. Because the parents' damages for the mother's past services, the father's lost wages, and hospital and travel expenses on the child's behalf were derivative, "they must be included within [the child's] cap. Accordingly, the limit for all damages in this case is \$750,000."<sup>51</sup> The court also considered the apportionment of the \$750,000 among the parents and the child. It found that the awards should be ranked as follows: 1) the patient's compensatory awards, 2) the patient's punitive awards, 3) the non-patients' derivative awards.<sup>52</sup> Accordingly, the court reduced the non-patients' claims first. Thus, the United States Fourth Circuit has decided that "derivative claims" in Virginia,<sup>53</sup> are subject to the same, single statutory cap as the primary injury, and these claims are the first to be eliminated when damages are reduced in order to fit within the allowable statutory amount. Thus, the Fourth Circuit, like the courts in Louisiana, found that loss of consortium claims are derivative of that of the primary patient, and as such, are subject to the same single statutory cap as is the patient's claim.

Allowing a plaintiff or his family to recover a greater amount because of a derivative loss of consortium claim would thwart the purpose of the statute by increasing the liability of physicians and hospitals and consequently, increasing the amount of malpractice insurance and healthcare costs. Therefore, damages for loss of consortium claims should be subject to the same statutory cap as are the primary victim's claims, and Louisiana courts have so held.

### III. THE LIABILITY CAP INCLUDES CLAIMS BASED ON VICARIOUS LIABILITY

In Louisiana, it is well established that a health care provider may be held responsible for the negligence of its employees under the doctrine of respondeat superior, or vicarious liability.<sup>54</sup> According to the Louisiana Third Circuit, "[i]t is generally recognized that where a physician is the employee of a hospital sued by a patient for particular injuries negligently inflicted during the course of the patient's treatment, the hospital may be held liable for the injuries sustained by the patient under the doctrine of respondeat superior."<sup>55</sup> In one Louisiana case, an entire surgical team was held vicariously liable because none of the members of

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51. *Starns*, 923 F.2d at 38.

52. *Id.*

53. See *Kerstetter v. United States*, 57 F.3d 362, 366 (4th Cir. 1995) (Virginia law does not allow consortium claims). See also *Carey v. Foster*, 345 F.2d 772 (4th Cir. 1965); *Bolen v. Bolen*, 409 F. Supp. 1374 (W.D. Va. 1976).

54. See *Tabor v. Doctors Memorial Hosp.*, 563 So. 2d 233 (La. 1990); *Pommier v. ABC Ins. Co.*, 715 So. 2d 1270, 1277 (La. App. 3d Cir. 1998); *Gibson v. Bossier City Gen. Hosp.*, 594 So. 2d 1332, 1342 (La. App. 2d Cir. 1991); *Daniel v. St. Francis Cabrini Hosp.*, 415 So. 2d 586 (La. App. 3d Cir. 1982); *Sudhor v. Medine*, 421 So. 2d 271 (La. App. 4th Cir. 1982); *Wells v. Womans Hosp. Found.*, 286 So. 2d 439 (La. App. 1st Cir. 1973); *Thompson v. Brent*, 245 So. 2d 751 (La. App. 4th Cir. 1971). See also John D. Hodson, *Liability of Hospital or Sanitarium for Negligence of Physician or Surgeon*, 51 A.L.R. 4th 235 (1987).

55. *Green v. State Through Southwest Louisiana Charity Hosp.*, 309 So. 2d 706, 713 (La. App. 3d Cir.), writ denied, 313 So. 2d 601 (1975).

that team padded a patient's legs where it was required during an operation, and the patient suffered a nerve injury as a result.<sup>56</sup> In another, a hospital was held vicariously liable for the negligence of a physician it employed who failed to diagnose gangrene, resulting in the loss of a 9-year-old child's leg.<sup>57</sup> Arguments have been made that a hospital (or physician) who acts, not only as a health care provider, but also as an employer may be held vicariously liable for an employee and, therefore, should not be granted limited liability under the damages cap in its capacity as an employer. However, as examined below, neither the language and structure of the Medical Malpractice Act nor the jurisprudence support this argument.

By examining the structure of the statutes in the Medical Malpractice Act as well as the implications of the jurisprudence, it is clear that the damages cap should apply for purposes of vicarious liability. Louisiana Revised Statutes 40:1299.41(1) defines a "health care provider" covered under the Medical Malpractice Liability Act as "any partnership . . . or corporation whose business is conducted principally by health care providers, *or an officer, employee, partner, member, shareholder, or agent thereof acting in the course and scope of his employment.*"<sup>58</sup> The italicized portion lends authority to the argument that the Louisiana Legislature intended to protect hospitals and physicians in their capacity as employers. The statute applies to the employees of health care providers acting within the course and scope of their employment and the health care providers who employ them. Because both the employees and the employing entities are covered individually, it is illogical to conclude that, when these two are connected, the employer's limitation on liability is somehow lost. Thus, Louisiana Revised Statutes 40:1299.42(B)(1) does not allow a patient to recover more than \$500,000 from a health care provider as an employer, who is vicariously liable for the negligence of a non-professional employee.

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56. *Pommier v. ABC Ins. Co.*, 715 So. 2d 1270 (La. App. 3d Cir. 1998).

57. *Green*, 309 So. 2d at 713.

58. (Emphasis added). La. R.S. 40:1299.41(1) (Supp. 1999) provides in its entirety: "Health care provider" means a person, partnership, limited liability partnership, limited liability company, corporation, facility, or institution licensed by this state to provide health care or professional services as a physician, hospital, community blood center, tissue bank, dentist, registered or licensed practical nurse, ambulance service under circumstances in which the provisions of R.S. 40:1299.39 are not applicable, certified registered nurse anesthetist, nurse midwife, licensed midwife, pharmacist, optometrist, podiatrist, chiropractor, physical therapist, occupational therapist, psychologist, or any nonprofit facility considered tax-exempt under Section 501(c)(3), Internal Revenue Code, pursuant to 26 U.S.C. 501(c)(3), for the diagnosis and treatment of cancer or cancer-related diseases, whether or not such a facility is required to be licensed by this state, or any professional corporation a health care provider is authorized to form under the provisions of Title 12 of the Louisiana Revised Statutes of 1950, or any partnership, limited liability partnership, limited liability company, or corporation whose business is conducted principally by health care providers, or an officer, employee, partner, member, shareholder, or agent thereof acting in the course and scope of his employment.

In *Goodliffe v. Parish Anesthesia Associates*,<sup>59</sup> a nurse was found negligent in administering anesthesia to a patient who developed TMJ syndrome. The patient sued the nurse and the nurse's employer, claiming that each of the two was limited by a separate damage cap. The plaintiff alleged the nurse was negligent in her actions and that her employer should be found negligent because it improperly trained the nurse. The court found the nurse negligent but there was no evidence the employer had been negligent in training her. The employer was found liable for the \$100,000 it provided under an insurance policy as coverage for the nurse. Even if the patient had asserted that the nurse's employer was vicariously liable for her negligence, the implication of this decision is that the damages cap of Louisiana Revised Statutes 40:1299.42(B)(1) would still apply: "The judgment is unclear as to whether [the employer] was held liable individually for its own separate \$100,000 or as the party covering [the nurse's] \$100,000. Nevertheless, we agree that any separate liability . . . must be predicated on its own negligence, which was not shown in this case."<sup>60</sup> The court here makes no mention of the possibility of the employer being liable for more than the statutory limit. It found that any liability of the employer must be founded on its own negligence. Even if a plaintiff can recover under a vicarious liability theory, it may be inferred that if a patient were able to recover on this basis, his recovery would be limited by the damages cap of Louisiana Revised Statutes 40:1299.42(B)(1).

A case pertinent to this inquiry was decided by the Colorado Supreme Court in 1993. In *Scholz v. Metropolitan Pathologists, P.C.*,<sup>61</sup> a patient underwent unnecessary surgery and had his prostate gland removed due to an unlicensed, non-professional lab technician's mislabeling of slides produced from a biopsy. The patient sued the technician's employer under a theory of vicarious liability and argued that the statutory liability cap of the Health Care Availability Act<sup>62</sup> did not apply to the employer. The court found the employer vicariously liable and covered by the cap. The court reasoned that the negligent technician was a "health care professional" for purposes of the Health Care Availability Act.<sup>63</sup> The court also found that the professional corporations or entities were entitled to the protection of the statutory cap in their capacities as both a health care provider and as an employer. The reason behind allowing this limitation of liability for the

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59. 663 So. 2d 769 (La. App. 5th Cir. 1995).

60. *Id.* at 779.

61. 851 P.2d 901 (Colo. 1993).

62. Colo. Rev. Stat. § 13-64-302 (1997):

The total amount recoverable for all damages for a course of care for all defendants in any civil action for damages in tort brought against a health care professional . . . or a health care institution . . . shall not exceed one million dollars, present value per patient, including any derivative claim by any other claimant, of which not more than two hundred fifty thousand dollars, shall be attributable to noneconomic loss or injury.

63. The HCAA defines a health care professional as "any person licensed in this state or any other state to practice medicine, chiropractic, nursing, physical therapy, podiatry, dentistry, pharmacy, optometry, or other healing arts. The term includes any professional corporation or other professional entity comprised of such health care providers as permitted by the laws of this state." Colo. Rev. Stat. § 13-64-202(4) (1997).

purpose of vicarious liability is clear:

[N]umerous, perhaps even the vast majority of, medical procedures require the assistance of unlicensed individuals. . . . [T]he legislature sought to prevent a plaintiff from naming some unlicensed employee whose conduct may have contributed to plaintiff's injuries as a defendant (in addition to the professional entity itself under a theory of respondeat superior) and thereby avoid application of the HCAA. . . .

. . . [T]he negligent conduct of unlicensed employees . . . who contribute to providing health care services affects the insurance premiums that health care providers pay, just as the conduct of professionals within those entities does.<sup>64</sup>

Therefore, the court found that the plaintiff could not circumvent the statutory cap on damages by naming a negligent, non-professional employee and asserting that the defendant health care provider was vicariously liable for the acts of its employee. The court aptly recognized that insurance premiums are affected by the costs of insuring the acts of such employees, as well.<sup>65</sup>

Similarly, in Louisiana, one of the primary goals of the Medical Malpractice Act was to lower the cost of medical malpractice insurance thereby making healthcare more affordable and available. This goal would be defeated if a plaintiff were allowed to avoid the limitation on damages by suing a health care provider as a vicariously liable employer. Medical malpractice insurance premiums would inevitably rise as a result. In addition, Louisiana Revised Statutes 40:1299.41(1) cannot be construed to allow for such an inconsistent application of the damages cap—so that a health care provider would be protected for its own negligence, an employee of that health care provider would be protected for his negligence, but the health care provider as employer would not be protected in claims for vicarious liability for the negligence of the employee. Therefore, in Louisiana, a plaintiff should not be allowed to circumvent the statutory cap on damages by claiming a health care provider is vicariously liable for one of its employees.

#### IV. LOUISIANA REVISED STATUTES 40:1299.42(B)(1) INCLUDES EXCLUSIVELY ECONOMIC INJURIES

Louisiana courts have held that where a physician causes an injury through an act which is not included within the definition of "malpractice,"<sup>66</sup> the requirements of the Medical Malpractice Act do not apply.<sup>67</sup> An economic injury, for purposes of this comment, consists of monetary damage which does not arise as a result of a physical injury. Although the applicability of the Act to a purely economic injury has been considered for purposes of the requirement of the Medical Review Panel,

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64. *Scholz*, 851 P.2d at 904-05.

65. *Id.* at 905.

66. *See supra* note 24.

67. *Sewell v. Doctors Hosp.*, 600 So. 2d 577 (La. 1992).

it has not been considered in a claim for a sum in excess of the statutory limit. The following cases provide examples of situations in which such a question could arise.

In *Price v. City of Bossier City*,<sup>68</sup> an employee had a slip and fall accident at work and went to the hospital for treatment. In accordance with the policy of her employer, she underwent a drug test after the completion of her examination for injuries. The physician negligently interpreted the test results<sup>69</sup> and reported a positive result to the employer. Consequently, the employee was discharged. The court held that the employee was not required to initially submit her claim to a Medical Review Panel "because the employee [was] not a patient as defined by the act" for purposes of the drug screen.<sup>70</sup> Justice Lemmon concurred in that decision and stated, "[I]n my view, economic injuries, at least in the absence of accompanying physical injuries do not fall under the Act."<sup>71</sup> In his brief concurrence, Lemmon cited Louisiana Revised Statutes 40:1299.42(B)(1): "The Medical Malpractice Act authorizes recovery, in a specified limited amount, 'for all malpractice claims for injuries to or death of a patient. . . .'"<sup>72</sup>

Notably, the word "injuries" in the statute is not modified; the statute does not say that only *physical* injuries fall within the statute. To the contrary, the statute reads: "all malpractice claims for injuries." Certainly, the nature of a medical malpractice claim *does* suggest a physical injury. However, to refuse physicians the protection of the damages cap where an injury is economic would defeat the purpose of the cap: to reduce the cost of malpractice insurance by allowing for greater predictability in the amounts of claims. If economic injuries were not subject to the cap of Louisiana Revised Statutes 40:1299.42(B)(1), the amount of claims would be less predictable. Thus, Justice Lemmon should not make this distinction where the law does not. In light of the clear, unambiguous wording of the statute, claims for injuries—even exclusively economic injuries—fall within the Medical Malpractice Act and should be subject to the requirements therein. Thus, where an employee, such as the one in the *Price* case, seeks to recover from the physician personally, her recovery should be limited to an amount within the statutory limit for the loss of her employment and related injuries.

The plaintiff in *Pena v. Fann*<sup>73</sup> was injured in an automobile accident, and at the request of the defendant's insurer, went to a physician for an independent medical examination. The physician determined that there was nothing wrong with the plaintiff. Later, the plaintiff underwent surgery when it was discovered that he

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68. 693 So. 2d 1169 (La. 1997).

69. *Id.* at 1170-71 (On the consent form for the drug screen, the employee "indicated that she . . . had eaten poppy seed dressing shortly before the test. . . . The Mayo Clinic Report indicated that [the employee] tested positive for morphine, . . . [but] cautioned that presence of morphine at low concentration . . . may be due to poppy seed ingestion." Nevertheless, the physician reported a positive result to the employer).

70. *Id.* at 1173 (Lemmon, J., concurring).

71. *Id.*

72. *Id.*

73. 677 So. 2d 1091 (La. App. 4th Cir. 1996).

actually had "a severe rotary subluxation caused by the accident and which was not properly diagnosed or treated" by the physician.<sup>74</sup> The court concluded that a sufficient doctor-patient relationship existed for application of Louisiana Revised Statutes 40:1299.47, holding that the claim was premature because it had not been submitted to a Medical Review Panel.<sup>75</sup> That being so, the court's holding can be extended. Because the plaintiff's claim is subject to the Medical Malpractice Act for purposes of the Medical Review Panel, it should also fall under the statutory cap on damages of Louisiana Revised Statutes 40:1299.42(B)(1) for both his physical injuries and any economic injuries he may have sustained.

Suppose, for instance, that the plaintiff in *Pena* sued the physician for the loss of his case against the defendant. Assume the doctor's finding that there was nothing wrong with the plaintiff prevented him from recovering a substantial amount from the defendant in an action arising out of the automobile accident. Could the plaintiff recover more than the statutory amount from the doctor as a result of the economic loss he sustained from losing his suit? Consider the language of Louisiana Revised Statutes 40:1299.42(B)(1): "for all malpractice claims for injuries to or death of a patient." The plaintiff would have a "malpractice claim" because the doctor's misdiagnosis is the basis for his claim. The claim would be for an "injury to . . . a patient" because the plaintiff's claim is for the economic injury he sustained as a result of the loss of his suit. Since the statute does not distinguish between the kinds of injuries which are subject to the damages cap, the courts should not do so either. In this hypothetical, obviously the plaintiff's claim should be subject to a damages cap because, as required in the statute, it is a malpractice claim for injuries to a patient.

For a second illustration of the application of the medical malpractice liability cap to claims for economic injury, suppose a popular musician was misdiagnosed with a terminal illness. As a result, the musician canceled a scheduled performance and suffered a loss of \$1,000,000 in profits from the show. The musician sued the physician for that loss. Should the musician be allowed to recover more than the allowable statutory amount? Would the claim for \$1,000,000 fall under the category of "all malpractice claims"? Would the claim be for "injuries to . . . a patient"? It seems that the claim would be a "malpractice claim" because it involved a misdiagnosis. In addition, the claim would be for an "injur[y] to . . . a patient": an economic injury arising from the misdiagnosis of the patient. Again, since the statute<sup>76</sup> does not distinguish between types of injuries, the fact that the injury is economic should not preclude the application of the damages cap. Furthermore, in negligence cases, courts have traditionally refused to allow recovery for intangible economic loss unaccompanied by physical injury.<sup>77</sup> The so-called "prohibitory rule" often acts as prima facie obstacle to any recovery in these

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74. *Id.* at 1092.

75. *Id.* at 1093-94.

76. La. R.S. 40:1299.42(B)(1) (1992).

77. David W. Robertson, *Recovery in Louisiana Tort Law for Intangible Economic Loss: Negligence Actions and the Tort of International Interference With Contractual Relations*, 46 La. L. Rev. 737, 740-41 (1986).

types of negligence cases.<sup>78</sup> Therefore, if the musician recovers, his award should be limited to \$500,000. His \$1,000,000 claim must be subject to the \$500,000 cap on damages, as required by Louisiana Revised Statutes 40:1299.42(B)(1).

#### V. CONCLUSION

The damages cap came into existence "when a proliferation of medical malpractice lawsuits resulted in higher costs of defensive medicine and decreased access to patient care, [and] medical associations and government agencies successfully partnered in every state and enacted tort reforms to protect licensed health care providers from these suits."<sup>79</sup> The cap has been successful in providing this protection for health care providers. A study of the frequency and severity of malpractice claims from 1975 through 1984 concluded that the cap on awards has reduced the awards by 23%.<sup>80</sup>

Another indication of the success of the cap in accomplishing its purpose is the slowing rate of increase in average indemnity costs. From 1971 to 1975, the average indemnity cost in Louisiana more than doubled: from approximately \$10,000.00 per claim to approximately \$24,000.00 per claim.<sup>81</sup> However, in 1984, the average was approximately \$36,000.00 per claim; thus, after the cap was enacted, the indemnity cost had not yet doubled in the eight years since 1976.<sup>82</sup>

When Louisiana Revised Statutes 40:1299.42(B)(1) is considered for purposes of its application to claims for loss of consortium, vicarious liability, and economic injury, it must be interpreted in light of its purpose: to lower medical malpractice insurance premiums so that citizens of the State of Louisiana will receive the benefit of affordable health care. Therefore, these three types of claims should be subject to the statutory liability cap in order to conform with the intent of the legislature expressed in the statutory language and to allow for affordable malpractice insurance premiums and health care.

A single liability cap of \$500,000 should apply to claims for loss of consortium which arise from injury to a primary patient. This position has been taken by Louisiana appellate courts.<sup>83</sup> The reasoning behind the limitation of recovery for loss of consortium claims in medical malpractice cases is that Louisiana Revised Statutes 40:1299(B)(1) allows for recovery for injuries to "a patient." A loss of consortium claim, though valid, will not arise without the injury to the patient himself. The consortium victim and the patient together cannot

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78. *Id.* ("The prohibitory rule was bottomed on generalized fears of multitudinous claims and limitless liability. These concerns have been called 'the floodgates argument.'")

79. Joanne C. Marier, *When Should Physicians Begin Thinking Like Lawyers?*, Practice Management Workshop Series for Residents & Fellows (Jan. 1997).

80. Supplemental Memorandum in Support of Defendant's Motions for Summary Judgment, at 7, *Butler v. Flint Goodrich Hosp.*, 607 So. 2d 517 (La. 1992) (No. 92-0559).

81. *Id.* (based upon a combined database of Hartford, St. Paul, and Aetna).

82. *Id.*

83. *Hollingsworth v. Bowers*, 690 So. 2d 825 (La. App. 3d Cir. 1996); *Moody v. United Nat'l Ins. Co.*, 657 So. 2d 236 (La. App. 5th Cir. 1995).



recover more for the injuries to "a patient" than the patient could alone.<sup>84</sup> The purpose of the statute, to allow for affordable medical care in Louisiana by limiting malpractice insurance premiums, must guide its interpretation. The cap should not be extended in ways the legislature did not intend. Therefore, claims for loss of consortium resulting from medical malpractice should be subject to a single, statutory liability cap.

The theory of vicarious liability is often applicable in cases of medical malpractice. Louisiana Revised Statutes 40:1299.41(1), which includes employees of health care providers within its definition of protected "health care providers," provides authority for the conclusion that vicarious liability cannot be a means of circumventing the damages cap. In order to conform to the purpose of the statute, claims for vicarious liability must be subject to the damages cap to allow for lower malpractice insurance premiums and lower health care costs.

Economic injuries are "injuries" within the meaning of Louisiana Revised Statutes 40:1299.42(B)(1). Therefore, claims arising from these injuries are subject to the statutory limitation on recovery. In some cases, Louisiana courts have held the Medical Malpractice Act applicable for purposes of submission to a Medical Review Panel.<sup>85</sup> The reasoning in these cases may be extended to allow for application of the damages cap. Because a solely economic injury falls within the requirement of Louisiana Revised Statutes 40:1299.42(B)(1) of "malpractice claims for injuries to . . . a patient," these claims must be subject to the damages cap.

The Louisiana Supreme Court stated that "[t]he Legislature . . . decided, within its prerogative, to put a three year absolute limit on a person's right to sue for legal malpractice, just as it would be within its prerogative not to allow legal malpractice actions at all."<sup>86</sup> If the legislature can disallow legal malpractice actions, the same should be true for medical malpractice actions. *A fortiori*, if the legislature can *disallow* this type of action, certainly it can place limitations on recovery in that action. This is exactly what the legislature has done by enacting the liability cap of Louisiana Revised Statutes 40:1299.42(B)(1). In accordance with the intent of the legislature as expressed in the language of this statute, claims for loss of consortium, vicarious liability, and economic injury should be subject to the cap on damages.

*Emily Townsend Black Grey\**

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84. See *Todd v. Sauls*, 647 So. 2d 1366, 1381 (La. App. 3d Cir. 1994).

85. *Price v. City of Bossier City*, 693 So. 2d 1169 (La. 1997); *Pena v. Fann*, 677 So. 2d 1091 (La. App. 4th Cir. 1996).

86. *Reeder v. North*, 701 So. 2d 1291, 1297 (La. 1996).

\* This author wishes to express her gratitude to Professor Saül Litvinoff for his advice, guidance, and teaching both during the composition of this comment and during her law school career.