South Dakota Legislative Research Council

Issue Memorandum 96-06

MEDICAL MALPRACTICE DAMAGE CAP RULED UNCONSTITUTIONAL

Background

South Dakota was among many other states that adopted a cap on the recovery of damages to deal with the medical malpractice crisis of the mid-1970s. In the last twenty years many courts have examined the issue of whether the damage caps violate due process. Some courts have upheld some version of damage caps while others have struck them down. On January 31, 1996 the South Dakota Supreme Court struck down the cap on all damages, leaving in its place a cap on general or noneconomic damages of five hundred thousand dollars. The case which prompted this decision arose when William and Jane Knowles brought two claims, one on behalf of their son, Kris, who suffered severe, permanent brain damage while under the care of Ellsworth Air Force Base Hospital, and one in their own right for emotional distress and loss of consortium. Kris was admitted to the base hospital for treatment of a fever when he was twelve days old. Medical Service Specialists, the Air Force equivalent to nurses' aides, recorded Kris's temperature but failed to report to nurses or doctors that Kris's temperature had been falling. Kris developed hypoglycemia and suffered respiratory arrest, which caused severe, irreversible brain damage. The United States admitted liability for medical malpractice and filed a motion for judgment of one million dollars based on the limitation provided in SDCL 21-3-11.

> 21-3-11. In any action for damages for personal injury or death alleging malpractice against any physician, chiropractor, dentist, hospital, registered nurse, certified registered nurse anesthetist, licensed practical nurse or other practitioner of the healing arts under the laws of this state, whether taken through the court system or by binding arbitration, the total damages which may be awarded may not exceed the sum of one million dollars.

The United States District Court ruled that SDCL 21-3-11 was constitutional and awarded one million dollars. The Knowles appealed, and the Eighth Circuit Court of Appeals certified four questions to the South Dakota Supreme Court.[1]

[1]In the Matter of the Certification of Questions of Law From the United States Court of Appeals for the Eighth Circuit, Pursuant to the provisions of SDCL 15-24A-1, Knowles v USA, 1996 SD 10. Of the four questions certified to the South Dakota Supreme Court, only the constitutionality of SDCL 21-3-11 will be discussed in this memorandum. The other three questions are summarized as follows: (1) Are Medical Service Specialists "practitioners of healing arts" for purposes of SDCL 21-3-11? The court reasoned that Medical Service Specialists are not protected by the cap in earlier versions of the statute, and since the 1986 version which included "other practitioners" is unconstitutional, the question is moot. (2) Does South Dakota law recognize emotional distress or loss of consortium for injuries to a minor child as a separate cause of action? The court found that South Dakota does not recognize a parent's emotional distress or loss of consortium claim for injuries to a minor child. South Dakota does

The South Dakota Supreme Court found that the cap on economic damages in SDCL 21-3-11 is in violation of the substantive due process clause of the South Dakota Constitution, Article VI, §2. South Dakota's constitutional test requires the statute "bear a real and substantial relation to the object sought to be obtained," which cannot be unreasonable, arbitrary, or capricious. Under this test, the issue was whether South Dakota's flat medical malpractice cap bears a "real and substantial relation" to its stated purpose of limiting insurance premiums to make health care more affordable and whether the cap was unreasonable, arbitrary, or capricious in accomplishing its purpose. The court concluded that in 1976 the Legislature acted reasonably in placing a cap on general damages, believing that a cap would provide more predictability in calculating premiums which in turn would make the market more reliable. In the long run, the cap should reduce premiums, making insurance coverage more affordable for physicians and hospitals. The Legislature's interest in assuring the availability of affordable medical care was a legitimate legislative objective. But in 1986 the law changed; the distinction between economic and noneconomic loss was eliminated. The court stated that the 1976 version sought only to cut the fat out, but the 1986 version, a flat cap on total damages, cut "not only fat, but muscle, bone and marrow." Medical bills, lost wages, and prescription costs are definite and easily quantifiable. If a malpractice patient's hospital bill exceeds the cap, the patient cannot recover remaining and future medical bills, past and future lost wages, or prescription costs. Without justification, the cap put in place in 1986 is an unreasonable and arbitrary imposition of economic burden upon those who are most severely injured, and the court found no evidence to support a cap on economic damages in 1986. However, pain and suffering are largely intangible, making noneconomic damage awards subjective and therefore unpredictable. This in turn poses a threat for increased premiums. The court found evidence from a 1976 legislative study on the topic of medical malpractice to support the cap on noneconomic damages.

Legislative History of SDCL 21-3-11

In the mid-1970s, the South Dakota Legislature, as well as other legislatures across the country, was concerned about the availability and cost of health care. The South Dakota Legislature passed Senate Concurrent Resolution No. 13, which directed that the Legislative Research Council study the availability and costs of medical malpractice insurance. The committee, which was formed as a result of this resolution, took testimony from doctors, attorneys, insurance company representatives, and other interested parties on the issue of medical malpractice. South Dakota had one of the worst doctor-patient ratios in the nation, with only about five hundred physicians in the state. Medical malpractice insurance premiums were increasing dramatically, especially in rural areas. Testimony indicated that solo practitioners were not able to obtain insurance. Hospitals faced increased premiums. Senate Bill 142 was introduced as a response to the medical malpractice crisis. The bill as introduced would have provided for the periodic payment of judgments obtained for medical malpractice.

recognize a parent's right to assert a claim for loss of the child's services and for medical and other consequential damages incurred in caring for the child. Under common law, a parent was entitled to the services of a child, and therefore, entitled to recover for the loss of services. Also, since the parent was responsible to provide medical attention to the child, the parent is likewise entitled to recover for the child's medical expenses. (3) Does the statutory limitation on damages apply separately to each of the three plaintiffs in this case and each of the two separate causes of action? The court concluded that the parents' damages claim (injury to parents for loss of services during the minority and expenses incurred by the parents as a result of the injuries) is different than the child's claim (injury to child which may be in the form of pain and suffering or mental anguish from the physical injury). Therefore, the parents' action is separate and distinct for purposes of the damage cap.

During the legislative process the bill was hoghoused; and, as passed, the bill (SL 1976, ch. 154, §§ 1 and 2) limited the amount of general or noneconomic damages that could be awarded for personal injury or death in actions alleging medical malpractice. The limit was placed at five hundred thousand dollars and the bill included a sunset provision after ten years. The text was as follows:

> Section 1. In any action for damages for personal injury or death alleging medical malpractice against any physician, dentist, hospital, sanitorium, registered nurse or licensed practical nurse under the laws of this state, whether taken through the court system or by binding arbitration, the total general damages which may be awarded shall not exceed the sum of five hundred thousand dollars. No limitation is placed on the amount of special damages which may be awarded.
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> Section 2. This Act shall apply only to causes of action arising from injuries or death occurring between July 1, 1976 and June 30, 1986.

Two years later, in 1978, chiropractors were added to the statute with the passage of Senate Bill 240 (SL 1978, ch. 154). The amendment also provided a ten-year window for actions from July 1, 1978, to June 30, 1986.

The next amendment to the statute occurred in 1985 when the termination date on the limitation was repealed by House Bill 1164 (SL 1985, ch. 167). The text of the statute became as follows:

> 21-3-11. In any action for damages for personal injury or death alleging malpractice against any physician, chiropractor, dentist, hospital, sanitorium, registered nurse or licensed practical nurse under the laws of this state, whether taken through the court system or by binding arbitration, the total general damages which may be awarded may not exceed the sum of five hundred thousand dollars. There is no limitation on the amount of special damages which may be awarded. This section applies only to causes of action arising from injuries or death occurring after July 1, 1976. However, in the case of chiropractors, it applies only to the causes of action arising from injuries or death occurring after July 1, 1978.

The last changes to the statute were made in 1986. Senate Bill 282 (SL 1986, ch. 172) included a number of changes. It added "certified registered nurse anesthetist[s]" and "other practitioner[s] of the healing arts." The bill also deleted "sanitorium." The most significant change removed the distinction between general and special damages and placed the limit for any damages at one million dollars. Opponents of Senate Bill 282 argued that the bill was unconstitutional for the same reasons that were subsequently stated in the Knowles case. With the 1986 amendments, the text of SDCL 21-3-11 became the following:

> 21-3-11. In any action for damages for personal injury or death alleging malpractice against any physician, chiropractor, dentist, hospital, registered nurse, certified registered nurse anesthetist, licensed practical nurse or other practitioner of the healing arts under the laws of this state, whether taken through the

> court system or by binding arbitration, the total damages which may be awarded may not exceed the sum of one million dollars.

Recent Unsuccessful Attempts at Revising SDCL 21-3-11

Partially in response to concerns about the unconstitutionality of SDCL 21-3-11, bills addressing noneconomic damages was introduced in each of the last three legislative sessions. None of these bills, which would have limited noneconomic damages while not limiting economic damages, passed. In addition to adding a dental hygienist, dental assistant, physician's assistant, nurse practitioner, nurse midwife, and the corporate or limited liability company employing any practitioner, Senate Bill 129 of the 1994 Legislative Session would have limited noneconomic damages to two hundred fifty thousand dollars, regardless of the number of causes of action or theories of recovery asserted. The bill defined noneconomic damages as compensation for pain and suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary damages but not punitive or exemplary damages.

Senate Bill 100 of the 1995 Session would have added health care facilities licensed pursuant to chapter 34-12 and pharmacists to the list of those to whom this section applied. It also would have provided a limit for noneconomic damages of three hundred fifty thousand dollars, one hundred thousand more than the failed bill of the previous year, and removed any limit for economic damages. In addition, the bill sought to clarify the application of the limit on damages in medical malpractice actions to multiple claims and claimants and to corporations or limited liability companies employing the practitioner. The limit for noneconomic damages applied to each practitioner, health care facility, or employer found to be liable and was not to be enlarged regardless of the number of claimants, beneficiaries, causes of action, or theories of recovery involved in any action. A single limit applied to any practitioner and the corporate or limited liability company that employed the practitioner unless there was separate, actionable fault on the part of the corporate or limited liability company. The definition of noneconomic loss was expanded from the previous year's bill to also include loss of enjoyment of life.

The bill introduced in the 1996 Legislative Session, Senate Bill 114, did not seek to amend SDCL 21-3-11; instead, it sought to repeal that section and insert a new section in the same chapter which would limit noneconomic damages. The section stated:

> In any medical malpractice action or arbitration proceeding for personal injury or death, the amount of damages recoverable against any and all defendants by the injured claimant, or by any other claimant authorized by law to claim damages because of the claimant's injury, pursuant to any and all theories of recovery, may not exceed the sum of three hundred fifty thousand dollars for noneconomic loss. As used in this section, noneconomic loss means compensation for pain, suffering, loss of enjoyment of life, inconvenience, physical impairment, disfigurement, and other nonpecuniary damage, but it does not include punitive or exemplary damages.

Despite these legislative attempts, the 1986 version of SDCL 21-3-11 remained in force until the recent court decision.

Conclusion

The South Dakota Supreme Court applied the doctrine of separability and concluded that, since the 1986 amended version of SDCL 21-3-11 is wholly unconstitutional, the pre-amendment 1985 version remains in full force and effect. When legislation repeals or amends an existing statute and then is declared unconstitutional, the legislation is a nullity and does not effect the statute as it existed prior to the amendment or repeal. The statute as it existed prior to the 1986 amendment, and therefore the statute in full force and effect, is as follows:

> 21-3-11. In any action for damages for personal injury or death alleging malpractice against any physician, chiropractor, dentist, hospital, sanitorium, registered nurse or licensed practical nurse under the laws of this state, whether taken through the court system or by binding arbitration, the total general damages which may be awarded may not exceed the sum of five hundred thousand dollars. There is no limitation on the amount of special damages which may be awarded. This section applies only to causes of action arising from injuries or death occurring after July 1, 1976. However, in the case of chiropractors, it applies only to the causes of action arising from injuries or death occurring after July 1, 1978.

This decision does not preclude the Legislature from revisiting the issue. The Legislature has the constitutional authority to cap noneconomic damages and may cap economic damages if there is an identified problem and the solution bears a real and substantial relationship to the problem. The court warned that "[ ] given the importance of recovery of economic damages to compensate an injured party for past, present and future out-of-pocket expenses and losses, the justification for limiting economic damages will have to be a strong one."

This issue memorandum was written by Jacque Storm, Senior Legislative Attorney for the Legislative Research Council. It is designed to supply background information on the subject and is not a policy statement made by the Legislative Research Council.
