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A Case Study in Judicial Nullification: Medical Malpractice Reform in Illinois

Hans A. von Spakovsky

Abstract: *Judicial nullification of civil justice reform laws usurps the role of state legislatures and defies the will of the people as expressed through their elected representatives. The Illinois Supreme Court recently engaged in such nullification for the third time when it acted as a super legislature, overriding the elected legislature's judgment by throwing out a 2006 law limiting noneconomic damages in medical malpractice cases. These caps were passed after the state legislature determined that the outrageous medical malpractice situation in Illinois created a critical problem and required reform. They were intended to bring medical malpractice and health care costs under control, reducing the number of nonmeritorious malpractice actions and damage awards and encouraging physicians to provide services at free medical clinics and in areas lacking medical care. Other states such as Ohio have had similar problems with imperial state supreme courts failing to uphold the law. This illegitimate decision will damage the quality and availability of medical care in Illinois and cries out for more reform, both of medical damage rules and of Illinois' imperial judiciary.*

Talking Points

- Judicial nullification of civil justice reform legislation usurps the role of state legislatures and defies the will of the people as expressed through their elected representatives.
- A number of states have had problems with imperial state supreme courts failing to uphold the rule of law, acting as *de facto* super legislatures to override the judgment of their state legislatures.
- In February, the Illinois Supreme Court overrode the Illinois legislature for the third time when it threw out limits on noneconomic damages in medical malpractice cases, but this time for the most clearly wrong and indefensible of grounds.
- This act of judicial nullification by the Illinois Supreme Court will damage the quality and availability of medical care in Illinois to the detriment of the health and safety of the state's citizens.

This past February, for an unbelievable third time, activist judges on the Illinois Supreme Court usurped the role of the legislature and defied the will of the people by overturning reasonable and necessary limits on excessive damage awards in medical malpractice cases.[1] As a direct result of the court's unconstitutional abuse of power, doctors will likely continue to flee the Land of Lincoln, medical costs will continue to climb faster than in

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other states, and the delivery of charity care will be further endangered.

Judicial Nullification of Tort Reform

Jury nullification occurs when individual jurors ignore the facts and the evidence or disregard the law in reaching a verdict. As the Second Circuit Court of Appeals has held, federal courts have an obligation to discharge such jurors for cause because nullification is "a violation of a juror's oath to apply the law."[2]

Regrettably, when judges engage in similar nullification of state civil justice reform legislation, there is usually no higher court that can discharge them for cause—i.e., for violating their sworn duty to follow the law. When state supreme court judges hold state tort reform unconstitutional, they almost always purport to rely on a provision of their state constitution. Thus, there is no "easy" federal issue to appeal to the Supreme Court of the United States; only the voters can discharge elected state judges who try to make the law instead of interpreting it.

The Illinois Supreme Court's actions are, unfortunately, not an isolated incident: Judicial nullification by a state supreme court is becoming an all-too-common occurrence. For example, the Ohio Supreme Court repeatedly overturned the Ohio legislature's prerogative in defining the applicable laws and rules for medical malpractice and other tort claims. In *Morris v. Savoy* in 1991, the Ohio court first threw out a $200,000 cap on general medical malpractice damages not involving death as a "due process" violation.[3] Then the court successively threw out the legislature's changes in the collateral source rule, medical malpractice payouts, punitive damages, and noneconomic damages in a series of decisions in which the court acted as a *de facto* super legislature, overriding the elected legislature's judgment.[4]

It was not until 2007, when three of the justices who had engaged in such nullification were no longer on the court, that the Ohio Supreme Court finally upheld the Ohio legislature's newest reiteration of tort reform, which included limits on noneconomic and punitive damages and the admissibility of collateral-benefit evidence in tort actions.[5] The Ohio court both accepted that the evidence "sufficiently demonstrated the need to reform the civil litigation system in the state"[6] and affirmed "the General Assembly's efforts over the last several decades to enact meaningful tort reforms," thus placing Ohio "firmly with the growing number of states that have found such reforms to be constitutional."[7]

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Regrettably, state courts in several other states have engaged in similar judicial nullification of tort

1. Lebron v. Gottlieb Memorial Hospital, Doc. No. 105741 (Illinois Feb. 4, 2010). 2010 WL 375190.
2. U.S. v. Thomas, 116 F.3d 606, 614 (2d Cir. 1997).
3. 576 N.E.2d 765 (Ohio 1991).
4. *See* Sorrel v. Thevenir, 633 N.E.2d 504 (Ohio 1994); Galayda v. Lake Hosp. Sys., Inc., 644 N.E.2d 298 (Ohio 1994); Zoppo v. Homestead Ins. Co., 644 N.E.2d 397 (Ohio 1994); State *ex rel*. Ohio Academy of Trial Lawyers v. Sheward, 715 N.E.2d 1062 (Ohio 1999). For other cases and a discussion of this issue, see Victor E. Schwartz & Leah Lorber, *Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore the Right Balance*, 32 RUTGERS L.J. 907 (2001).
5. Arbino v. Johnson & Johnson, 880 N.E.2d 420 (Ohio 2007). Ohio elects its justices to six-year terms. Justice of the Supreme Court of Ohio, http://www.supremecourt.ohio.gov/SCO/justices/default.asp (last visited April 23, 2010). The justices who had engaged in judicial nullification before being replaced were Francis E. Sweeney, Andrew Douglas, and Alice Robie Resnick. The two Ohio justices in the dissent in *Arbino* who wanted to continue the court's prior judicial nullification of the legislature's tort reform legislation were Terrence O'Donnell and Paul E. Pfeifer. Unfortunately, O'Donnell has been on the court since 2003 and Pfeifer since 1992.
6. *Id.* at 442.
7. *Id.* at 444. For a list of the court decisions upholding such reforms, *see* footnote 8 at 444.

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reform, including New Hampshire, North and South Dakota, and Wisconsin.[8]

Nullification in Illinois

On February 4, 2010, the Illinois Supreme Court held that a 2006 law limiting noneconomic damages (such as excessive pain and suffering awards) to $500,000 for doctors and $1 million for hospitals was "unconstitutional" under the separation of powers provisions of the Illinois constitution.[9] The state law still permitted *unlimited* damage awards for actual medical costs and quantifiable damages such as lost wages, but the plaintiffs' bar is usually not content with such actual damages, no matter how large; after all, they obtain their most outrageous windfall contingency fees from emotionally based and impossible-to-quantify punitive damages and "pain and suffering" awards. Indeed, it is the mere *possibility* of these awards that extorts settlements even from defendants who have committed no wrong and bankrupt medical providers, causing medical malpractice rates to run in the tens (and hundreds) of thousands of dollars annually for some medical specialties.

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The statutory limitations on noneconomic damages had been enacted after the Illinois General Assembly determined that the medical malpractice situation in Illinois required reform. The caps were intended to:

> reduce the number of nonmeritorious healing art malpractice actions, [to] limit non-economic damages in healing art malpractice actions, [to] encourage physicians to provide voluntary services at free medical clinics, [to] encourage physicians and hospitals to continue providing health care services in Illinois, and [to] encourage physicians to practice in medical care shortage areas.[10]

These caps were based on the following findings by the legislature:

- That limiting noneconomic damages would improve rural healthcare;
- That the cost of healthcare had decreased in states that had imposed such limits;
- That there are no objective criteria for assessing or reviewing noneconomic damage awards;
- That such awards are highly erratic and dependent on subjective preferences;
- That the erratic nature of such damages subvert[s] their credibility and undercut[s] their deterrent function;
- That damages must be limited to provide consistency and stability for all parties and society; and
- That such limits are the most effective step in reducing litigation costs and expediting settlement.[11]

Apparently, however, the Illinois Supreme Court did not like the legislature's policy choices. In a poorly reasoned and nonsensical decision, the chief justice and three other justices essentially made up a "legal" doctrine that takes away the authority of the Illinois legislature to define the nature of damages available for medical malpractice (a traditional authority unquestioned anywhere else in Anglo–American jurisdictions). The justices claimed that the law limiting damages violated the "separation of power" between the judicial and legislative branches by interfering with the judiciary's right of "remittitur," which is the ability of judges to disregard or reduce the amount of a jury verdict.

The separation of powers analysis is completely flawed because it fails to acknowledge the legisla-

8. *See* Brannigan v. Usitalo, 587 A.2d 1232 (N.H. 1991); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978); Knowles v. United States, 544 N.W.2d 183 (S.D. 1996); and Ferdon v. Wisconsin Patients Comp. Fund, 701 N.W.2d 440 (Wisc. 2005).
9. *Lebron, slip op*. at 6, 15–16.
10. *Id.* at 7 (citing Pub. Act 94-677, § 101(5), eff. August 25, 2005).
11. *Id.* at 8–9 (citations omitted).

ture's constitutional power to make, amend, alter, or abolish the tort laws of the state—including both the procedural and substantive law applying to malpractice claims against medical providers. This authority includes the power not only to change prior laws enacted by the legislature, but also to change judge-made law itself.

Any first-year law student knows that the legislature always retains the prerogative to decide what remedies will be available in the state courts for each specific type of tort, including medical malpractice claims. In fact, the majority in *Lebron* acknowledged that the legislature has the authority to alter the common law and change or limit available remedies.[12] Yet the court then proceeded to disregard that right by holding that altering the common law and limiting the remedies available in malpractice claims "violates" the separation of powers doctrine by invading the judiciary's sphere of authority. As the dissent points out, the majority is actually the one violating the separation of powers doctrine through its "improper incursion into the power of another branch of government."[13]

As one of the dissenting justices wrote, the majority's view is "unsupported" by the origins and history of judicial remittitur, which is a judicially created remedy for unreasonably *high* damages. The notion that statutory caps are the equivalent of a remittitur, which courts alone have the authority to grant, "is untenable."[14] The reduction of an award according to statute is "a determination that a higher award is not permitted as a matter of law, it is not a remittitur at all."[15] Thus, when a court reduces a jury award according to a statutory limit, it is simply implementing a legislative policy decision to reduce the amount recoverable to that which the legislature deems reasonable; the court is not re-examining the jury's verdict or imposing its own factual determinations.

The outrageous nature of the court's ruling is best demonstrated by its effect on the workers compensation system. Most states require employees injured on the job to bring their claims through an administrative workers compensation system that is set up by statute to define what remedies are available to the injured worker. Under the court's reasoning, such a statute would violate separation of powers and interfere with the judiciary's prerogatives since it does not allow a judge to determine—without any restrictions—what remedy is appropriate for an injured worker.

Those familiar with the Illinois Supreme Court will not be surprised by its failure to uphold the law, let alone its assumption of the role of a super legislature, vetoing the work of the actual state legislature. The plaintiffs' trial bar seems to have an iron grip on the courts in Illinois, with Cook County being rated as the third worst judicial hellhole in the country by the American Tort Reform Association (ATRA) because of the abundance of frivolous and abusive lawsuits there.[16] That includes ludicrous lawsuits on behalf of spectators at the zoo who were splashed by dolphins or a $425,000 judgment against siren makers in favor of firefighters who claimed that fire engine sirens were "too loud."[17]

The Illinois legislature has tried three different times to rein in out-of-control medical malpractice awards. The *Lebron* decision was only the latest case of judicial nullification by the Illinois Supreme Court, which had overturned similar limits in 1976 and 1997.[18] Unfortunately, similar to Ohio, the state legislature will probably have no real opportunity to implement medical malpractice reform in

12. *Id.* at 20.
13. *Id.* at 33.
14. *Id.* at 43.
15. *Id.* at 44.
16. AMERICAN TORT REFORM ASSOCIATION, JUDICIAL HELLHOLES 2009–2010, 9.
17. *Id.* at 9–10.
18. Best v. Taylor Machine Works, 689 N.E.2d 1057 (Ill. 1997); Wright v. Central Du Page Hospital Association, 347 N.E.2d 736 (Ill. 1976).

Illinois unless and until the four justices who voted in the majority in the *Lebron* case either retire or are defeated in their retention elections.[19]

The Actions of an Imperial Court

Medical malpractice caps on noneconomic damages are one of the most effective means of curtailing the rise in health care costs—increases that are in part the direct result of abusive claims and skyrocketing malpractice premiums. States like Mississippi and Texas[20] that have recently imposed such limits have seen huge drops in premiums, frivolous claims, and the flight of doctors from those states. California has had a cap on punitive damages in place for over 30 years that has kept medical malpractice premiums much more stable than in other states. Illinois has been experiencing these same problems for years, and the law struck down in *Lebron* was the legislature's proven solution to many of those problems.

The* Lebron *decision will once again cause medical providers to flee Illinois and medical malpractice premiums to rise.

Whatever personal injury lawyers gain from this ruling will come at the expense of Illinois citizens who, as the head of ATRA correctly notes, are in need of "critical health care services, particularly in underserved rural communities."[21] The *Lebron* decision will once again cause medical providers to flee Illinois and medical malpractice premiums to rise. It is a disservice to the citizens of the state, one that is directly attributable to an imperial court's disrespect for basic separation of powers principles.

*—**Hans A. von Spakovsky** is a Senior Legal Fellow and Manager of the Civil Justice Reform Initiative in the Center for Legal & Judicial Studies at the Heritage Foundation.*

19. Justices in Illinois are elected for 10-year terms. See IllinoisJudges.net, Supreme/Appellate District Map, http://www.illinoisjudges.net/subhead_maps.htm (last visited April 23, 2010). The four justices in the majority who overruled the legislature were Thomas R. Fitzgerald, Charles E. Freeman, Thomas L. Kilbride, and Anne M. Burke. Fitzgerald, Freeman, and Kilbride have retention elections in 2010.
20. The Texas Supreme Court also recently upheld a 10-year statute of repose applicable to medical malpractice claims as "a reasonable exercise of the Legislature's police power" that was intended to make medical and health care more affordable, accessible, and available in Texas. Methodist Healthcare System v. Rankin, 2010 WL 852160 (Tex. 2010).
21. Heartland Institute Experts Respond to Illinois Medical Malpractice Ruling, http://fromtheheartland.org/?p=1717 (Feb. 4, 2010).