I suggest the following simple ten ways to avoid malpractice in litigation:

Lebron v. Gottlieb Memorial Hospital: The Land of Lincoln Reopens the Medical Malpractice Reform Debate

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The battle was long and intense and expensive. But when it was over, hospitals, doctors, and other medical providers in Illinois finally thought they had won much needed reforms and had gotten some protections from runaway verdicts that they felt were chasing health care providers out of the state of Illinois and crippling the health care system. With the passage of The Medical Malpractice Reform Act of 2005, the Illinois Legislature seemingly put in place comprehensive medical malpractice reform that, among other things, (1) capped jury awards for non-economic damages at $500,000.00 against physicians and $1,000,000.00 against hospitals; (2) changed the certificate of merit requirements for medical malpractice actions; (3) enacted a patient’s right to know law; (4) changed the standards for participation of expert witnesses; (5) enacted the “sorry works” pilot program that encouraged expressions of grief or sorrow by health care providers; and (6) imposed a number of regulatory requirements on medical malpractice insurers in the state of Illinois. But it was the caps on non-economic damages for which the doctors and hospitals fought hardest and medical providers in Illinois breathed a sigh of relief when they became effective on August 25, 2005. However, no one is relieved now. On February 4, 2010, in the case of Lebron v. Gottlieb Memorial Hospital, the Illinois Supreme Court found that the Medical Malpractice Reform Act’s limitation on non-economic damages was unconstitutional and, because of a non-severability clause, struck down not only the damages caps but the rest of the reform provisions as well.¹

Throughout her pregnancy, Frances Lebron was under the care of Dr. Roberto Levi-D’Ancona, an obstetrician employed by Gottlieb Memorial Hospital. On October 31, 2005, Ms. Lebron gave birth to a daughter, Abigaile, by Caesarian section. In a subsequently filed lawsuit, Ms. Lebron alleged that Abigaile suffered severe brain injury, cerebral palsy, cognitive mental impairment, and other severe and permanent neurologic injuries as a result of the negligent acts and omissions of Dr. D’Ancona and the hospital nursing staff. In Count V of her complaint, Ms. Lebron sought a declaration that the caps on non-economic damages contained in the Medical Malpractice Reform Act of 2005 violated the Illinois Constitution. The Circuit Court, relying on Best v. Taylor Machine Works,² which struck down the legislature’s 1995 tort reform effort, granted Ms. Lebron’s motion and found that section 2-1706.5 of the Act amounted to a legislative remittitur in violation of the separation of powers doctrine. Dr. D’Ancona and the hospital appealed directly to the Illinois Supreme Court. The Defendants argued that the cap on non-economic damages constituted a valid exercise of the General Assembly’s police power in response to a public threat, as that threat was reflected in the Legislative findings in support of the Act, and that the Act did not violate separation of powers principles.

In Best, the Plaintiffs argued that a $500,000 non-economic damage cap contained in the Tort Reform Act of 1995 amounted to impermissible special legislation because it arbitrarily penalized those injured most severely by capping their damage awards without considering the particular facts and circumstances of the case and at the same time it arbitrarily benefited certain tortfeasors by releasing them of responsibility of fully compensating injured plaintiffs. The Best Court agreed with Plaintiffs that the non-

¹ Lebron v. Gottlieb Memorial Hospital, 2010 WL 375190 (Ill. Feb. 4, 2010).

economic damages cap was arbitrary and amounted to special legislation insofar as it unfairly imposed the burden of cost savings desired by the Legislature on only one class of injured plaintiffs. The Court also found that the cap violated the separation of powers doctrine because it operated as a “one size fits all” legislative remittitur, encroaching on the judicial prerogative of determining whether a jury’s assessment of damages is excessive.\(^3\)

The Court struck down the Act in its entirety.

In *Lebron*, the Defendants first argued that because the Court in *Best* determined that the non-economic damages provisions of the Act violated the special legislation clause, the separation of powers analysis was merely dicta and not controlling in *Lebron*. The Court agreed that the separation of powers analysis in *Best* was not necessary to its decision in that case, however, because the separation of powers issue was “deliberately passed on” by the Court, it was entitled too much weight and should therefore be followed unless erroneous.\(^4\)

Defendants next argued that section 2-1706.5, the provision at issue in *Lebron*, was distinguishable from section 21115.1, the provision invalidated in *Best* because the *Best* statute was part of a broad based effort to reduce system wide litigation costs whereas section 2-1706.5 at issue in *Lebron* was narrowly tailored to address only the rising costs of health care. The Court agreed that the section at issue in *Best* was much broader than the section at issue in *Lebron*, however, the Court noted that both statutes suffered the same constitutional infirmity: they invaded the province of the judiciary to assess on a case by case basis whether a jury’s award is excessive and instead imposed a “one size fits all” legislative remittitur.\(^5\) Therefore, even if the damages cap was narrowly tailored to address a legitimate government interest, the legislature’s exercise of powers properly belonging to the judiciary rendered the act void as an impermissible violation of the separation of powers provisions of the state constitution.

The *Lebron* Court also addressed the argument posited by the State Attorney General in an *amicus curiae* brief that the legislation amounted to a proper exercise of the state’s police power because it appropriately balanced the benefits and burdens of resolving the health care crisis among multiple stakeholders, including insurers, health care providers and patients. The Court was not persuaded. Instead, the Court noted that because it was not resting its decision on the special legislation analysis of *Best*, the fact that the act may have served to address a legitimate legislative goal or may have addressed that goal in a balanced and equitable manner would not cure the statute of the constitutional infirmity. The Court also noted that while the legislature is permitted to alter the common law and change or limit available remedies, that power is not absolute and must be exercised within constitutional bounds. Finding that the legislature’s attempt in this case ran afoul of the separation of powers doctrine and also that the act contained a non severability provision, the Court struck down the entirety of the Illinois Medical Malpractice Act of 2005. The Court’s decision leaves health care providers in Illinois searching for answers and leaves many of the rest of us concerned that similarly drafted damages caps in our states might suffer the same fate.

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3 Id. at 179 Ill. 2d 413-14.
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