

**STATE OF LOUISIANA**  
**COURT OF APPEAL, THIRD CIRCUIT**

**04-1235**

**SUSAN ARRINGTON, ET AL**

**VERSUS**

**GALEN-MED, INC. d/b/a LAKE AREA MEDICAL CENTER and  
HEALTH CARE INDEMNITY, INC.**

**COOKS, J., dissents.**

I respectfully dissent from the majority opinion for several reasons. The majority, apparently searching for a legal basis on which to rest its decision, recites language in a law review article written by the late Louisiana Second Circuit Judge C.A. Marvin quoting the late Louisiana Supreme Court Justice Albert Tate. Judge Marvin's article is befittingly entitled: *Dissents in Louisiana: Civility Among Civilians?* The article discusses the thoughts of legal scholars on the value of dissenting opinions, the importance of judicial civility, and provides very entertaining examples of dissents authored by Louisiana jurists. I wondered for a time just how the majority happened upon the article in researching the issues in this case. At last, near the end of the article, Judge Marvin, as an examples of a "highly critical dissent" referenced Louisiana Supreme Court Justice Dennis' dissent in *Butler v. Flint Goodrich Hosp. of Dillard Univ.*, 607 So. 2d 517 (La. 1992), *cert. denied*, 508 U.S. 909, 113 S. Ct. 2338 (1993), and noted the following use of maritime metaphors by the Justice to characterize the majority's analysis upholding the constitutionality of the MMA's \$500,000 cap:

Like a ship in the night, with only a look and a nod in passing, the majority barely acknowledges Article I, Section 3 of our state constitution and this court's [prior] interpretations. . . while pursuing a hitherto uncharted course. Indeed, if my colleagues meant to follow our previous interpretation of state constitutional law, as their citations indicate, they certainly fouled up their navigation. . . My colleagues. . . may have acted irresolutely because of a lack of full understanding of

the significant differences between various equal protection [levels]...of scrutiny. . . [A] majority of this court has been blinded by a dazzling array of legal talent assembled by special interest groups opposing the single catastrophically injured and disabled tort victim...[T]he interest group may have caused the court to do far-reaching harm to our state constitutional law as well as to many areas of our tort law in addition to medical malpractice.

*Id.* at 525-526, 528.

It appears the majority in this case may well have, with the same look and nod in passing, “fouled up their navigation” by failing to mention Art. I, § 3, and totally avoiding any discussion of the level of scrutiny applicable in determining the constitutionality of a legislative enactment. Reliance on Justice Tate’s views, that judge’s in Louisiana are freer to use creative analogies in interpreting anew legislative concepts, and are “less bound by precedent when deciding an issue of constitutional . . . law,” does not save the majority’s analysis from being hopelessly lost at sea. 58 La.L.Rev. 975, 977 (1998).

The fact is judges are not free to devise new rules of interpretation to avoid *existing* legislation and judicial precedent upholding the validity of statutes. In the area of constitutional law, the Louisiana Supreme Court has stated “[l]egislative enactments are clothed with the presumption of constitutionality and regularity . . . [and] [t]his presumption continues until the party challenging the act’s constitutionality establishes that it contravenes some provision of the state or federal constitution.” *Everett v. Goldman*, 359 So.2d 1256, 1270 (La.1978); *Johnson v. Welsh*, 334 So.2d 395 (La.1976); *Everhardt v. City of New Orleans*, 253 La. 285, 217 So.2d 400 (1968). In the interest of “doing the right thing,” we simply *cannot* abandon the analytical method of review followed by our Supreme Court in *Sibley v. Board of Supr’s of Louisiana*, 477 So. 2d 1094 (La.1985) (on rehearing), and later in *Butler v. Flint Goodrich Hosp.*, 607 So.2d 517 (La.1992), to achieve a more desirable

remedy for an admittedly disadvantaged class of injured victims.

In this case, the Plaintiffs challenged the constitutionality of the Medical Malpractice Act's \$500,000 cap found in La.R.S. 40:1299.42 (B)(1) alleging, as the majority opinion correct states, that the cap "violates a number of provisions of the Louisiana Constitution of 1974: (1) the 'due process' and 'adequate remedy' provisions of the La. Const. Art. 1, § 22; (2) the 'separation of powers' provisions of La. Const. art 2, §2; (3) the provision of La. Const. Art. 3, §§ 2 and 12, in that it is a 'special law' granting privileges and immunities and changes the method of collecting debts and enforcing judgment; and (4) the provisions of La. Const. Art 5, §16, in that no amendment to the constitution was ever adopted changing the original jurisdiction of the district courts." Plaintiffs also alleged in their Fifth Amending and Supplemental Petition, under the Louisiana Constitution of 1974, the MMA's cap violates the "right to equal protection, and other rights therein guaranteed."<sup>1</sup>

Plaintiffs are not the first to tread these waters. Other litigants have attacked the

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<sup>1</sup> In a Motion for Summary Judgment filed by Plaintiffs on June 19, 2003, they specifically stated "separation of powers and federal and state substantive due process grounds and prohibited special law grounds prohibit the 1975 legislature from directing the result of judicial decisions in this case." They also "reserve[d] other grounds of challenge for further development of evidence." In answer to Plaintiffs' Fifth Supplemental Petition and in a "Second Motion for Summary Judgment On Behalf of the State," the State urged that the district court was bound by the opinion of the Supreme Court of Louisiana in *Butler v. Flint Goodrich Hospital*, 607 So.2d 521, and specifically stated in paragraph 7 that "*La. R.S. 40:1299.42 (B)(1) and (2) does not violate state constitutional guarantees of equal protection.*" In ruling on the motions for summary judgment filed by both parties, the trial judge stated "[E]ven though there is no adequate remedy, *equal protection*, or separation of powers, in view of the erosion of 'the dollar', this court must **deny** the Motion for Summary Judgment of the Plaintiff and grant the Motion for Summary Judgment of defendants, GALEN-MED., INC. and THE STATE OF LOUISIANA on the constitutionality claim." The State argued during oral argument and in brief that Plaintiffs did not specifically include the equal protection ground in their motion for summary judgment and therefore consideration of the merits of their motion by us should be limited to the other grounds more particularly identified in the motion. I am satisfied that the equal protection issue grounded on Art. I, § 3 was before the court and considered by it in rendering a ruling in this case. The summary judgment pleadings filed by Plaintiffs was clearly enlarged by the evidence presented at the hearing and the State's own summary judgment motion placed the equal protection issue before the court. I also am unmoved by the State's argument at trial that it is somehow unfair for this court to consider Art. I, § 3 because it did not have opportunity to address the equal protection issue below. The pleadings filed by the State in response to Plaintiffs' pleadings and its motion for summary judgment clearly show the contrary is true. The State was fully apprised of the issue and sought to advance it in the pleadings and at the hearing on the motions for summary judgment.

constitutionality of the MMA's cap, and other provisions of the Act, as offending the exact constitutional provisions they direct us to reconsider in this case.

The majority does not support its decision on any of the constitutional provisions relied upon by Plaintiffs except one— Art. I, § 22's "adequate remedy" limitation. Generally, an adequate tort remedy in Louisiana includes an award not only for the medical expenses arising from the injury, but also a reasonable dollar amount for the injury itself, including any injury to the victim's non-pecuniary interests. The majority apparently concludes that Art. I, § 22's specific guarantee of "an adequate remedy" prevents a court from validating as constitutional any legislation which provides less than an adequate remedy for tort injuries. I agree with the majority that Art. I, § 22 specifically limits the legislature's power to enact laws which infringe on "every person[']s" right to "have an adequate remedy . . . for injury to him in his person . . . ." I also agree with the majority's conclusion that Plaintiffs presented sufficient expert evidence in this case to prove that the devaluation of the dollar over the passage of time coupled with other economic factors make the current MMA's \$500,000 cap, exclusive of medical expenses, in today's market wantonly inadequate as a remedy for all damages sustained by catastrophically or severely injured medical malpractice victims, which damages include loss of wages and diminished earning capacity. But this finding alone by the majority, without any further analysis, does not support its sweeping conclusion that the MMA's cap on medical malpractice damages is *per se* unconstitutional because it fails to provide an adequate remedy to Plaintiffs. The Louisiana legislature has acted in other areas of the law to limit recovery of damages to all victims within a class, such as workers' compensation, and in some cases, to provide the State's tort liability shall not exceed \$500,000. Further, in some instances a Plaintiff's right to recover damages *at all* is

barred by legislative grants of immunity from suit. *See* La.R.S. 9:2795. Employing a pure “adequacy” test, *stripped of any consideration as to whether such legislation serves a legitimate public interest*, seriously threatens the legislature’s sometimes competing but equally protected power to enact laws in furtherance of the *common good* vested in it by the same Louisiana Constitution that protects Plaintiffs’ right to an adequate remedy.

This also is not the first time that the courts of this state have considered the limitations found in Art. I, § 22 in determining the merits of an attack on the constitutionality of the MMA’s cap. Art. I, § 22 provides:

All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights.

In *Everett*, 359 So.2d 1256, Justice Calogero, writing for the supreme court’s majority, recognized that Art. I, § 22 “like the fourteenth amendment to the United States Constitution, protects fundamental interest to a greater extent than interests that are not considered of fundamental constitutional importance.” According to the *Everett* majority “[f]undamental rights include such rights as free speech, voting, interstate travel and other fundamental liberties.” *Id.* at 1266. When a fundamental right is affected traditional constitutional analysis requires the court to find such legislation invalid unless a “*compelling governmental interest*” exists for its enactment. The State’s power also is severely limited when it seeks to create *separate or suspect* classifications such as those “involving . . . unalterable traits as race, alienage . . . religion,” birth, age, sex, culture, *physical condition*, and political ideas or affiliations. *Id.* at 1266; *Sibley v. Board of Supr’s of Louisiana*, 477 So. 2d 1094, 1107 (La.1985) (on rehearing). When a fundamental right or suspect classification *is not* involved, the Louisiana Supreme Court has held “the issue . . . is

whether the discriminatory treatment is supported by any *rational basis* reasonably related to the governmental interest sought to be advanced by it.” *Everett*, at 1266. (Emphasis added). The *Everett* court declared “[t]he right of malpractice claimants to sue for damages caused them by medical professionals does not involve a fundamental constitutional right. Thus, it is to be tested by the lesser standard of rational basis.” *Id.* at 1268-1269. If a medical malpractice victim’s right to sue for damages is not a fundamental right, by implication and analogy, the *Everett* decision requires a finding that the victim’s right to sue for “adequate” damages is not a fundamental one as well and the same rational basis test applies in judging the constitutionality of a statute affecting it *unless it creates a separate or suspect classification*. One of the stated purposes for the enactment of the MMA’s provisions, especially the \$500,000 limitation on the liability found in La.R.S. 40:1299.42(B)(1), is that it assures the availability of affordable malpractice insurance for healthcare providers and lowers the costs of healthcare generally for the citizens of this state. It is hardly disputable that the amount a healthcare provider is required to pay a malpractice victim affects the cost of malpractice insurance and ultimately may affect the availability and quality of healthcare in this State. Thus, the enactment of a provision limiting a healthcare provider’s exposure for damages associated with his negligence in providing healthcare to patients *rationally relates* to and assures continued healthcare services for citizens of this State at a reasonable cost. As noted by Justice Dennis in *Butler*, the “rational relationship” test is similar to the federal “minimal scrutiny” test and as he astutely observed:

Under the federal test, statutory classifications will not be declared invalid ‘if any state of facts reasonably may be conceived to justify [them]’. *McGowan v. Maryland*, 366 U.S. 420, 426, 81 S. Ct. 1101, 1105, 6 L. Ed. 393 (1961). Also, the court using minimum scrutiny is to give the greatest amount of deference to the legislature, as the constitutionality of the provision is presumed. The burden of proof rests

on the individual to show that no rational basis exists. Note, *Equal Protection and Medical Malpractice Damage Caps*, 28 Idaho L. Rev. 396, 404 (1991). To some scholars, this analysis is really a predetermined ruling and ‘minimal’ is really no scrutiny at all:

“For example, it would be ‘rational’ in this sense to burn down a barn to kill a rat. Further, courts will not allow an empirically based challenged to undo a legislative classification. Even if dubious on empirical grounds, the legislation will be sustained if the legislative judgment was logically plausible. It is therefore unsurprising that nearly all legislative classifications have been sustained when courts apply this standard. Bovbjerg, Sloan and Blumstein, *Valuing Life and Limb in Tort: Scheduling ‘Pain and Suffering.’* 83 N.W. L. Rev. 908, 970 (1989) (footnotes omitted).”

*Id.* at 526.

The State is allowed to discriminate against individuals by denying them an “adequate remedy” or any remedy for that matter under certain circumstances. Thus, the courts have said the State need only articulate a *rational basis* for limiting the damages recoverable by *all* medical malpractice victims. Perhaps this explains why the courts of this State heretofore have not been willing to strike down the MMA’s and the MLSSA’s \$500,000 statutory cap based on Art 1, § 22’s access to the court, due process, and adequate remedy guarantees. *Sibley I, Sibley v. Board of Sup’rs of Louisiana*, 462 So.2d 149 (La. 1985); *Everett*, 359 So.2d 1256; *Armand v. State*, 00-1457 (La.App. 1 Cir. 6/21/02), 822 So.2d 671, *writ denied*, 02-2036 (La. 11/1/02), 828 So.2d 583; *Ruiz v. Oniate*, 00-2105 (La.App. 4 Cir. 12/27/01), 806 So.2d 81; *LaMark v. NME Hospitals, Inc.* 542 So.2d 753 (La. App. 4 Cir. 1989), *writ denied*, 551 So.2d 1334 (La.1989).

Therefore, I believe the most serious challenge to the constitutionality of the Act’s monetary limitation is based on the equal protection right guaranteed under Art. I, § 3, as applied to catastrophically or severely injured victims of medical malpractice. Art. I, § 3 declares:

No person shall be denied the equal protection of the law. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime.

When the State provides an “adequate remedy” to some members of a class of victims but denies an “adequate remedy” to other members of the same class *because of their physical condition*, attributes, political ideas or affiliation, the State’s burden to show justification for such discrimination is heightened. Legislation that allows some medical malpractice victims to receive full recovery for the injuries they sustained; but limits the recovery of other malpractice victims whose injuries exceed \$500,000 clearly denies the latter group equal protection of the law. The Louisiana Supreme Court made clear in *Sibley*, 477 So.2d 1094 (on rehearing), as it attempted to do earlier in *Everett*,<sup>2</sup> that the rational basis test, which had been generally applied in reviewing governmental infringement of constitutionally protected rights that are not fundamental, is not the appropriate test when reviewing the right to equal protection guaranteed by Art. I, § 3 of the Louisiana Constitution. The equal protection provision limits the State’s legislative power to create *separate or suspect classifications* in enacting laws. The *Sibley II* majority specifically rejected the federal multi-level scrutiny system – rational, intermediate, and strict – as “an appropriate model for interpreting and applying the protection of equal laws pledged by our state constitution.” *Sibley*, 477 So.2d 1104. The supreme court held “when a law classifying individuals on the basis of *physical condition* is attacked, the

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<sup>2</sup> In *Everett*, Justice Calogero as the author of the opinion stated: “But in all cases where separate classifications are at issue, ‘the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment.’” *Everett* at 1266. The *Sibley II* majority, which Justice Calogero joined, expands the questions which must be asked when separate classifications are created and identifies the burden which must be carried by the parties when an attack on the constitutionality of a particular statute is asserted based on Art. 1, §3, equal protection guarantee.

proponent of the legislation must show that the law does not arbitrarily, capriciously, or unreasonably discriminate against the disadvantaged class by demonstrating that *the legislative classification substantially furthers a legitimate state objective.*” *Id.* at 1104. (Emphasis added.)

In reviewing the discussions of the Declaration of Rights committee of the 1973 Constitutional Convention, Judge Dennis writing for the *Sibley II* majority found the committee proposed adoption of “an article raising the threshold of equal protection by prohibiting discrimination because of ‘birth, race, age, sex, social origin, physical condition, or political or religious ideas.’” *Id.* at 1108. Thus, the *Sibley II* majority held “Article I, Section 3 commands the court to decline enforcement of a legislative classification of individuals in three different situations: (1) When the law classifies individuals by race or religious belief, *it shall be repudiated completely*; (2) When the statute classifies persons on the basis of birth, age, sex, culture, physical condition, or political ideas or affiliations, *its enforcement shall be refused unless the state or other advocates of the classification shows that the classification has a reasonable basis*; (3) When the law classifies individuals on any other basis, it shall be rejected whenever the member of a disadvantaged class shows that it does not suitably further any appropriate state interest.” *Id.* at 1103. (Emphasis added.)

In *Sibley II*, the Louisiana Supreme Court held that the Act’s limitation in operation “classifies individuals because of their physical condition.” The court further explained:

The law on its face is designed to impose different burdens on different classes of persons according to the magnitude of damage to their physical condition. The statute creates two classes: one, a group of malpractice victims each of whom have suffered damage that would oblige a defendant under our basic law to repair it by paying in excess of 500,000 dollars; another, a class consisting of victims whose damage

would not require an award over this amount to make individual reparation. Victims in the former class are prevented from recovering for all their damage, while those in the latter class are allowed full recovery. Damage to the physical condition of each malpractice victim is the primary element of his being assigned to one of the two classes. Thus, the statutory classification disadvantages or discriminates against one class of individuals by reason of or because of their physical condition.

*Id.* at 1108-1109.<sup>3</sup>

Moreover, not only does the MMA's cap discriminate between victims in the same class, it also creates subclasses of catastrophically or severely injured victims of malpractice by limiting recovery to *one* award of \$500,000. The subclasses are created depending on whether the catastrophically or severely injured patient has a spouse, minor children or parent. For example, as recognized in *Ferdon v. Wisconsin Patients Compensation Fund*, 2005 WI 125 (WI. 7/14/ 05), 701 N.W.2d 440, 446 (WI. 2005), a single patient may recover in Louisiana the entire \$500,000 while a married catastrophically injured victim must share the cap with his or her spouse and children.

The State offered no evidence in this case, as in the cases prior, to refute that the Act's limitation of recovery discriminates against catastrophically or severely injured medical malpractice victims because of their physical condition. The State simply argues in 1992 it met the constitutional burden Art. I, § 3 placed upon it in the *Butler* case by showing that this discrimination was not arbitrary, capricious and unreasonable and furthers an appropriate State purpose. The State insists that the holding in *Butler* controls our disposition of the equal protection issue raised in this case and we are obliged to follow it without further inquiry. I do not share the State's

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<sup>3</sup> The supreme court did not reach the merits of the *Sibley* constitutionality claim because it remanded the case to the district court to allow the state an opportunity to introduce evidence "to show that there is good reason for the statutory classification, that is, that the legislative classification substantially furthers a legitimate state purpose." The case, however, was settled by the parties on remand.

confidence that the supreme court holding *nearly thirteen years ago* in *Butler*, based on the facts existing at that time, forever precludes us from revisiting the constitutional issue in this case based on the present facts. As the Wisconsin Supreme Court in *Ferdon*, 701 N.W. 2d 440, 448, recognized:

[A] statute may be constitutionally valid when enacted but may become constitutionally invalid because of changes in the conditions to which the statute applies. *A past crises does not forever render a law valid.* Over a period of time social, political and economic changes may render a statute obsolete . . . . Where changed conditions have rendered a statute unconstitutional, the basis for its abrogation by court action is clear. *It is well settle that the continued existence of facts upon which the constitutionality of legislation depends remains at all times open to judicial inquiry.*

(Emphasis added.)

Plaintiffs in this case contend the continued application of the Act's cap, which undeniably discriminates against *catastrophically* and *severely* injured victims of medical malpractice, is unconstitutional because the evidence overwhelmingly shows *today* that the legislative purpose for the discrimination is no longer being furthered and the State has failed to show that the original purpose for the Act's adoption will be undermined by affording a more equitable remedy to these victims. They also contend the benefits analysis employed by the court in *Butler* is flawed.

The *Butler* court concluded the Act's \$500,000 limitation provided three benefits to the severely injured medical malpractice victim which serves as a *quid pro quo*: a reasonable alternative remedy to offset the Act's discriminatory classification which prevents this group from receiving full recovery. Justice Watson, writing for the majority, held:

As an offset to the Act's \$500,000 limitation, Louisiana now offers those most severely injured by medical malpractice three benefits: (1) greater likelihood that the offending physician or other health care provider has malpractice insurance; (2) greater assurance of collection from a solvent fund; and (3) payment of all medical care and related benefits. Compensation and full medical care for those grossly injured by medical malpractice are legitimate social interests, which are furthered

by the malpractice legislation. The discrimination in the Act against those with excessive injuries is accompanied by a quid pro quo: A reasonable alternative remedy has been provided. See *Bazley*. Since the legislature's statutory solution to the medical malpractice problem furthers the state purpose of compensating victims, it is not constitutionally infirm.

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

Plaintiffs have presented empirical evidence, *which has not been refuted by the State*, to attack the "reasonable alternative remedy" analysis relied upon by the *Butler* court in finding the cap constitutional. In *Butler*, the first benefit the court recognized was that the MMA insures a greater likelihood that the offending physician or other healthcare provider has malpractice insurance. To counter this finding, Plaintiffs submitted an affidavit by Dr. Michael Kurth, an economic expert, who attested that: "There is no evidence that the caps on medical malpractice lawsuits translate into lower malpractice insurance premiums." The expert further stated that "[m]alpractice rates are more affected by the number of malpractice claims per physician in a state and the median payment on those claims, than by a few large awards." Plaintiffs also cite excerpts from the report of the *Congressional Budget Office, Government Accounting Office*, released October 1992, stating that malpractice liability reform would have little or no effect on health care costs because malpractice liability insurance premiums amount to less than one percent (1%) of total health care costs in the U.S. As recognized by the court in *Ferdon*, 701 N.W. 2d 440, 471 studies by the U.S. General Accounting Office also "have concluded that a number of factors go into whether medical malpractice premiums increase or decrease and that there is no definitive correlation between caps on noneconomic damages and lower medical malpractice premium rates." "Indeed, according to a General Accounting Office report, differences in both premiums and claims payments are affected by multiple factors in addition to damage caps, including state premium rate regulation, level of

competition among insurers, and interest rates and income returns that affect insurers' returns. Thus, the General Accounting Office concluded it could not determine the extent to which differences among states in premium rates and claims payments were attributable to damage caps or to additional factors. For example, Minnesota which has no caps on damages, has relatively low growth in premium rates and claim payments." *Id.* at 472. The U.S. Department of Health and Human Services found most victims of malpractice do not file a claim. In fact, *only 1.53%* of those who are injured even file a claim. There is nothing in the record before us to suggest Louisiana victims of malpractice are more litigious than the national average.

Second, the *Butler* majority expressed that the cap provided greater assurance of collection from a solvent fund. The PCF argues allowing the Plaintiffs an award in excess of the \$500,000 limitation: (1) Would expose the healthcare provider to potentially unlimited financial liability, thereby fueling increased liability insurance costs, increased medical care costs, and a return to a medical care crisis sought to be avoided by the Act initially; (2) would erode the protection afforded health care providers by participation in the PCF, thereby encouraging providers to cease participation and ending the substantial benefits afforded by the Act – primarily, assurance of recovery against a solvent fund; and, (3) would encourage a system of recovery that, to its logical conclusion disfavors settlement with health care providers, because settlement forecloses potential full recovery – a position contrary to the public policy of this State that settlements are favored. Other than these foreboding and conclusionary statements, the PCF provided no evidence, expert or otherwise, to show that allowing a more equitable recovery by Louisiana victims of catastrophic injury in medical malpractice cases will compromise the solvency of the Fund or result in any

of the horrors articulated in its brief.<sup>4</sup>

Plaintiffs claim there are several ways to remedy the grave disparity in the treatment of severely injured victims that do not necessarily require abandonment of the cap on damages. They suggest devising a more equitable remedy for plaintiffs will not necessarily require an increase in the amount the Fund is currently obligated to pay nor will such relief threaten the solvency of the Fund. They point out that most health care providers in this State already pay premiums for \$1,000,000 coverage, and Galen-Med, the provider in this case, maintained a \$10,000,000 policy. They further contend simply excluding loss of wages (economic loss) from the cap's limitation and increasing the providers contribution for this *small* class of plaintiffs will substantially remedy the disparity in most cases with only a nominal, if any, increase in premiums.<sup>5</sup>

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<sup>4</sup>The PCF's argument might explain why the Fourth Circuit Court of Appeal in *LaMark v. NME Hospital, Inc.*, 542 So.2d 753 (La.App. 4 Cir. 1989), reiterated what it stated in *Williams v. Kushner*, 524 So.2d 191, 195 (La.App. 4 Cir. 1988), *writs granted*, 526 So.2d 785 (La.1988): "[W]ith a limitation of \$500,000 dollars on the total amount recoverable, the amount of the surcharge medical care providers pay to the Patient's Compensation Fund is calculated on a known risk, and the additional amount that would be required to cover limitless judgment is unnecessary. Because the cost of increased premiums could reasonably be expected to be passed on to patients, the legislature could have reasonably believe that stabilized . . . rates would retard increases in costs of medical care and would permit medical care provider to offer a full range of services without the threat of exorbitant costs of insurance coverage."

<sup>5</sup> The PCF Oversight Board is in a unique position to aid the court in performing its judicial responsibility to protect the constitutional rights of Louisiana citizens. The Board is charged with the duty of managing the Fund for the benefit of the victims of medical malpractice and the healthcare providers. As part of its responsibility, the Board is authorized to "[c]ollect, accumulate and maintain claims experience data from enrolled health care providers and insurance companies providing professional liability insurance coverage to health care providers in this state, in such form as may be necessary or appropriate to permit the fund to develop appropriate surcharge rates for the fund." La.R.S. 40:1299.44 (D)(2)(b)(iii). The Board has claims experience data and surcharges rates charged healthcare providers from 1975 to the present in Louisiana. The Board also is responsible for the management and administration of the Fund, including maintaining records of all monies paid out in judgment, settlement, or for future medical care to injured victims. Since all claims against qualified healthcare providers are filed or were forwarded to the PCF Oversight Board, this body should have a record of the number of claims filed for a significant period of time since enactment of the Act to the present, the estimated amount of the claims, and the disposition of the suits filed. Plaintiffs' expert testified that malpractice rates are affected by a number of factors other than claim experiences and amounts paid in a particular state. The Board is further authorized to "[e]mploy, or in accordance with the provisions of law applicable to contract for personal, professional or consulting services, retain the services of a qualified competent actuary to perform the annual actuarial study of the fund required by this Section and to advise the board on all aspects of the fund's administration, operation and defense which require application of the actuarial science." Again, the Board is in a special position to provide the court with more than arguments in brief in response to Plaintiffs' evidence which suggest that because the number of catastrophically or

It is worth noting that economic losses, unlike awards for pain and suffering, are definable and not subject to the jury's discretion. Insurers, and so too physicians, would still be protected from runaway jury verdicts by a limitation on non-economic damages. According to the affidavit submitted by Dr. Michael Kurth, Louisiana is only *one of six states* that extend the cap to include economic damages. In fact, the American Bar Association's Commission on Medical Professional Liability has recommended that no dollar limit be imposed on recovery of economic loss. While excluding economic damages is one way to equalize the treatment of malpractice victims as suggested by the Plaintiffs, it is by no means the only method.

The third benefit highlighted by the *Butler* majority was that the MMA guarantees payment of all medical care and related benefits. The Plaintiffs suggest allowing them to recover damages in parity with all other malpractice victims will not automatically impact or increase the PCF's statutory obligation to pay future medical and related expenses to malpractice victims. The PCF has paid the maximum amount it is required to pay to these Plaintiffs; and, they are not demanding more from it. Mr. Arrington died as a result of his injuries. Neither he nor any of his family members will receive any "medical or related benefits" from the PCF to offset the cap's \$500,000 limitation.<sup>6</sup> Thus, the most important "*quid pro quo*" benefit the *Butler* court articulated in validating the cap is missing in the case of victims who do not survive

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severely injured victim is small compared to the total number of malpractice victims, adjusting the cap to provide these victims recovery for their economic losses will not substantially affect the surcharge rate paid to the fund or premiums paid to insurers by healthcare providers.

<sup>6</sup> Because Mr. Arrington died there is no obligation for continuing medical benefits. Moreover, the courts have held the costs associated with burying the victim are included in the cap, thereby leaving this financial burden to the family. Galen-Med, whose liability was limited in advance of trial to \$10,000, refused to pay Mr. Arrington's embalming fee arguing this cost was not a "medical" expense recoverable over and above the statutory limit. *See Arrington v. E.R. Physicians Group APMC*, 2003-02 (La.App. 3 Cir. 5/21/03); 847 So.2d 236.

their injuries.<sup>7</sup>

Additionally, the Plaintiffs argue a catastrophically injured victim is severely disadvantaged, *even after judgment*, because the PCF Oversight Board requires these victims oftentimes, to continually re-litigate a claim for much needed future medical care. See *Maraist v. Alton Ochsner Medical Foundation*, 02-2677 (La.App. 1 Cir. 5/26/04), 879 So.2d 815; *Manning v. United Medical Corporation of New Orleans*, 04-0310 (La.App. 4 Cir. 3/2/05), 897 So.2d 867. Thus is a result, they contend, that was never intended by the statute. See *Bartee v. Children's Clinic of Southwest Louisiana, et al.*, 05-583 (La.App. 3 Cir. 8/17/05), 910 So.2d 470, *writ denied*, 05-2465 (La. 3/24/06), 925 So.2d 1230; *Kelty v. Brumfield*, 93-1142 (La. 2/25/94), 633 So.2d 1210.

Further, the Plaintiffs argue the PCF has assumed a status as a *de facto* party-litigant, which result was again never intended by the statute. *Graham v. Willis-Knighton Medical Center*, 97-0188 (La. 9/9/97), 699 So.2d 365; *Conner v. Stelly*, 02-0280 (La. 1/30/02), 807 So.2d 827.

As it stands today, the record does not contain any evidence tending to show that fashioning a more equitable and nondiscriminatory remedy for catastrophically and severely injured victims will undermine the public purpose for the Act's adoption recognized by the supreme court in *Butler*; nor does the evidence suggest that a more equitable remedy will cause the State to revisit the perceived health care crisis which served as the impetus for the legislature's enactment of the MMA's limitation.

The supreme court in *Sibley II* clearly holds "when a statute classifies persons on the basis of ...physical condition, *its enforcement shall be refused unless the state or other advocate of the classification shows that the classification has a reasonable*

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<sup>7</sup> Thus, Mr. Arrington is a member of another subclass whose members do not fully share in the benefits mentioned in *Butler*.

*basis.” Id.* at 1107. In this case, the State opted, perhaps at its peril, to rely on prior jurisprudence despite the current evidence presented by the Plaintiff which, if left unrefuted, substantially lessens the weight of the evidence it apparently relied on in *Butler* to satisfy Art. I, § 3’s heightened burden. While I reject the State’s excuse for not meeting its burden, I would remand this case, as the supreme court found it necessary to do in *Sibley II*, for a full and fair hearing in the interest of justice on all issues bearing on whether a *reasonable basis* still exists for maintaining the discriminatory classification affecting Plaintiffs’ right to full recovery in this case and whether the \$500,000 limitation as it affects the right of catastrophically or severely injured malpractice victims *continues to further a legitimate public purpose*. I would direct the trial court to allow the State, the PCF, the Plaintiffs and all interested and affected parties to present additional evidence on the constitutional issues raised herein and render a new decision after conducting a hearing and considering all the evidence.