Professional Liability

No full measure

by Charles J. Zauzig, III

Victims of medical malpractice committed by health care providers in the state of Virginia are afforded limited protection under the statutory scheme in place since 1976. When the General Assembly passed Virginia Code §8.01-581.15 with the goal of controlling malpractice insurance rates and presumably maintaining the availability of medical care, it traded the right of an injured party to full compensation in exchange for physician profit. This paradox was eloquently argued by Professor John C. Jeffries, Jr.:

> And the greater the injury, the greater the forfeiture. Those who have suffered devastating injury - those who have been forced to exhaust their assets to provide for continuing care, who have lost all prospect of future earnings, and who will endure a lifetime of anguish and pain - are made to pay the most. Those most able to pay, pay not at all. As a scheme for distributing the costs of holding down insurance rates, the malpractice cap is not merely unfair; it is perverse.[1]

The cap has been twice challenged constitutionally in the Virginia Supreme Court in *Etheridge v. Medical Center Hospitals, et al.*, 237 Va. 87, 376 S.E.2d 525 (1989) and *Pulliam v. Coastal Emer. Svcs. of Richmond, et al.*, 257 Va. 1, 509 S.E.2d 307 (1999) and has emerged unscathed. In 1999, the General Assembly amended Virginia Code §8.01-581.15 to increase the cap from $1 million to $1.5 million effective August 1, 1999, with yearly $50,000 increases until July 1, 2008, when a final increase of $75,000 will bring the cap to $2 million. The insidious reality of the cap is not only the denial of a full measure of recovery, but also that the only victims who receive the statutory limit are those who obtain jury verdicts equal to or in excess of the applicable cap. There exists no incentive under this Virginia system for an insurance carrier to offer to pay in settlement the entire cap when there is no risk of greater exposure by going to trial. Any verdict in excess of the cap is reduced post-trial by the trial judge.[2] There are no provisions, such as a bad faith statute, to force the carrier to offer up its policy limits, which normally equals the cap, even in the clearest cases of liability with directly caused catastrophic injuries. Close scrutiny of the statute and the cases interpreting the reach of the statute is necessary to navigate a case through the impact of the cap or in some fortunate cases to circumnavigate the cap.

The Cap, The Whole Cap and Nothing but the Cap

No matter how the plaintiff paints the injuries suffered they will come under the umbrella of the cap: "...in a medical malpractice action, the total damages recoverable for injury to a 'patient' are limited to the statutory amount, regardless of the number of legal theories upon which the claims are based."[3] Thus, prejudgment interest, being actual damages, is subject to the cap[4] as are punitive damages.[5] Likewise, a parent's claim for medical expenses of their child is subject to the child statutory cap.[6] Of course, the above presupposes that the indivisible injuries are a product of conduct that qualifies as "malpractice" as defined under Virginia Code §8.01-581.1, namely "... any tort based on health care or professional services rendered, or should have been rendered, by a health care provider, to a patient." When read along with the definition of "health care" ("any act ... by any health care provider for, to or on behalf of a patient during the patient's medical ... care" (Virginia Code §8.01-581.1)), the Court has taken a broad approach in analyzing the

conduct involved. Encompassed within malpractice torts are assault and batteries[7] and negligent maintenance of equipment used incident to treatment.[8] Even outrageous intentional acts by health care providers such as an intentional infliction of emotional distress by a medical doctor's conducting an unnecessary breast exam to "... satisfy the defendant's prurient interests ... accompanied by sexual innuendo ..." comes under the ambit of the statute. To reach this conclusion, the Court, in *Hagan v. Antonio*,[9] analyzed the conduct as to whether it was "an inseparable part of examination or treatment." And while rape or robbery during an exam "could never arguably be classified as an inseparable part of the examination or treatment", the defendant's running his fingers over the patient's nipples and asking her whether she was excited was deemed to be part of an ordinary exam.

There are some special circumstances when the conduct of the defendant can be a breach of contract as opposed to a breach of a duty underlying a tort claim. The General Assembly intentionally left out contract claims in the final version of the Medical Malpractice Act. This legislative history was discussed in detail by the *Glisson* Court, which concluded that "...the whole statutory scheme focuses on tort and not breach of contract."[10] In that case, plaintiff alleged a special oral agreement with the defendant health care provider that he not perform an arthroscopic surgery on her knee. Since the plaintiff was alleging the breach of this oral agreement and not alleging a breach "to exercise reasonable care in determining the best procedure to employ and to exercise the appropriate degree of care in performing the operation he recommended...," the action was that of contract and not subject to the Act.[11]

Etheridge quickly dispelled any illusions that the cap could be stacked for each health care provider liable. The patient is limited to one cap "for any injury" and, therefore, the number of "health care providers" becomes irrelevant. A crucial inquiry must be made as to whether the defendant is a health care provider as defined by Virginia Code §8.01-581.1. If the defendant does not fit the definition then no protection is provided. The Supreme Court, when asked to determine whether any person is a health care provider under the act, has strictly construed the statute. Be careful to look at the version of the statute in effect when the cause of action arose (*i.e.*, at the time of the injury) as the General Assembly has added entities to the definition of health care provider from time to time.[12] The person or entity must be licensed by this Commonwealth to provide health care at the time of rendering of the professional services.[13]

Where there are multiple defendants each defendant's status warrants examination. *Etheridge* interprets that part of Virginia Code §8.01-581.15 which states "total amount recoverable for any injury" to mean "...an indivisible injury caused by the concurring negligence of each defendant."[14] This multiple defendant/one cap rule, however, presupposes that all the defendants qualify as Virginia Code §581.1 health care providers. Even where the basis for liability for one of the defendants is that of agency, the principal must establish protection of the cap separate from the agents. Unlike an action at common law, the vicarious liability of a principal is not limited to that of the ultimate liability of the agent. So as in *Schwartz v. Brownlee*,[15] if the agent physician is a licensed health care provider entitled to the benefit of the cap, the principal cannot take advantage of the cap unless it too falls within the definition of a Virginia Code §8.01-581.1 health care provider:

> We are of opinion that in the enactment of Code §8.01-581.15, the General Assembly has abrogated the common law and that its intent to do so is plainly manifested. By making the medical malpractice cap applicable only to licensed health care providers and denying the protection of the cap to non-health care providers, the General Assembly has provided in medical malpractice cases an exception to the rule that the liabilities of principals and agents are coterminous.[16]

Settlement with multiple defendants requires some caution due to the interplay of the cap and the release of joint tortfeasor statute, Virginia Code §8.01-35.1. According to the holding in *Fairfax Hospital System Inc. v. Nevitt*,[17] a verdict against a health care provider protected by the cap is first reduced per *Etheridge* and then a credit of any settlements with joint tortfeasors is then applied pursuant to Virginia Code §8.01-35.1. If the total amount of settlements with the other joint tortfeasors equaled the cap, the remaining joint tortfeasors would owe nothing to the plaintiff. If the settlement of one of the tortfeasors is that of a structured settlement, the present value of the structure is used to reduce the other tortfeasor's obligation, not the total payout.[18]

The number of plaintiffs can, in some instances, increase the exposure to the defendants. Here the analysis turns on identifying the plaintiffs who are classified as "patients" under the Act. Virginia Code §8.01-581.15 caps "... the total amount recoverable for any injury to, or death of, a patient." [emphasis added]. Each "patient" then has a right to a separate cap for their particular injuries. Multiple patients-plaintiffs are usually seen in the context of obstetrical malpractice. According to *Bulala*, where there is a live birth of an injured fetus, there exists two patients, the mother and the child. The court delineated the damages of each:

> The elements of that claim encompass recovery for her own physical injury and

the effect on her health according to its degree and probable duration. Her injury was the perineal tearing due to defendant's failure to perform an episiotomy. Among the other elements of the mother's claim associated with her physical injury are: recovery for physical pain, mental suffering, and medical expenses connected with her own physical injury. Additionally, the mother, as a part of her claim, would be entitled to recover for mental suffering resulting from the birth of a defective child. *See Modaber v. Kelley*, 232 Va. 60, 66, 348 S.E.2d 233, 236-7 (1986) (injury to fetus constitutes injury to mother allowing recovery for mental suffering associated with stillbirth).

We turn to the child's compensatory damage claim. In *Kalafut v. Gruver*,[20] 239 Va. 278, 389 S.E.2d 681 (1990), decided today, we held that a "tortfeasor who causes harm to an unborn child is subject to liability to the child, or to the child's estate, for the harm to the child, if the child is born alive." *Id.* at 283-84, 389 S.E.2d at 684. We drew the line between nonliability and liability for prenatal injury at the moment of live birth of the child, when the child became a "person." Therefore, the child in this case had a claim against the defendant and would be entitled to the benefit of a separate statutory cap, provided she was defendant's "patient" within the meaning of the Act.

...Therefore, as we construe the Act, at the moment of live birth, and until the pediatrician assumes responsibility for the care of the newborn, the infant is the obstetrician's "patient." Hence, a separate statutory cap for compensatory damages applies to the child's case. And, the child's damage claim is comprised of the usual elements of damage, if established by the required proof, appropriate to any infant's personal injury action.[19]

A similar result was reached in *Fairfax Hospital System Inc. v. McCarthy*,[20] where the court held that a postnatal injury to the mother culminating in a hysterectomy and the prenatal injury to the infant were separate claims and separate injuries. A father of a child does not have an independent cap for emotional distress for the birth of the injured child in that his claim is derivative of the child's and he is not a "patient." [21]

In representing persons injured as a result of malpractice, the trial lawyer needs to analyze the medical malpractice Act with the perspective of avoiding the harsh penalty it exacts on our clients. Each case may have the potential of falling outside of the parameters of the statute either because of the action of the tortfeasor, the status of the tortfeasor or the number of plaintiffs. Justice Russell, in his dissent in *Etheridge*, pointed out that "The familiar figure holding the scales of justice wears a blindfold. She should not be required to peer around it to ascertain whether the defendant is a 'health care provider' before deciding what judgment to pronounce." In those rare cases where the cap can be avoided, the blindfold is replaced and the opportunity for a full measure of justice is returned to those who need it most.

Endnotes

1. Brief of *Amicus Curiae*, The Virginia Trial Lawyers Association in Support of Appellant, *Karl B. Pulliam, Executor of the Estate of Elnora R. Pulliam v. Coastal Emergency Services of Richmond*, Record No. 659, p. 4.
2. Despite the routine defense motion to reduce the *ad damnum* pretrial, the Court in *Etheridge v. Medical Center Hospitals*, 237 Va. 87, 96, 376 S.E.2d 525, 529 (1989), requires the jury to set the damages without limitation and for the cap to be applied once this function of the jury has been fulfilled. "A trial court applies the remedy's limitation only after the jury has fulfilled its fact-finding function. Thus, Code §8.01-581.15 does not infringe upon the right to a jury trial because the section does not apply until after a jury has completed its assigned function in the judicial process." *Id.*
3. *Bulala v. Boyd*, 239 Va. 218, 389 S.E.2d 670 (1990).
4. *Pulliam, supra*, at 25.
5. *Bulala, supra*, at 230, 231.
6. *Id.*, at 230.
7. *Glisson v. Loxley*, 235 Va. 62, 366 S.E.2d 68 (1988).
8. *Gonzalez v. Fairfax Hospital System*, 239 Va. 307, 389 S.E.2d 458 (1990).
9. *Hagan v. Antonio*, 240 Va. 347, 397 S.E.2d 810 (1990).
10. *Glisson, supra*, at 67.
11. *Id.* at 68.
12. *See by implication Schwartz v. Brownlee*, 253 Va. 159, 164 n. 3, 482 S.E.2d 827, 830 (1997).
13. *Taylor v. Mobil Corp.*, 248 Va. 101, 444 S.E.2d 705 (1994).
14. *Etheridge, supra.*, at 105.
15. *Schwartz, supra.*
16. *Id.*, at 166.
17. *Fairfax Hospital System Inc. v. Nevitt*, 249 Va. 591, 457 S.E.2d 10 (1995).
18. *Fairfax Hospital System v. McCarty*, 244 Va. 28, 36, 419 S.E.2d 621, 626 (1992).
19. *Bulala, supra*, at 229.
20. *Fairfax Hospital System Inc. v. McCarthy, supra.*
21. *Bulala, supra.*

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Special Feature

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VTLA launches new listserv to serve plaintiff attorneys

We heard you! Many VTLA members have been calling for a plaintiff-only personal injury listserv in which all participants have agreed that their practice consists exclusively of representing plaintiffs in such cases. We heard you, and the new VTLA PlaintiffServ is up and running.

To be eligible for this listserv, VTLA members must agree that they exclusively handle personal injury cases or other tort cases on behalf of injured parties. "It is important to note," said Executive Director Jack Harris, "that a member does not have to have an exclusive personal injury practice to be eligible. A member can devote his or her time to criminal defense work, family work or to other areas as long as when personal injury matters *are* handled, it is only for the plaintiff."

VTLA has a certification form which must be signed by a member applying to participate in this listserv. At that time the member certifies the nature of his or her practice, and also that all discussions in the listserv will remain confidential.

"We felt the creation of this service answers requests by many VTLA members and will allow for frank discussions among plaintiff attorneys ultimately improving representation for our clients," said VTLA President Donald Patten.

This listserv becomes part of a growing list of available listservs for our membership. The general membership listserv has been helping members send requests for information and advice on a tremendously broad list of topics in nearly every area of the law. Our Workers' Compensation Section has established its own listserv and other sections have been invited to do the same.

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2001 CLE Calendar

February 23 &24 Williamsburg	**Punitive Damages Retreat** P. Brent Brown, Chairman
May 8, Richmond May 10, Tyson's Corner May 22, Roanoke May 24, Norfolk	**Annual Tort Seminar** Michael J. Miller, Chairman
June 4, Norfolk June 7, Tyson's Corner June 19, Richmond June 21, Roanoke	**Family Law Seminar** Brian West, Chairman
September 11, Richmond September 13, Tyson's Corner September 20, Norfolk September 25, Roanoke	**Criminal Law Section Seminar** James O. Broccoletti, Chairman
September 28 & 29 Richmond	**Fiesta3** Franklin R. Blatt, Chairman
October 29, Tyson's Corner October 30, Richmond	**Annual Advocacy Seminar** Charles J. Zauzig, III, Chairman
December 5 Richmond	**Annual Paralegal Seminar** Barbara S. Williams, Chairman

Masters of Trial Work teach in Nov.

Chuck Zauzig's plans for the Advocacy program will intrigue trial lawyers of every variety. He has assembled a stellar line-up of speakers who will tell you how they achieve the victories that have made them true Masters of Advocacy: Coleman Allen, Jeffrey Breit, Bob Hall, Bruce Rasmussen and Tom Williamson are already named to appear.

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Each of these speakers will bring their own unique point of view on how they approach persuading juries – come and be surprised at what you hear! It will be 6 hours jam-packed with new-to-you tips, techniques, and philosophies for trying cases.

October 29 Holiday Inn Tyson's Corner
October 30 Richmond Crowne Plaza

Punitive damages retreat

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discussed, including:

- discovery
- use of toxicological evidence
- bifurcation: defeating the motion
- establishing blood alcohol levels
- overcoming constitutional barriers
- persuasive jury arguments that motivate awards
- settlement strategies
- setting the scene in opening statement
- drafting effective jury instructions
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- preparing plaintiff and witness for trial
- themes that work

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