No. 27464—*The Estate of Marjorie I. Verba by Sally Jo Nolan, Executrix v. David A. Ghaphery, M.D.*

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McGraw, Chief Justice, dissenting:

This Court should more closely re-evaluate its earlier decision in *Robinson v. Charleston Area Medical Center, Inc.*, 186 W. Va. 720, 414 S.E.2d 877 (1991), which in my view failed to discern obvious constitutional infirmities in the $1 million cap imposed by W. Va. Code § 55-7B-8 on non-economic damages awarded in medical malpractice cases. The statute fails to pass constitutional muster on at least two grounds.[1]

First, the limitation on non-economic damages denies equal protection by discriminating among tort victims in such way as to deny recovery to the most egregiously injured. The *Robinson* Court prefaced its analysis of the equal protection challenge to W. Va. Code § 55-7B-8 by stating that "'[a] statutory limitation on [a common-law measure of] recovery is simply an economic regulation, which is entitled to wide judicial deference.'" 186 W. Va. at 729, 414 S.E.2d 886 (quoting *Etheridge v. Medical Center Hosp.*, 237 Va.

[1]Appellant, as well as *amicus curiae* The Association of Trial Lawyers of America, also present a persuasive argument that § 55-7B-8 runs afoul of the right to a jury trial provided by Article III, § 13 of the West Virginia Constitution. *See, e.g., Lakin v. Senco Prod., Inc.*, 987 P.2d 463 (Ore. 1999) (invalidating $500,000 cap on noneconomic damages based upon interference with constitutional right to trial by jury); *Sofie v. Fibreboard Corp*., 771 P.2d 711 (Wash. 1989) (finding that statutory limit on compensatory noneconomic damages violated state constitutional right to trial by jury). But, as appellee rightly points out, the present case involves a statutory cause of action for wrongful death, which falls outside the ambit of this constitutional provision. *See Simms v. Dillon*, 119 W. Va. 284, 193 S.E.2d 331 (1937) (holding that Article III, § 13 does not guarantee the right to trial by jury in any circumstance where it did not exist at common law), *overruled on other grounds, State Road Comm'n v. Milam*, 146 W. Va. 368, 120 S.E.2d 254 (1961).

87, 99, 376 S.E.2d 525, 531 (1989)). Several state courts have, however, recognized that the right to recover for personal injury is a significant substantive right requiring application of intermediate scrutiny or equivalent approaches. *See, e.g.*, *Spilker v. City of Lincoln*, 469 N.W.2d 546, 548 (Neb. 1991); *Hanson v. Williams County*, 389 N.W.2d 319, 325 (N.D. 1986); *Heath v. Sears, Roebuck & Co.*, 464 A.2d 288, 295 (N.H. 1983). I would have this Court overrule *Robinson* on this point and join those jurisdictions that apply a heightened level of equal-protection scrutiny to statutory limitations on the right of injured persons to recover tort damages from otherwise liable parties. Specifically, the Court should apply intermediate scrutiny, where it must be shown that the challenged legislation is substantially related to the achievement of an important governmental interest. *See Payne v. Gundy*, 196 W. Va. 82, 468 S.E.2d 335 (1996) (applying intermediate scrutiny to gender discrimination case); *Israel by Israel v. W. Va. Secondary Schools Activities Comm'n*, 182 W. Va. 454, 388 S.E.2d 480 (1989) (same); *Shelby J.S. v. George L.H.*, 181 W. Va. 154, 381 S.E.2d 269 (1989) (applying intermediate level of scrutiny to case involving illegitimacy).

Under such analysis, it is inconceivable that § 55-7B-8 would pass constitutional muster. As other courts have observed, statutes imposing a "one-size-fits-all" limitation on damages (economic or non-economic) create classifications based upon severity of injury, and then proceed to penalize those who are more seriously injured by denying them compensation beyond the statutory limit:

> [T]he burden imposed by [a statute limiting non-economic damages in medical malpractice cases] on the rights of individuals to receive compensation for serious injuries is direct and concrete. The hardship falls most heavily on those who are most severely maltreated and, thus, most deserving of relief. Unlike the less severely injured, who receive full and just compensation, the catastrophically injured victim of medical malpractice is

> denied any expectation of compensation beyond the statutory limit. Moreover, the statute operates to the advantage not only of negligent health care providers over other tortfeasors, but of those health care providers who are *most irresponsible*.

Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 169 (Ala. 1991) (emphasis in original). The Supreme Court of New Hampshire echoed this reasoning, noting that

> [i]t is clear that the cap on damage recovery distinguishes not only between malpractice victims and victims of other torts but also "between malpractice victims with non-economic losses that exceed $250,000 and those with less egregious non-economic losses." . . . We agree with the North Dakota Supreme Court that
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> > "the limitation of recovery does not provide adequate compensation to patients with meritorious claims; on the contrary, it does just the opposite for the most seriously injured claimants. It does nothing toward the elimination of nonmeritorious claims. Restrictions on recovery may encourage physicians to enter into practice and remain in practice, but do so only at the expense of claimants with meritorious claims."
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> *Arneson v. Olson*, 270 N.W.2d [125,] 135-36 [(N.D. 1978)]. It is simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and therefore most in need of compensation.

Carson v. Maurer, 424 A.2d 825, 836-37 (N.H. 1980) (citation omitted); *see also Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1069-78 (Ill. 1997) (holding that $500,000 limit on noneconomic damages violated constitutional prohibition against special legislation, because, *inter alia*, "the statute discriminates between slightly and severely injured plaintiffs, and also between tortfeasors who cause severe and moderate or minor injuries"); *Smith v. Schulte*, 671 So. 2d 1334, 1336-44 (Ala. 1995) (finding that statute limiting the amount recoverable in a wrongful death action against a health care provider to $1,000,000 violated the equal protection guarantee of the Alabama Constitution).

I agree fully with Chief Justice Bird's dissent in *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (en banc), where she stated:

> There is no logically supportable reason why the most severely injured malpractice victims should be singled out to pay for social relief to medical tortfeasors and their insurers. The idea of preserving insurance by imposing huge sacrifices on a few victims is logically perverse. Insurance is a device for spreading risks and costs among large numbers of people so that no one person is crushed by misfortune. . . . In a strange reversal of this principle, the statute concentrates the costs of the worst injuries on a few individuals.

38 Cal. 3d at 173, 211 Cal. Rptr. at 393-94, 695 P.2d at 689-90 (Bird, C.J., dissenting). Accordingly, given the obvious existence of alternatives to § 55-7B-8 that impose far less hardship on the most egregiously injured victims of medical malpractice, I would find that the statute violates the equal protection guarantees contained in Article III, § 10 of the West Virginia Constitution, as well as the prohibition against special legislation set forth in Article IV, § 39.

For similar reasons, the statute also runs afoul of the "certain remedy" provision contained in Article III, § 17 of the West Virginia Constitution. In *Robinson*, the Court rejected this reasoning, finding that § 55-7B-8 was constitutional under the test previously formulated in syllabus point 5 of *Lewis v. Canaan Valley Resorts, Inc.*, 185 W. Va. 684, 408 S.E.2d 634 (1991):

> "When legislation either substantially impairs vested rights or severely limits existing procedural remedies permitting court adjudication, thereby implicating the certain remedy provision of article III, section 17 of the Constitution of West Virginia, the legislation will be upheld under that provision if, first, a reasonably effective alternative remedy is provided by the legislation or, second, if no such alternative remedy is provided, the purpose of the alteration or repeal of the existing cause of action or remedy is to eliminate or curtail a clear social or economic problem, and the alteration or

> repeal of the existing cause of action or remedy is a reasonable method of achieving such purpose."

Syl. pt. 3, *Robinson*, *supra* (quoting *Lewis*). As one commentator has correctly perceived, the *Lewis/Robinson* approach does no more than "impose a minimal 'rationality requirement' on the state legislature to justify the diminishment of the common law remedy." Jennifer Friesen, *State Constitutional Law* § 6-3(c)(1), at 358 (2d ed. 1996).

In my estimation, the present standard does not give proper heed to the important constitutional interests at stake when an existing remedy is substantially altered by the Legislature. Instead, the proper standard that should be employed in this circumstance requires that such restrictive legislation must either provide a *quid pro quo* or reasonable alternative remedy, or it must be shown that abolishment or modification of the substantive right is required in order to achieve an important public objective, and the means chosen by the Legislature must be substantially related to achieving that purpose. *See Smith v. Department of Ins.*, 507 So.2d 1080, 1088-89 (Fla. 1987) (per curiam) (invalidating $450,000 cap on noneconomic damages recoverable in tort based upon Florida's constitutional guarantee of access to court for redress of injury, where "overpowering public necessity" not demonstrated); *Kansas Malpractice Victims v. Bell*, 757 P.2d 251, 262-64 (Kan. 1988) (finding that $1 million limit on medical malpractice recovery, with $250,000 cap on noneconomic damages, offended constitutional right to "remedy by due course of law," where no *quid pro quo* provided); *see also State ex rel. Oatl v. Sheward*, 715 N.E.2d 1062, 1092 n.14 (Ohio 1999) (suggesting that heightened scrutiny would be applied to claim that cap violated due course of law provision if it were found that right to jury trial were implicated). I would overrule

Robinson and its precursors on this issue, and, at the very least, remand the present case for the development of a factual record pertinent to determining whether § 55-7B-8 passes scrutiny under this revised standar

The Court in this case has chosen to ignore these deficiency in *Robinson*, and instead retreat behind the doctrine of *stare decisis*. While this Court obviously has an institutional responsibility to be consistent in its enunciation of the law, it should never be deterred from rectifying previous errors that implicate significant personal rights:

> "No legal principle is ever settled until it is settled right. . . . 'Where vital and important public and private rights are concerned, and the decisions regarding them are to have a direct and permanent influence upon all future time, it becomes the duty as well as the right of the court to consider them carefully, and to permit no previous error to continue, if it can be corrected.'"

Sizemore v. State Workmen's Compensation Comm'n, 159 W. Va. 100, 108, 219 S.E.2d 912, 916 (1975) (citation omitted). Moreover, where the pertinent question involves a determination of the scope of the protections set forth in our state constitution's Bill of Rights, the Court should never be deterred from ultimately reaching the correct result. *See Frey v. United States*, 421 U.S. 542, 559, 95 S. Ct. 1792, 1801, 44 L. Ed. 2d 363 (1975), (Marshall, J., dissenting) ("important decisions of constitutional law are not subject to the same command of *stare decisis* as are decisions of statutory questions") (citations omitted).

For the foregoing reasons, I respectfully dissent.[2]

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[2]The majority has chosen to address the issue of whether attorney's fees and costs may be recovered where the jury's verdict exceeds the cap. While I believe that the cap on non-economic damages gives defendants an incentive to be intransigent and drive up the costs of litigation in an effort to dissuade plaintiffs from pursuing legitimate claims, and would therefore permit plaintiffs to recover (continued...)

[2](...continued)
reasonable attorney's fees and costs when a jury awards the maximum amount permissible under the cap, this issue was never presented to the court below. As has frequently been emphasized, "[t]his Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance." Syl. pt. 2, *Sands v. Security Trust Co.*, 143 W. Va. 522, 102 S.E.2d 733 (1958). Consequently, such issue should not have been addressed by this Court, and its present treatment is nothing more than dictum.