

Texas Courts Should Reduce a Plaintiff's Responsibility Before Applying the Noneconomic Damage Cap

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I. INTRODUCTION

Throughout the course of tort reform, the Texas Legislature passed two bills that affect tort recovery in medical malpractice actions: the proportionate responsibility statute and the noneconomic damage cap statute (“the damage cap”). While the two statutes are separate, they are related. The legislature gave no explicit instructions to the courts describing the method to apply them. This is an important question that deserves an answer because applying each theory leads to different monetary results.

A simple hypothetical can help demonstrate these different results: a jury awards a medical malpractice plaintiff \$300,000 in noneconomic damages, but also finds that the plaintiff is 20% at fault for her injuries. The court has two options here: it can reduce based on a plaintiff's responsibility first, or it can apply the damage cap first. The two options are detailed in the following chart:

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\$300,000 in Damages Plaintiff Allocated 20% Responsibility	
Reduce Based On Responsibility First:	Reduce Based On Damage Cap First:
<ul style="list-style-type: none"> · Because plaintiff is 20% responsible, she will only recover \$240,000 in damages. · Thus, no need to apply the damage cap. 	<ul style="list-style-type: none"> · Damages reduced to \$250,000 per the damage cap. · Damages further reduced because of 20% responsibility, meaning plaintiff cannot recover 20% of damages (\$50,000 of \$250,000).
Damages Recovered: \$240,000	Damages Recovered \$200,000

This Comment will answer the open question found in Texas law. Part II will discuss the statutes and the purposes behind them. Part III will begin an in-depth statutory construction analysis of the proportionate responsibility statute and the damage cap, both by themselves and compared to each other. Finally, Part IV of this Comment will analyze the consequence the statutory construction analysis has on the effect of the statutes. All these different pieces lead to the conclusion in Part V that the legislature created the damage cap to apply after the proportionate responsibility statute.

II. THE RELEVANT STATUTES

Before delving into the issue, it is helpful to understand the statutes in question. The evolution of the proportionate responsibility statute helps give a full appreciation of the statute. Texas common law started with a system of contributory negligence.¹ This system barred a plaintiff's recovery when the jury determined the plaintiff was contributory negligent.² "Under contributory negligence, if a plaintiff was even one percent at fault, he or she could not recover."³ To remedy the harshness of this rule, the legislature passed its first comparative negligence statute in 1973.⁴ This 1973 version of the statute (Article 2212a) stated:

¹ Parrott v. Garcia, 436 S.W.2d 897, 901 (Tex. 1969).

² *Id.*

³ Dugger v. Arredondo, 408 S.W.3d 825, 830 (Tex. 2013).

⁴ Nabors Well Servs., Ltd. v. Romero, 456 S.W.3d 553, 559 (Tex. 2015).

Contributory negligence shall not bar recovery in an action by any person or party or the legal representative of any person or party to recover damages for negligence resulting in death or injury to persons or property if such negligence is not greater than the negligence of the person or party or persons or parties against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributed to the person or party recovering.⁵

The legislature designed the statute to reduce plaintiffs' damages as a practical matter.⁶ If a plaintiff was 20% percent responsible, it does not make sense for her to recover 100% of her damages.⁷ It is equally unfair to prohibit a plaintiff from recovering anything when she is only 20% at fault.⁸ Therefore, the legislature created the comparative negligence statute as the appropriate measure to account for the plaintiff's fault, while alleviating the harshness that contributory negligence previously imposed on plaintiffs. In 1995, the legislature replaced comparative negligence, found in Article 2212a, with proportionate responsibility, found in Chapter 33 of the Texas Civil Practice and Remedies Code.⁹ The proportionate responsibility statute states that "the court shall reduce the amount of damages to be recovered by the claimant with respect to a cause of action by a percentage equal to the claimant's percentage of responsibility."¹⁰ Chapter 33 clearly defined a way for courts to reduce based on a plaintiff's responsibility.

In the 1970s, the legislature also set out to fix another harsh result that was occurring, this time specifically in the medical field.¹¹ Insurance companies began raising premiums for medical malpractice insurance.¹² The spike in insurance rates forced doctors to limit the treatments that they

⁵ *Univ. of Tex. at El Paso v. Nava*, 701 S.W.2d 71, 72 (Tex. App.—El Paso 1985, no pet.) (quoting Act of Mar. 27, 1973, 63d Leg., R.S., ch. 28, § 1, 1973 Tex. Gen. Laws 41, repealed by Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 9(1), 1985 Tex. Gen. Laws 3242, 3322).

⁶ See *Kroger Co. v. Keng*, 23 S.W.3d 347, 350 (Tex. 2000).

⁷ See *Univ. of Tex. at El Paso*, 701 S.W.2d at 72.

⁸ See *id.*

⁹ *Nabors Well Servs., Ltd.*, 456 S.W.3d at 559.

¹⁰ TEX. CIV. PRAC. & REM. CODE ANN. § 33.012(a) (West 2015).

¹¹ Ruben James Reyes, Comment, *Capping Your Rights: The Texas Statute of Non-Economic Damage Caps in Medical Malpractice Cases and Its Assault on the Rights of the Injured and the Power of the Courts*, 6 SCHOLAR 347, 350 (2004).

¹² *Id.*

could offer or even close practices all together.¹³ The legislature believed that large jury awards due to “the filing of *legitimate* health care liability claims in Texas” drove up insurance prices.¹⁴ The legislature concluded that if it could decrease the cost of these legitimate claims, it could reduce the cost of the insurance premiums.¹⁵ The plan to decrease the cost and reduce insurance premiums was to place a limit on the health care professionals’ liability.¹⁶ This would guarantee the access of medical care in Texas.¹⁷ The damage cap states:

In an action on a health care liability claim where final judgment is rendered against a physician or health care provider other than a health care institution, the limit of civil liability for noneconomic damages of the physician or health care provider other than a health care institution, inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed \$250,000 for each claimant, regardless of the number of defendant physicians or health care providers other than a health care institution against whom the claim is asserted or the number of separate causes of action on which the claim is based.¹⁸

The legislative history to the bill suggests that the legislature chose these words to alleviate the costs of insurance premiums without unnecessarily restricting the rights of plaintiffs.¹⁹ The legislature wanted to “strike an appropriate balance between common-sense reforms to the medical liability system and protecting the right of those who are harmed to recover compensation.”²⁰ The language allows for plaintiffs to recover all

¹³HOUSE RESEARCH ORG., TEX. H.R., FOCUS REPORT: MAJOR ISSUES OF THE 78TH LEGISLATURE, REGULAR SESSION 9 (August 6, 2003), <http://www.hro.house.state.tx.us/pdf/focus/major78.pdf>.

¹⁴*Id.*; Lucas v. United States, 757 S.W.2d 687, 691 (Tex. 1988) (quoting Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 1.02(a)(2), 1977 Tex. Gen. Laws 2039, *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884) (internal quotations omitted).

¹⁵Reyes, *supra* note 11, at 350.

¹⁶*See id.*

¹⁷*See id.*

¹⁸TEX. CIV. PRAC. & REM. CODE ANN. § 74.301(a) (West 2015).

¹⁹HOUSE RESEARCH ORG., *supra* note 13, at 9.

²⁰*Id.*

economic damages suffered and sets a maximum amount that a health care defendant is liable to pay for noneconomic damages.²¹ The legislature believed this type of damage cap would work to lower the cost of insurance prices for doctors over time without unduly restricting plaintiff's rights.²²

III. THE STATUTORY LANGUAGE INDICATES THE LEGISLATIVE INTENT TO APPLY THE PLAINTIFF'S RESPONSIBILITY BEFORE LIMITING THE DEFENDANT'S LIABILITY.

As demonstrated earlier, a court has a choice to make when applying these statutes: should it apply the damage cap regardless of a plaintiff's responsibility or consider that responsibility to see if the damage cap is even applicable? In making this decision, the court has places it can look for guidance. The first place the court can look is to the language of the two statutes themselves. While looking at the language, it is also helpful to look to the purposes of the statutes to put the statute in the correct context. The language in the statutes indicate that the legislature intended for courts to apply the plaintiff's responsibility first and then apply the damage cap, if necessary.

A. *The Language and the Purpose of the Proportionate Responsibility Statute Indicates That the Legislature Intended For a Court to Reduce a Plaintiff's Percentage of Responsibility From the Total "Amount of Damages" Found By the Trier of Fact.*

The legislature used the phrase "the amount of damages" to signify that courts should reduce a plaintiff's responsibility from the total amount of damages found by the trier of fact.²³ When looked at in the context of the proportionate responsibility statute, this is the only meaning that a court can reasonably infer. Proportionate responsibility is: "[t]he principle that reduces a plaintiff's recovery proportionally to the plaintiff's degree of fault

²¹TEX. CIV. PRAC. & REM. CODE ANN. § 74.301(a).

²²The legislature researched damage caps in other jurisdictions and discovered that in California a \$250,000 noneconomic damage cap worked to reduce malpractice insurance premiums over time. HOUSE RESEARCH ORG., *supra* note 13, at 9. The legislature was confident that Texas would have the same result. *Id.*

²³TEX. CIV. PRAC. & REM. CODE ANN. § 33.012(a) (West 2015).

in causing the damage,”²⁴ and damage is the “[l]oss or injury to person or property.”²⁵ With this doctrine in mind the court used the term “damages” in the proportionate responsibility statute. “Damages” is defined as the “[m]oney claimed by, or ordered to be paid to, a person as compensation for [damage].”²⁶ Thus, when the jury determines the amount of damages to which a plaintiff is entitled, they are also deciding the total amount of damage the plaintiff suffered. The jury then makes a finding of the plaintiff’s percentage of responsibility, which is the percent of damage the plaintiff caused based off of the total amount of damage. This total amount of damage suffered equates to the amount of damages found by the trier of fact. Therefore, it only makes sense to reduce the total amount found by the trier of fact by a plaintiff’s responsibility.

The words the legislature used in the settlement credit statute also support the contention that a court should reduce a plaintiff’s responsibility from the total amount of damages found by the trier of fact.²⁷ Here, the legislature mandates that the courts apply a settlement credit after apportioning a plaintiff’s responsibility: “[i]f the claimant has settled with one or more persons, the court shall *further reduce* the amount of damages to be recovered by the claimant with respect to a cause of action by the sum of the dollar amounts of all settlements.”²⁸ The plain meaning indicates that courts should first reduce by a plaintiff’s responsibility and then apply the settlement credit. This supports the contention that the legislature intended for a plaintiff’s responsibility to be reduced from the amount of damages found by the trier of fact rather than a reduced amount. Practically this makes sense because the plaintiff’s percentage of responsibility is

²⁴ *Comparative-Negligence Doctrine*, BLACK’S LAW DICTIONARY (9th ed. 2009). It is important to note that this is the definition for the comparative negligence doctrine, but Texas has a different name for the same principle.

²⁵ *Damage*, BLACK’S LAW DICTIONARY.

²⁶ *Damages*, BLACK’S LAW DICTIONARY.

²⁷ The proportionate responsibility statute is located at Section 33.012(a) of the Texas Civil Practice and Remedies Code, and the settlement credit statute is at Section 33.012(b). TEX. CIV. PRAC. & REM. CODE ANN. § 33.012(a)–(b).

²⁸ TEX. CIV. PRAC. & REM. CODE ANN. § 33.012(b) (emphasis added). The application of this can be easily demonstrated with a hypothetical: A plaintiff is injured by two doctors. She sues both doctors for medical malpractice. She settles with Doctor A for \$50,000. She continues to trial against Doctor B and receives a non-economic damage award of \$300,000 but is also determined to be 20% at fault. The law states that the court will first reduce the plaintiff’s damages, by her percentage of fault, to \$240,000. At that point the court will then further reduce the plaintiff’s damages by the settlement, and the plaintiff will walk away with a \$190,000 judgment.

determined based on the total amount of damages, it is not determined based on the amount reduced by a settlement credit.

The concept of reducing a plaintiff's fault or applying settlement credits to the amount of damages found by the trier of fact is not a new idea; it started with the original comparative fault statute. In 1982, the parties to a lawsuit tasked the Texas Supreme Court with interpreting the old comparative negligence and settlement credit statute, Article 2212a of the Texas Revised Civil Statutes.²⁹ The statute stated:

If an alleged joint tort-feasor makes a settlement with a claimant but nevertheless is joined as a party defendant at the time of the submission of the case to the jury (so that the existence and amount of his negligence are submitted to the jury) and his percentage of negligence is found by the jury, the settlement *is a complete release of the portion of the judgment attributable to the percentage of negligence found on the part of that joint tort-feasor.*³⁰

The court established that it should take the judgment found by the trier of fact and reduce the settling party's negligence from that amount: "[w]e construe this portion of the statute to mean that the settling tortfeasor's percentage of negligence found by the jury is to be multiplied by the total damages found by the jury. This amount is then deducted from the recovery."³¹ The court also stated that it would use the "same process" to reduce the plaintiff's contributory negligence.³² Following this decision, the El Paso Court of Appeals held the language of the comparative negligence statute³³ means courts should reduce a plaintiff's negligence from the total amount of damages.³⁴ Although this is not the current statute, it is a persuasive analog for the way courts should interpret the current statute. As

²⁹Dabney v. Home Ins. Co., 643 S.W.2d 386, 390 (Tex. 1982).

³⁰*Id.* at 388 n.1 (emphasis added) (citing Act of Mar. 27, 1973, 63d Leg., R.S., ch. 28, § 2(e), 1973 Tex. Gen. Laws 41, 42, *repealed by* Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 9(1), 1985 Tex. Gen. Laws 3242, 3322).

³¹*Id.* at 390.

³²*Id.*

³³The contributory negligence statute at the time stated: "[A]ny damages allowed shall be diminished in proportion to the amount of negligence attributed to the person or party recovering." Univ. of Tex. at El Paso v. Nava, 701 S.W.2d 71, 72 (Tex. App.—El Paso 1985, no pet.) (citing Act of Mar. 27, 1973, 63d Leg., R.S., ch. 28, § 1, 1973 Tex. Gen. Laws 41, *repealed by* Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 9(1), 1985 Tex. Gen. Laws 3242, 3322).

³⁴*Id.* at 72.

previously mentioned, the application of Article 2212a and Chapter 33 are very similar; the legislature used Chapter 33 to clarify Article 2212a. Both statutes are used to reduce a plaintiff's recovery by the percentage of fault caused by the plaintiff. Therefore, the court's interpretation here helps to identify what courts should do with the new statute.

The Fort Worth Court of Appeals looked at the current statutory language of the proportionate responsibility statute in Section 33 of the Texas Civil Practice and Remedies Code.³⁵ The court examined the words of the settlement credit statute rather than the proportionate responsibility statute.³⁶ It focused on the words "the amount of damages to be recovered."³⁷ The court found that these words indicate the legislature's intent that "the settlement credit is to be applied to the amount of damages to be recovered by the plaintiff in the entire cause of action"³⁸ The damages found by the trier of fact are awarded based on the entire cause of action rather than on a limited amount. Therefore, if the settlement credit applies to the entire cause of action, it should apply as a reduction for the damages found by the trier of fact.

This is relevant because the exact same wording is used in the proportionate responsibility statute, just one subsection above the settlement credit.³⁹ If the court interprets the phrase "the amount of damages to be recovered" this way in the settlement credit subsection, then "the amount of damages to be recovered" must mean the same thing in the proportionate responsibility subsection.⁴⁰ Therefore, a court should reduce a plaintiff's percentage of responsibility from the damages in the entire cause of action, which are the damages found by the trier of fact.

The Louisiana comparative fault statute has words similar to the Texas proportionate responsibility statute.⁴¹ The Louisiana Supreme Court faced

³⁵ *Welch v. McLean*, 191 S.W.3d 147, 172 (Tex. App.—Fort Worth 2005, no pet.), *overruled on other grounds by Phillips v. Bramlett*, 288 S.W.3d 876, 882 (Tex. 2009).

³⁶ *See id.*

³⁷ TEX. CIV. PRAC. & REM. CODE ANN. § 33.012(b) (West 2015).

³⁸ *Welch*, 191 S.W.3d at 172.

³⁹ TEX. CIV. PRAC. & REM. CODE ANN. § 33.012(a).

⁴⁰ "If the court determines the legislature intended that an undefined word or phrase has either a common, technical, or legal meaning, it is presumed that that word or phrase has the same meaning throughout the statute." Ron Beal, *The Art of Statutory Construction: Texas Style*, 64 BAYLOR L. REV. 339, 388 (2012) (citing *Hayek v. W. Steel Co.*, 478 S.W.2d 786, 793 (Tex. 1972)).

⁴¹ *See Hall v. Brookshire Bros., Ltd.*, 848 So. 2d 559, 569–70 (La. 2003).

the issue of whether to apply a plaintiff's fault before applying the damage cap.⁴² The court used a statutory construction analysis to help answer the question presented.⁴³ The Louisiana comparative fault statute says: "[i]f a person suffers injury, death, or loss as the result partly of his own negligence . . . the *amount of damages recoverable* shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death or loss."⁴⁴ The court found that "the amount of damages recoverable" language indicated the legislature's intent to reduce damages based on the plaintiff's fault before applying the damage cap.⁴⁵ The court demonstrated this by comparing "damages recoverable" with the words "amount recoverable" found in the Louisiana damage cap.⁴⁶ The court reasoned that the damage cap "limits the *amount* that a qualified health care provider . . . [has] to pay . . . but it does not limit the *damages* that a medical malpractice victim sustains."⁴⁷ The court ruled that the "*amount* that is to be paid to the victim of proven malpractice is not synonymous with the *damages* recoverable by that victim, which are, simply stated, the total damages assessed by the trier of fact."⁴⁸ It comes down to the difference between a reduction of damages and a limitation of recovery. The words, although they may look the same, have very different applications. A reduction of damages focuses on just that, reducing the *damages* found by the trier of fact. This is vastly different than a limitation on recovery, which is concerned with ensuring a plaintiff's *recovery* does not exceed a maximum amount.

The same analysis applies to Texas's similar language. The words "amount of damages recoverable" are comparable to the words "the amount of damages to be recovered" found in the Texas proportionate responsibility statute. The phrases of both statutes focus on the reduction of damages rather than on limitation of recovery. With similar language to the Texas statute, this Louisiana holding is a persuasive interpretation to understanding what the legislature meant in the proportionate responsibility statute.

⁴² See *id.* at 559.

⁴³ See *id.* at 570.

⁴⁴ *Id.* at 569–70 (citing LA. CIV. CODE ANN. art. 2323 (West 2008)).

⁴⁵ *Id.* at 570–71.

⁴⁶ See *id.*

⁴⁷ *Id.* at 570.

⁴⁸ *Id.* at 571.

Finally, it is important to note that the legislature did know how to use the words “damages found by the trier of fact.” In the very next section of the Texas Civil Practice and Remedies Code, the legislature specified “damages found by the trier of fact,” but the reason becomes apparent when looking at the statute.⁴⁹ This section describes the way to calculate a defendant’s liability: “Except [when a defendant is jointly and severally liable], a liable defendant is liable to a claimant only for the percentage of damages found by the trier of fact equal to that defendant’s percentage of responsibility”⁵⁰ The legislature wanted to be clear that courts are to calculate a defendant’s liability from the damages found by the trier of fact as opposed to the damages reduced by a plaintiff’s fault or reduced by any settlement credit.⁵¹ The Texas Supreme Court clarified that although the language is different, there is not a practical difference before a court reduces a plaintiff’s fault or applies a settlement credit: “[D]amages under these two sections are the same only when the claimant has not settled and shares no responsibility.”⁵² With the Texas Supreme Court explaining that the damages found by the trier of fact are just the damages without any settlement or responsibility reduction, that reduction then must come from the total amount of damages found by the trier of fact rather than some other amount.

B. The Language of the Damage Cap and the Purposes Behind the Damage Cap Suggest Courts Should Reduce a Plaintiff’s Responsibility Before Limiting a Health Care Defendant’s Liability.

While looking to the proportionate responsibility statute on its own indicates reduction early in the recovery process, looking at the damage cap on its own indicates it should not apply almost until the very end. As a reminder, the damage cap states: “[i]n an action on a health care liability claim where final judgment is rendered against a single health care institution, the limit of civil liability for noneconomic damages . . . shall be limited to an amount not to exceed \$250,000 for each claimant.”⁵³ The plain

⁴⁹TEX. CIV. PRAC. & REM. CODE ANN. § 33.013(a) (West 2015).

⁵⁰Roberts v. Williamson, 111 S.W.3d 113, 122 (Tex. 2003) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 33.013(a)).

⁵¹See *id.* at 122–23.

⁵²*Id.* at 123.

⁵³TEX. CIV. PRAC. & REM. CODE ANN. § 74.301(b) (West 2015).

meaning of the words “limit of civil liability” indicates the intent to have the cap apply after other damage reductions. Additionally, these words fully embody the purpose of the cap.

First, the meaning of the word liability indicates that the legislature intended for courts to apply the damage cap after applying any other damage reduction available by law. Liability is: “[t]he state of being bound or obliged in law or justice to do, pay, or make good something.”⁵⁴ This means that when writing the damage cap statute, the legislature intended to limit the amount of money a health care defendant would be obligated to pay.⁵⁵

Additionally, by using the words “not to exceed \$250,000,” the legislature created a cap that would only apply if the obligation of a defendant exceeded \$250,000. The court will only need to reduce an award to comply with the cap if the recovery surpasses the limit established by the legislature. The goal is to guarantee that a health care defendant never pays more than \$250,000 in noneconomic damages.⁵⁶ To accomplish this goal, the court must first determine what the defendant is obligated to pay to see if it will exceed \$250,000. The court cannot determine the obligation without first reducing based on a plaintiff’s percentage of responsibility.⁵⁷ After reducing the plaintiff’s responsibility, if the defendant’s liability is higher than \$250,000, then the court applies the damage cap.

These words fully embody the purpose behind the statute. The damage cap is used only when necessary to achieve the goals of the legislature.⁵⁸ The legislature enacted the damage cap to reduce the premiums for medical malpractice insurance, not to deprive plaintiffs any more than necessary.⁵⁹ The legislature researched other states’ damage caps and discovered that \$250,000 was the appropriate amount to reduce insurance premiums over time.⁶⁰ With this knowledge, the legislature established a delicate balance between reducing premiums and a plaintiff’s rights by limiting the civil

⁵⁴ *Liability*, BLACK’S LAW DICTIONARY (6th ed. 1990).

⁵⁵ See TEX. CIV. PRAC. & REM. CODE ANN. § 74.301(b); *Liability*, BLACK’S LAW DICTIONARY.

⁵⁶ See TEX. CIV. PRAC. & REM. CODE ANN. § 74.301(a).

⁵⁷ Discussed *infra* Part II(B). A court cannot determine a plaintiff’s recovery until after a plaintiff’s percentage of fault is reduced from the award. Determining a plaintiff’s recovery is the way to determine the amount a defendant is obliged to pay.

⁵⁸ HOUSE RESEARCH ORG., *supra* note 13, at 9.

⁵⁹ See *id.*

⁶⁰ *Id.*

liability to an amount not to exceed \$250,000.⁶¹ This means that a noneconomic damage award cannot be larger than \$250,000, not that it necessarily has to be less than \$250,000. This supports reading the statute to apply after other damage reductions because the goal of the damage cap is accomplished as long as the defendant pays a maximum amount of \$250,000. This is the amount the legislature decided would fulfill the expectation of reducing insurance premiums over time. Applying the cap before apportioning a plaintiff's responsibility unnecessarily reduces a plaintiff's damages to an amount lower than \$250,000. Therefore, the court should only apply the damage cap after reducing a plaintiff's fault and only if necessary.

Other courts have reached the same result with similar statutes. One such court is the El Paso Court of Appeals of Texas in *University of Texas at El Paso v. Nava*.⁶² The court in that case evaluated the order in which to apply a plaintiff's fault and a limitation on recovery found in the Texas Tort Claims Act.⁶³ The legislature passed the Texas Tort Claims Act in 1969 to create a way to bring suit against the State of Texas by "abolish[ing] governmental immunity in certain instances."⁶⁴ It passed as a "limited waiver of the state's sovereign immunities."⁶⁵ The Texas Tort Claims Act set a maximum amount of liability, similar to the damage cap: "[I]iability hereunder shall be limited to \$100,000 per person and \$300,000 for any single occurrence for bodily injury or death . . ."⁶⁶ In the case at hand, the jury awarded the plaintiff \$160,000, but found that she was 50% negligent.⁶⁷ The trial court reduced the plaintiff's damages by 50%.⁶⁸ Therefore, the proper amount of damages awarded to the plaintiff was \$80,000.⁶⁹ The court of appeals agreed with the court's decision reasoning that "[t]he money damages resulting from [the plaintiff's] negligence are \$80,000.00, which does not exceed the \$100,000.00 limit set by the

⁶¹ *See id.*

⁶² 701 S.W.2d 71 (Tex. App.—El Paso 1985, no pet.).

⁶³ *See id.* at 72.

⁶⁴ *Brown v. Owens*, 674 S.W.2d 748, 750 (Tex. 1984).

⁶⁵ *Univ. of Tex. at El Paso*, 701 S.W.2d at 72.

⁶⁶ *Id.* (citing Act of Apr. 11, 1973, 63d Leg., R.S., ch. 50, § 1, 1973 Tex. Gen. Laws 77, 77, amended by Act of June 19, 1983, 68th Leg., R.S., ch. 530, § 1, 1983 Tex. Gen. Laws 3084, 3084–85).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

legislature, so no further reduction need be made.”⁷⁰ Therefore, the court found that applying the plaintiff’s fault first was the appropriate way to reduce the plaintiff’s damages because as long as the award is below the limit, the purpose of the statute is fulfilled.⁷¹

Because of the similarities between the Texas Tort Claims Act and the damage cap, the court’s decision is persuasive on the issue presented in this case. The Texas Tort Claims Act is structured as a maximum liability for government actors. This directly correlates to the structure of the damage cap, which is designed as a maximum liability for health care professionals. The court’s decision in *University of Texas at El Paso* supports the contention that ensuring a plaintiff’s noneconomic damage award does not exceed \$250,000 accomplishes the goals and complies with the language of the statute. Therefore, reducing a plaintiff’s percentage of responsibility first is consistent with the purposes and language of the damage cap.

C. Comparing the Language in the Proportionate Responsibility Statute and the Language in the Damage Cap, the Legislature Intended for the Plaintiff’s Responsibility to Apply First.

When creating the damage cap and the proportionate responsibility statute, the legislature used two different phrases. The legislature used the phrase “reduce the amount of damages to be recovered” in the proportionate responsibility statute, while using the phrase “final judgment” in the damage cap.⁷² These two phrases indicate that the legislature intended for courts to reduce recovery by a plaintiff’s percentage of responsibility before applying the damage cap.

This becomes apparent when delving into the meaning of damages. The legal understanding of damages is the “sum of money which a person wronged is entitled to receive from the wrongdoer as compensation for the wrong.”⁷³ With this understanding, the court must reduce the damages found by the trier of fact by the plaintiff’s percentage of responsibility because a plaintiff is not entitled to receive compensation for that

⁷⁰ *Id.*

⁷¹ *See id.*

⁷² TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.012(a), 74.301(a) (West 2015).

⁷³ *Damages*, BLACK’S LAW DICTIONARY (9th ed. 2009) (citing FRANK GAHAN, *THE LAW OF DAMAGES* 1 (1936)).

percentage.⁷⁴ At this point, the court arrives at the plaintiff's recovery, which is "the obtainment of a right to something . . . by a judgment or decree."⁷⁵ This is when final judgment is rendered. Final judgment is not rendered until "[a] court's last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs . . . and enforcement of the judgment."⁷⁶ A court needs to establish a plaintiff's recovery before it is able to settle all the rights of the parties. Therefore, the recovery is established before a final judgment is rendered. A final judgment is needed in order for the damage cap to apply.⁷⁷ This leads to the idea that the court must first reduce by the plaintiff's responsibility and then apply the damage cap, if necessary.

The Court of Appeals of Texas in Dallas held the words "the amount of damages to be recovered" meant that the legislature intended for the damage cap to apply after damage reductions.⁷⁸ In *Irving Holdings, Inc. v. Brown*, the parties asked the court which order to apply the plaintiff's proportionate responsibility and the "actually paid or incurred" limitation on a plaintiff's economic damages.⁷⁹ The "actually paid or incurred" limitation reduces a plaintiff's medical or health care expenses to the amount actually paid or incurred.⁸⁰

To answer the question presented, the court turned to the language of the statutes.⁸¹ It determined the words "damages to be recovered" in the proportionate responsibility statute indicated the legislature's intent for courts to reduce by a plaintiff's responsibility first.⁸² The plain meaning of the statute indicates that proportionate responsibility functions as a reduction of damages found by the trier of fact in order to find the

⁷⁴ As a reminder, proportionate responsibility is "[t]he principle that reduces a plaintiff's degree of fault in causing the damage." *Proportionate Responsibility*, BLACK'S LAW DICTIONARY (9th ed. 2009). This means that the plaintiff is not entitled to any percent of damages that the court reduces due to the percentage of responsibility.

⁷⁵ *Recovery*, BLACK'S LAW DICTIONARY.

⁷⁶ *Final Judgment*, BLACK'S LAW DICTIONARY.

⁷⁷ TEX. CIV. PRAC. & REM. CODE ANN. § 74.301(a).

⁷⁸ See *Irving Holdings, Inc. v. Brown*, 274 S.W.3d 926, 931 (Tex. App.—Dallas 2009), *overruled on other grounds by* *Haygood v. De Escabedo*, 356 S.W.3d 390, 399–400 (Tex. 2011).

⁷⁹ *Id.* at 929.

⁸⁰ TEX. CIV. PRAC. & REM. CODE ANN. § 41.0105 (West 2015).

⁸¹ See *Irving Holdings*, 274 S.W.3d at 931.

⁸² See *id.*

recovery.⁸³ The court compared this language with the language found in the “actually paid or incurred” limitation.⁸⁴ It found that the “actually paid or incurred” limitation served as a limitation on recovery.⁸⁵ This is a key difference because “[a] plaintiff’s recovery is not determined until after the court has: (1) ascertained the amounts of damages a claimant has sustained, and then (2) if applicable, reduced those amounts under [the proportionate responsibility statute].”⁸⁶ Therefore, the court decided to reduce the plaintiff’s percentage of responsibility before it applied the “actually paid or incurred” limitation.⁸⁷ Just as the court reduces by the plaintiff’s responsibility before the “actually paid or incurred” limitation, it needs to reduce by responsibility before applying the damage cap. The court is required to reduce by a plaintiff’s percentage of responsibility in order to find a recovery. Once the recovery is established, the court can render a final judgment and then apply the damage cap, if necessary.

IV. THE CONSTRUCTION OF THE STATUTES MUST GIVE FULL EFFECT TO BOTH THE DAMAGE CAP AND THE PROPORTIONATE RESPONSIBILITY STATUTE.

It is important to further discuss the effects of both statutes because when two statutes conflict, the court has to construe them to give effect to both.⁸⁸ Here, the proportionate responsibility statute and the damage cap conflict because of the different monetary results that arise from the different possible applications. Reading the statutes to reduce based on a plaintiff’s percentage of responsibility before applying the damage cap gives effect to both statutes.

A. *The Damage Cap Does Not Need to Apply in Every Case to Receive Full Effect.*

Although the damage cap will not always be used when applying the plaintiff’s responsibility first, it is still in effect. This is because the legislature designed the damage cap in such a way that it would not always

⁸³ *See id.*

⁸⁴ *See id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *See id.* at 933.

⁸⁸ Beal, *supra* note 40, 415 (quoting *Wintermann v. McDonald*, 102 S.W.2d 167, 171 (Tex. 1937)).

apply. It will only apply when necessary to fulfill the purposes. As previously discussed, the legislature created the damage cap to solve the insurance crisis in the medical field.⁸⁹ The legislature designed the cap in a way that proved effective in other jurisdictions in order to “decrease the cost of [health care liability] claims . . . [and] do so in a manner that will not unduly restrict a claimant’s rights any more than necessary to deal with the crisis”⁹⁰ It created a cap that will only apply if a noneconomic damage award is more than \$250,000 once the final judgment is rendered.⁹¹ With the specific design of the statute, the cap will not always be applicable, but it is still fully effective. Therefore, when the court reduces by the plaintiff’s responsibility first and that takes her damages below \$250,000, the damage cap does not apply. This does not decrease the damage cap’s effectiveness; it is merely inapplicable in the situation. Likewise, there will be instances that her responsibility will not take her damages below \$250,000, and the court will need to further reduce her damages to comply with the cap. The cap is also clearly in effect in this situation.

The Dallas Court of Appeals reached the same result when it addressed a similar issue.⁹² As a reminder, the court in *Irving Holdings* decided that it should reduce by a plaintiff’s responsibility first and then apply the “actually paid or incurred” limitation.⁹³ In that case, the defendant argued this could not be the correct reading of the statute because courts have to give full effect to both statutes.⁹⁴ The defendant further argued that this would not give effect to the statutes because in certain situations the reduction by a plaintiff’s responsibility would eliminate the application of the “actually paid or incurred” limitation.⁹⁵ The court agreed with the defendant that its statutory interpretation needed to give effect to both statutes.⁹⁶ However, the court disagreed that apportioning a plaintiff’s percentage of responsibility first eliminates the effectiveness of the “actually paid or incurred” limitation:

⁸⁹ HOUSE RESEARCH ORG., *supra* note 13, at 9.

⁹⁰ Reyes, *supra* note 11, at 350 (footnote omitted).

⁹¹ TEX. CIV. PRAC. & REM. CODE ANN. § 74.301 (West 2015).

⁹² See *Irving Holdings, Inc. v. Brown*, 274 S.W.3d 926, 931–32 (Tex. App.—Dallas 2009, pet. denied).

⁹³ *Id.* at 933; see full discussion *infra* Part I.A.

⁹⁴ See *id.* at 931.

⁹⁵ *Id.*

⁹⁶ *Id.*

The factfinder's determination of damages based on the claimant's reasonable and necessary medical expenses may exceed the "actually paid or incurred" limitation of [S]ection 41.0105 in some cases and not in others. In the former cases, this would necessitate a further reduction of the claimant's recovery; in the latter cases it would not. This does not mean [S]ection 41.0105 is given effect in some cases but not in others.⁹⁷

The court explains that while the "actually paid or incurred" limitation is sometimes inapplicable, it is always in effect.⁹⁸ The same is true for the damage cap. The damage cap remains in effect even in the instances it is not used. The cap is designed so it will only apply in certain situations. Therefore, it is in line with the intent of the legislature for it to sometimes be inapplicable.

Similarly, Nebraska has a statutory damage cap limiting the liability of political subdivisions.⁹⁹ The damage cap states: "[t]he total amount recoverable under the Political Subdivisions Tort Claims . . . shall be limited to: (1) One million dollars for any person for any number of claims arising out of a single occurrence; and (2) Five million dollars for all claims arising out of a single occurrence."¹⁰⁰ The Nebraska Legislature created the damage cap "because of legislative concern regarding the cost and availability of liability insurance for political subdivisions, and the perceived need of the state to protect fiscal stability of its political subdivisions."¹⁰¹ The court held that this "limited waiver" of immunity should apply after the reduction of a plaintiff's fault.¹⁰² The court reasoned that:

a statutory limitation on damages . . . "applies to cap the total recovery after the reduction of the plaintiff's damages for his or her comparative negligence, rather than applying to the total damages established before the reduction for

⁹⁷ *Id.* at 931–32.

⁹⁸ *Id.*

⁹⁹ NEB. REV. STAT. § 13-926.

¹⁰⁰ *Id.*

¹⁰¹ *Connelly v. City of Omaha*, 816 N.W.2d 742, 758 (Neb. 2012) (quoting *Staley v. City of Omaha*, 713 N.W.2d 457, 469 (Neb. 2006)).

¹⁰² *Id.* at 758, 764–65.

comparative negligence, since the latter approach would multiply the effect of the damage limitation.”¹⁰³

The court explained that the damage limitation has to apply after reducing by a plaintiff’s fault because any other application works against both the purpose and the language of the statute.¹⁰⁴ The statute is supposed to have an effect similar to the damage cap. It is not in place to reduce a plaintiff’s damages; rather it is in place to ensure that a subdivision does not pay more than one million dollars. Reducing a plaintiff’s damages to an amount below one million dollars would be unnecessary and would multiply the effect of the statute. The effect is not supposed to be multiplied, it is supposed to stay within the constraints the cap provides.

This is similar to the damage cap in place in Texas. The damage cap creates a maximum amount for a defendant’s liability. Just as the courts are not supposed to multiply the effect of Nebraska’s damage limitation, Texas courts are not supposed to intensify the effect of the damage cap. Courts must stay within the language and purposes of the damage cap, and this means that courts must apply a plaintiff’s percentage of responsibility before applying the damage cap.

B. The Proportionate Responsibility Statute Is in Full Effect Only When It Is Applied Before the Damage Cap.

It is a rule of statutory construction that when two statutes are in conflict, the court needs to read them to give effect to both.¹⁰⁵ At first glance, it may appear that applying plaintiff’s responsibility first does not give the proportionate responsibility statute its full effect, because a few applications will lead to obscure results. But when delving further into the statutes, it is apparent that proportionate responsibility does get its full effect when applying responsibility first, even in these few peculiar situations.

It helps to give an example of the situation that gives rise to an odd result followed by the explanation of its effect. The curious situation could arise when a doctor performs the same surgery on two different patients and

¹⁰³ *Id.* at 764–65 (citing 57 AM. JUR. 2D *Municipal, County, School, and State Tort Liability, Tort Liability* § 602 (2012); see also *Univ. of Tex. at El Paso v. Nava*, 701 S.W.2d 71, 71 (Tex. App.—El Paso 1985, no pet.).

¹⁰⁴ *See id.*

¹⁰⁵ *Comm’rs Court of Caldwell Cty. v. Criminal Dist. Attorney, Caldwell Cty.*, 690 S.W.2d 932, 936 (Tex. App.—Austin 1985, writ ref’d n.r.e.).

makes the same mistake in both procedures. Both patients independently bring suit against the doctor. The only factual difference between the two suits is Patient A left out information when answering questions in her pre-operation exam.¹⁰⁶ The two juries determine that both Patient A and Patient B deserve \$500,000 as compensation for the noneconomic damages they suffered. Additionally, Patient A's jury determined she contributed 50% of the responsibility that led to the injury she sustained. Patient B's jury found he contributed 0% of the responsibility that led to his damages. In Patient A's case, the court will reduce her \$500,000 by her 50% of responsibility first and will end up with a \$250,000 recovery. Next, the court looks to the corresponding section of the damage cap, which states that the limit of liability for noneconomic damages cannot exceed \$250,000. Since her percentage of responsibility brought her damages to \$250,000, the damage cap does not apply, and Patient A will walk away with \$250,000 in noneconomic damages. On the other hand, Patient B does not have any responsibility to reduce his award, so the court will apply the damage cap and reduce his award to \$250,000. At the end of the day, Patient A and Patient B get the same recovery although Patient A shared 50% of the responsibility.

While this result does seem curious at first glance, when digging deeper, it is clear to see that it is not all that odd. This result is due to the effect the statutes are supposed to have. Both the proportionate responsibility statute and the damage cap get their full effect here.¹⁰⁷ The full effect of the statutes is demonstrated by the purposes behind creating them.

The proportionate responsibility statute is intended to alleviate the harshness of contributory negligence.¹⁰⁸ Under contributory negligence, a plaintiff's unreasonable actions that proximately caused her injury served as a complete bar to recovery.¹⁰⁹ The legislature perceived this as an extremely harsh result, so it moved to a system of proportionate responsibility.¹¹⁰ Under proportionate responsibility, rather than barring recovery, a plaintiff's responsibility proportionately reduces the recovery by her

¹⁰⁶ As a reminder, failing to answer pre-operation questions truthfully can be considered in a plaintiff's percentage of fault. *See Elbaor v. Smith*, 845 S.W.2d 240, 245 (Tex. 1992).

¹⁰⁷ This Comment previously examined the effect of the damage cap *infra* Part II.A. and thus, it will not be analyzed again in this section.

¹⁰⁸ *See Nabors Well Servs., Ltd. v. Romero*, 456 S.W.3d 553, 559–60 (Tex. 2015) (citing *Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 518 (Tex. 1978)).

¹⁰⁹ *See Parrott v. Garcia*, 436 S.W.2d 897, 901 (Tex. 1969).

¹¹⁰ *See Nabors Well Servs.*, 456 S.W.3d at 559–60.

fault.¹¹¹ Therefore, the purpose is to ensure that plaintiffs get the damages to which they are entitled, while not reducing the damages more than necessary.

This means the statute is in full effect when the plaintiff receives her damages reduced by her percentage of responsibility. In the example, because Patient A's damages are reduced according to her percentage of responsibility, she does not receive any compensation for her fault. Thus, the proportionate responsibility statute is given its full effect because the plaintiff does not recover any percentage of her responsibility. As for Patient B, he does not have any percentage of responsibility and is entitled to his full recovery. Therefore, the proportionate responsibility statute is inapplicable in the situation, but is still in full effect because he does not recover anything for his fault. Once the recovery is established, the court has to limit the doctor's liability to \$250,000. Thus, the court properly reduces his damages to \$250,000 and gives full effect to the cap. Both statutes get full effect when the plaintiff's percentage of responsibility is reduced first.

In the alternative, if the court capped the damages first, it would use both statutes, but not with the effect the statutes were supposed to have. This would not give either statute its full effect. The Louisiana Supreme Court reached the same conclusion when handling this issue.¹¹² The court confronted the same question presented here, whether to apply Louisiana's comparative fault statute first or the statutory cap in malpractice actions.¹¹³ The court decided to reduce by the plaintiff's fault first because applying the cap first is "unreasonable and manifestly unjust and is not supported by the language, purpose, or intent of the comparative fault act."¹¹⁴ If the court applied the damage cap first, it would be imposing what the Louisiana Supreme Court refers to as a double reduction.¹¹⁵ This is not supported by the purposes for creating comparative fault.¹¹⁶ The court uses a hypothetical to demonstrate its point:

A plaintiff rendered quadriplegic as a result of the defendant's medical malpractice is determined to be 10

¹¹¹TEX. CIV. PRAC. & REM. CODE ANN. § 33.012(a) (West 2015).

¹¹²See *Hall v. Brookshire Bros., Ltd.*, 848 So. 2d 559, 572 (La. 2003).

¹¹³See *id.* at 568.

¹¹⁴*Id.* at 571.

¹¹⁵*Id.*

¹¹⁶See *id.*

percent comparatively at fault and is awarded \$1,000,000.00 in damages. Under the [defendant's] position, this plaintiff's damage award, already reduced to \$400,000 . . . will be further reduced by another \$40,000.00, even though the jury found that the fault of others proximately caused the plaintiff \$900,000.00 (after deduction of the plaintiff's 10% fault) in damages. That further \$40,000.00 reduction will not serve to bring the award into alignment with principles of comparative fault.¹¹⁷

The principles of comparative fault in Louisiana are similar to the principles of proportionate responsibility in Texas. The comparative fault act was initially passed "to ameliorate the harshness of the former contributory negligence doctrine by apportioning losses between a plaintiff and a defendant when both are negligent."¹¹⁸ The court ensures that the Louisiana Legislature did not pass the comparative fault statute as punishment to a partially negligent plaintiff, but passed it to be "beneficial to plaintiffs in that it increased the probability that they would be compensated, at least in part, for their injuries."¹¹⁹ The court then examined the result of capping the damage first in the hypothetical it set out:

Rather than pay 40% of the plaintiff's damages, the [defendant] would be responsible for only 36% of those damages. While [the comparative fault statute] requires that each party bear responsibility for his or her own fault, it does not require that a plaintiff who is only 10% at fault suffer a reduction of her recovery from 40% (under the cap) to 36% (after applying the reduction for comparative fault to the cap), thereby enhancing and amplifying the reduction imposed on the plaintiff.¹²⁰

The court maintains that if it is going to reduce by a plaintiff's recovery, it needs to further a legitimate purpose.¹²¹ Capping the plaintiff's damages

¹¹⁷ *Id.* at 572.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *See id.*

first and then reducing by the plaintiff's fault serves no purpose in Louisiana.¹²²

The Texas and Louisiana statutes are similar. Both serve the purpose of alleviating the harshness of contributory negligence. Both are created to ensure that the plaintiff gets all damages to which she is entitled and to ensure that her damages are reduced only by her percentage of responsibility. Therefore, the logic the Louisiana Supreme Court uses is applicable to the issue at bar. Because the double reduction does not serve the purpose of either statute, applying the damage cap first would not give the cap the appropriate effect. The statutory construction analysis presented in this Comment is the only way and the proper way to read the proportionate responsibility statute and the damage cap together. The only way to give full effect to both statutes is to apply the plaintiff's percentage of responsibility first.

V. CONCLUSION

The plaintiff called into question at the beginning of this Comment should have a final damage award of \$250,000. The Texas Legislature carefully chose the language in both the proportionate responsibility statute and the damage cap. This is evidenced by simply looking at the legislative history behind these statutes. The words used were no mistake. The words were carefully crafted with a specific intent to have a certain effect and use. That is the reason the language of a statute is seen as a critical factor in determining the intent of the legislature, and that is exactly why if the language of a statute indicates a clear application the courts need to follow that application. To go against the intent prescribed would abandon all notions of statutory construction. Because the language here indicates the legislature's intent to apply the plaintiff's responsibility before applying the damage cap, courts should do just that.

¹²² *See id.*