The Business, Entrepreneurship & Tax Law Review

Volume 4 | Issue 1 Article 24

2020

No Cap: Analyzing the Kansas Supreme Court's Decision to Overturn Caps on Non-Economic Damages in Hilburn v. Enerpipe Ltd.

Raymond T. Rhatican

No Cap: Analyzing the Kansas Supreme Court's Decision to Overturn Caps on Non-Economic Damages in *Hilburn v. Enerpipe Ltd.*

Raymond T. Rhatican[*]

ABSTRACT

In the summer of 2019, the Kansas Supreme Court ruled that the state legislature's cap on non-economic damages violated the state constitution's right to trial by jury. In doing so, the Kansas high court overturned its own precedent in *Miller v. Johnson*, finding that the "inviolate" right to trial by jury is not subject to legislative meddling. Kansas also joined several other states, including Missouri, in rejecting a strained fact-law distinction employed by most states which uphold such caps in the face of right to jury challenges against the backdrop of "inviolate" constitutional language.

There is little to no "rational basis" for enacting these caps in the first place. Accordingly, courts should consider adopting the stronger "rational basis with bite" standard of review suggested by Judge Stegall's *Hilburn* concurrence, which would free courts from adhering to dubious precedent upholding caps on "procedural" grounds, and demand that statutes curtailing substantial constitutional rights maintain a legitimate connection to public welfare.

[*] Ray Rhatican is a second-year law student at the University of Missouri and an Associate Member of the *Business, Entrepreneurship, & Tax Law Review.* He graduated with a degree in Political Science in 2018 from the University of Missouri, where he was a fellow with the Kinder Institute on Constitutional Democracy. He would like to thank Zach Robinson, Sydney Johnson, Marissa Price, and JoEllen Grohs for their immense help throughout the writing process.

I. INTRODUCTION

Justice Louis Brandeis opined in his dissent to the U.S. Supreme Court's majority opinion in *New State Ice Co. v. Liebmann* that "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[1] During the summer of 2019, Kansas re-entered the fray of a nationwide debate regarding the constitutionality and economic legitimacy of legislative caps on non-economic damages, and distanced itself from a novel and controversial approach to legislative damage caps adopted seven years prior.[2] Following the Kansas Supreme Court's decision in *Hilburn v. Enerpipe Ltd.*, nine states maintain caps on non-economic damages in general tort or personal injury cases, nine maintain them in products liability cases, and 24 states maintain them in medical malpractice cases.[3] Six states enforce caps on total damages in medical malpractice cases.[4] In the remainder of states, caps have either not been passed or have been found unconstitutional.[5]

Damage caps shift an advantage from injured plaintiffs, who are otherwise able to obtain full compensation, to insurance companies who reap increased certainty and decreased payouts.[6] The legitimacy of these caps and their ability to survive scrutiny provides serious implications for the business and legal communities.[7] Caps on non-economic damages theoretically affect the rate of premiums offered by insurers, impacting their business decisions and bottom line.[8] These premiums in turn affect the business operations of insureds—such as physicians who may avoid certain procedures—otherwise beneficial to society, due to fear of litigation and increased premiums.[9] The Congressional Budget Office has suggested that damage caps in medical malpractice would also indirectly reduce consumer healthcare costs by limiting defensive medicine, a practice whereby physicians prescribe excess medical services under the pressure of potential lawsuits.[10] The "tort reform" initiatives that have ushered in these caps are often justified as a component

1. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting).

2. *See* Hilburn v. Enerpipe Ltd., 442 P.3d 509 (Kan. 2019).

3. *Fact Sheet: Caps on Compensatory Damages*, CTR. FOR JUST. & DEMOCRACY N.Y.C. L. SCH. (June 20, 2019), https://centerjd.org/content/fact-sheet-caps-compensatory-damages-state-law-summary#_ftnref5.

4. *Id.*

5. *Id.*

6. *See infra* Part VI.

7. Ronen Avraham & Alvaro Bustos, *The unexpected results of caps on non-economic damages,* INT'L REV. L. & ECON. 1 (2010), https://law.utexas.edu/faculty/ravraham/unexpected-effects-of-caps.pdf.

8. Kevin McManus, *Finding A Cure for High Medical Malpractice Premiums: The Limits of Missouri's Damage Cap and the Need for Regulation*, 49 ST. LOUIS U. L.J. 895, 913–15 (2005).

9. "Defensive medicine in simple words is departing from normal medical practice as a safeguard from litigation. It occurs when a medical practitioner performs treatment or procedure to avoid exposure to malpractice litigation. Defensive medicine is damaging for its potential to poses health risks to the patient. Furthermore, it increases the healthcare costs." M. Sonal Sekhar & N. Vyas, *Defensive Medicine: A Bane to Healthcare*, ANNALS MED. & HEALTH SCI. RES. (2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3728884/.

10. *Cost Estimate for H.R. 1215, Protecting Access to Care Act of 2017*, CONG. BUDGET OFF. (Mar. 22, 2017), https://www.cbo.gov/publication/52518; *See also* Sekhar & Vyas, *supra* note 9.

of a pro-business agenda.[11] Constitutionality aside, there is debate among legal and economic scholars as to whether these caps achieve their stated goal of providing certainty to insurers and lower premiums for physicians and consumers.[12] The results are mixed.[13]

Part II of this article lays out the legal background to Kansas' *Hilburn* decision. This background includes discussion of the national landscape concerning damage cap jurisprudence, particularly with respect to that of Missouri. Part II also explores the justifications underlying *Miller v. Johnson*, the 2012 case in which Kansas initially upheld their statutory damage caps.[14] Of particular interest in that case is the now-abandoned "quid pro quo" approach to Constitutional infringements. Part III of this article explores *Hilburn* in depth and explains the rationale supporting the decision. Part IV of this article pays special attention to a controversial "fact-law" distinction at the center of most opinions which uphold legislative caps on jury-determined damages, including the ongoing debate concerning this principle. Part V of this article discusses the right to a trial by jury as it existed at common law, which is of supreme import in states with constitutions that protect this right as "inviolate." Part VI of this article explores questions presented by the *Hilburn* decision, including the economic rationale underlying the legislative enactment of damage caps. Finally, Part VII of this article provides potential solutions for states considering the constitutional validity of legislative damage caps in the wake of *Hilburn*.

II. LEGAL BACKGROUND

Nearly all states that have enacted non-economic damage caps have experienced constitutional challenges to the judicial limitation, most frequently on the basis of the right to trial by jury.[15] Although § 5 of the Kansas Bill of Rights provides that "[t]he right of trial by jury shall be inviolate,"[16] the Kansas legislature imposed a statutory cap on non-economic damages in 1988.[17] Under this statute, recovery by each party for non-economic loss in any personal injury action was limited to $250,000, which was to incrementally grow to $350,000 by 2022.[18] In

11. Michelle Andrews, *This GOP Health Bill Proposes New Limits To Medical Malpractice Awards*, NPR (JUNE 28, 2017), https://www.npr.org/sections/health-shots/2017/06/28/534465478/this-gop-health-bill-proposes-new-limits-to-medical-malpractice-awards.

12. Kelly Kotur, *An Extreme Response or A Necessary Reform? Revealing How Caps on Noneconomic Damages Actually Affect Medical Malpractice Victims and Malpractice Insurance Rates*, 108 W. VA. L. REV. 873, 892–93 (2006).

13. *Compare* H.E. Frech III, *An Economic Assessment of Damage Caps in Medical Malpractice Litigation Imposed by State Laws and the Implications for Federal Policy and Law*, 16 HEALTH MATRIX 693, 695-707 (2006) (explaining how caps reduce incentive to bring lawsuits and should reduce premiums), *with* Michael A. Morrisey, *Medical Malpractice Reform and Employer-Sponsored Health Insurance Premiums*, HEALTH SERV. RES. (2008) (claiming there is "no statistically significant evidence that noneconomic damage caps exerted any meaningful influence on the cost of employer-sponsored health insurance.").

14. *See generally* Miller v. Johnson, 289 P.3d 1098 (Kan. 2012).

15. Christopher R. Staley, Comment, *Bypassing the Bill of Rights-the Kansas Supreme Court's Use of Quid Pro Quo to Analyze the Inviolate Right to Trial by Jury (*Miller v. Johnson*, 289 P.3d 1098 (Kan. 2012))*, 53 WASHBURN L.J. 147, 157 (2013).

16. KAN. CONST. Bill of Rights, § 5.

17. KAN. STAT. ANN. § 60-19a02 (West 2018), *invalidated by* Hilburn v. Enerpipe Ltd., 442 P.3d 509 (Kan. 2019).

18. *Id.*

2012, a medical malpractice plaintiff challenged the cap's constitutionality in *Miller v. Johnson*, under a right to trial by jury theory, pursuant to § 5 of the Kansas Bill of Rights.[19] The *Miller* court upheld the cap by extending to § 5 challenges the "quid pro quo" test utilized by the court in § 18 right to remedy challenges.[20]

Section 18 of the Kansas Bill of Rights provides that "[a]ll persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay."[21] The Kansas Supreme Court has repeatedly utilized a quid pro quo analysis to allow legislative alteration to a plaintiff's remedy.[22] However, unlike § 5, § 18 does not enshrine the right as "inviolate."[23] The *quid pro quo* test upholds a judicial limitation imposed by the legislature if it satisfies two prongs: (1) as applied, the limitation is reasonably necessary in the public interest, and (2) the legislature provides "an adequate substitute remedy" for impairment of Constitutional rights.[24] In extending the quid pro quo test to challenges pursuant to the § 5 right to trial by jury, the *Miller* court held the cap was "reasonably necessary to promote the public welfare" because it operates in the "broader scheme of mandatory insurance," and the state has an interest in the availability and affordability of that insurance.[25] This holding rested on the assumption, explored below, that damage caps have a meaningful relationship with consumer premium costs.[26] The court also argued that overturning application of quid pro quo would require dismantling the Kansas workers' compensation and no-fault insurance systems.[27] In so holding, *Miller* determined that, despite the Kansas Supreme Court's consistent determination that § 5 "preserves the jury trial right as it historically existed at common law" at the time of the Kansas Constitution's ratification,[28] the "inviolate" right to a trial by jury is not inviolate, but instead subject to subsequent legislative modification.[29] The right to jury trial as it existed at common law and the legislature's ability to alter the common law are more directly taken up below.[30]

Miller's extension of quid pro quo analysis to the right to trial by jury was controversial.[31] Kansas Supreme Court Judge Carol Beier's concurring opinion in *Miller* refused to adopt the majority's constitutional analysis and "mystifying" application of quid pro quo to justify an abridgement of a constitutional right, stating her desire to "kick [quid pro quo] to the curb where it always belonged."[32] Curiously, Kansas had distinguished itself prior to *Hilburn* as the only state to approach

19. *See generally Miller*, 289 P.3d at 1106.
20. *Id.* at 1113.
21. KAN. CONST. Bill of Rights, § 18.
22. *See., e.g.*, Samsel v. Wheeler Transp. Servs., Inc., 789 P.2d 541, 555 (Kan. 1990) ("Due process requires that the legislature substitute the viable statutory remedy of quid pro quo (this for that) to replace the loss of the right.").
23. *Compare* KAN. CONST. Bill of Rights, § 5, *with* KAN. CONST. Bill of Rights, § 18.
24. Hilburn v. Enerpipe Ltd., 442 P.3d 509, 512 (Kan. 2019).
25. *Miller*, 289 P.3d at 1114.
26. *See infra* Part VI..
27. *Miller*, 289 P.3d at 1144 (Beier, J., concurring in part and dissenting in part).
28. *Id.* at 1108 (majority opinion).
29. *Id.* at 1110 ("The decisions of this court are replete with instances of common-law rights being modified or abolished." (quoting Manzanares v. Bell, 522 P.3d 1291, 1301 (Kan. 1974))).
30. *See infra* Part V.
31. Staley, *supra* note 15, at 175 ("[T]he court's reliance on the quid pro quo analysis to a right to trial by jury challenge was flawed.").
32. *Miller*, 239 P.3d at 1132 (Beier, J., concurring); *Id.* at 1138.

caps with a quid pro quo inquiry regarding constitutionality.[33] Although Justice Brandeis once acknowledged that "[d]enial of the right to experiment may be fraught with serious consequences to the nation,"[34] commentators suggested in the aftermath of *Miller* that perhaps Kansas should have looked to its neighbors for guidance.[35]

Months before the *Miller* decision, the Missouri Supreme Court also addressed a constitutional challenge to statutory damage caps, and returned a verdict contrary to that of its western neighbor by finding the cap unconstitutional.[36] The court, also analyzing constitutional language enshrining the right to trial by jury as "inviolate,"[37] determined that the cap at issue "directly curtails the jury's determination of damages and, as a result, necessarily infringes on the right to trial by jury."[38]

III. THE *HILBURN* DECISION

Seven years after *Miller*, Judge Beier was able to pen the majority opinion in *Hilburn v. Enerpipe Ltd.,* a landmark 2019 case overturning Kansas Supreme Court precedent and invalidating the legislature's 1988 cap as unconstitutional.[39] *Hilburn* was decided against the backdrop of a recently tempered presumption of statutory constitutionality with regard to "fundamental interests."[40] This foundational change in Kansas jurisprudence eroded the *Miller* court's justification in relying heavily on stare decisis in upholding the cap,[41] which validated Judge Beier's qualms with the *Miller* decision and paved the way to the cap's demise.[42] The *Hilburn* majority, acknowledging this changed landscape, held that "in such cases, the presumption of constitutionality does not apply."[43]

Without upsetting the use of quid pro quo analysis in § 18 challenges,[44] the *Hilburn* court overturned *Miller*'s holding that this analysis could be extended to § 5 without running afoul of the Kansas Constitution and the "inviolate" status of the right to trial by jury.[45] In doing so, *Hilburn* held that § 5 provides more than a right

33. Staley, *supra* note 15, at 173 ("The Kansas Supreme Court is the only state supreme court in the United States to apply a quid pro quo test in determining whether a noneconomic damages cap violates the right to trial by jury.").

34. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandies, J., dissenting).

35. Staley, *supra* note 15, at 173.

36. *See* Watts v. Lester E. Cox Med. Ctrs, 376 S.W.3d 633, 636 (Mo. banc 2012).

37. *Id.* at 637 (citing MO. CONST. art. I, § 22(a)).

38. *Id.* at 640.

39. *See generally* Hilburn v. Enerpipe Ltd., 442 P.3d 509, 524 (Kan. 2019).

40. *See generally* Hodes & Nauser v. Schmidt, 440 P.3d 461, 499 (Kan. 2019) ("A more stringent test has emerged, however, in cases involving 'suspect classifications' or 'fundamental interests.'" (quoting State *ex rel.* Schneider v. Liggett, 576 P.2d 221, 227 (Kan. 1978))).

41. *Hilburn*, 442 P.3d at 519 ("The *Miller* majority also asserted that the cost-benefit analysis involved in evaluating the wisdom of following precedent favored application of a quid pro quo test to analysis of section 5 claims.").

42. Miller v. Johnson, 289 P.3d 1098, 1141–44 (Kan. 2012) (Beier, J., concurring in part and dissenting in part).

43. *See Hilburn*, 442 P.3d at 513.

44. *Appellate Court Digests,* KAN. B. ASS'N (June 14, 2019), https://www.ksbar.org/blogpost/1618780/326236/June-14-2019-Digests ("The section 5 right to jury trial is completely distinct from the section 18 right to remedy. A statutory cap substitutes the legislature's nonspecific judgment for a jury's specific judgment. This runs afoul of the constitution's grant of an "inviolate" right to a jury.").

45. *See Hilburn*, 442 P.3d at 514.

to *empanel* a jury.[46] The court cited Beier's *Miller* concurrence in finding that the Kansas Constitution placed the right to a jury determination of damages "beyond everyday legislative meddling. The people entrusted juries with the task of deciding damages."[47] In effect, the Kansas Supreme Court distanced itself from its reliance on the fact-law distinction in *Miller*.[48] *Hilburn* rejected the Attorney General's argument that the court should follow the lead of the majority of other states, such as Virginia,[49] which have upheld their caps on the basis of a rather technical fact-law distinction.[50] Instead, unlike in *Miller*, *the Hilburn* court was persuaded by the Kansas Constitution's protection of the right to trial by jury as "inviolate."[51] As a result, *Hilburn* determined that the disturbance of the jury's finding of fact with regard to the amount of the award was an impermissible encroachment on the jury's obligation to determine damages and ran afoul of § 5.[52] Specifically, *Hilburn* took issue with the suggestion that the legislature's "general" determination could be an adequate substitute for the "specific" determination of a jury.[53] For this encroachment on the inviolate right to a trial by jury, *Hilburn* found the legislature's cap on noneconomic damages facially unconstitutional.[54]

It is important to note that the *Hilburn* decision did not overturn the cap in actions for wrongful death or punitive damages.[55] Although the opinion does not expressly state this exception, the court's § 5 analysis is couched in preserving the right to trial by jury *as it existed* at the time the Kansas Constitution was ratified in 1859.[56] The Kansas Supreme Court has "consistently held that the determination of noneconomic damages" fits this criteria.[57] The statute providing a cause of action for wrongful death, for example, was not passed until 1963,[58] and though the legislature has the power to alter the common law with enactments such as that providing for wrongful death suits, it may not modify that which has been granted

46. *Id.* at 515 ("Giving the jury 'a practically meaningless opportunity to assess damages simply 'pays lip service to the form of the jury but robs it of its function.'" (quoting *Miller*, 289 P.3d. at 1136)).

47. *Id.* at 516.

48. *Miller*, 289 P.3d at 1136 ("Rather than stating in a straightforward way that K.S.A. 60–19a02 does impair the Section 5 right to jury trial, the majority feints toward then-Justice Kay McFarland's position in her concurrence in *Samsel II* that the right to jury trial does not extend to the remedy phase of trial.").

49. *Hilburn*, 442 P.3d at 521.

50. *Id.* at 521–24 ("For example, in Virginia, the Supreme Court has said, 'The resolution of disputed facts continues to be a jury's sole function. 'The province of the jury is to settle questions of fact, and when the facts are ascertained the law determines the rights of the parties.' Thus, the Virginia Constitution guarantees only that a jury will resolve disputed facts.").

51. *Id.* at 523 ("[W]e simply cannot square a right specially designated by the people as 'inviolate' with the practical effect of the damages cap: substituting juries' factual determinations of actual damages with an across-the-board legislative determination of the maximum conceivable amount of actual damages.").

52. *Id.* at 524.

53. *Id.*

54. *Id.*

55. *Id.* at 514; Chris Tillery, *Kansas Supreme Court Overturns Statutory Cap On "Pain and Suffering" And Other Noneconomic Damages In Personal Injury Cases*, SEIGFREID BINGHAM, http://www.sb-kc.com/news/2019/06/kansas-supreme-court-overturns-statutory-cap-on-pain-and-suffering-and-other-noneconomic-damages-in-personal-injury-cases/ (last visited Mar. 14, 2020).

56. *Hilburn*, 442 P.3d at 514.

57. *Id.*

58. KAN. STAT. ANN. § 60-1903 (West 2018), *invalidated* by Hilburn v. Enerpipe Ltd., 442 P.3d 509 (Kan. 2019).

constitutional protections, as was the existing Kansas common law upon ratification of the Kansas constitution.[59]

IV. THE FACT-LAW DISTINCTION

When reviewing the reasoning in the *Miller* and *Hilburn* decisions, it is important to keep in mind that the now-abrogated quid pro quo approach to § 5 was unique to Kansas' constitutional jurisprudence.[60] Most courts take a different analytical path.[61] As the majority in *Hilburn* acknowledges, "[t]he fact-law or fact-policy distinction has been relied on in varying degrees by almost all courts that have upheld damages caps in the face of jury trial-based challenges."[62]

Courts upholding caps on the basis of the fact-law distinction find that the "trial court's application of law to the facts" as found by a jury does not impede a plaintiff's right to a trial by jury.[63] In her dissent in *Watts v. Lester E. Cox Medical Centers*, the Missouri Supreme Court case that overturned Missouri's caps, Judge Mary Rhodes Russell argued that the cap merely represented the "substantive legal limits of a plaintiff's damage remedy," and the cap was, therefore, an appropriate legislative activity regarding a matter of law, as opposed to a matter of fact safely within the jury's discretion and the protection of the right to trial by jury.[64] This dissent followed Missouri precedent prior to the *Watts* decision, which upheld caps under the theory that the jury performed its proper role in assessing damages, and "[o]nly after the jury had performed its constitutional fact-finding duty would the court apply the substantive law (e.g., damage caps) to those facts."[65] As Russell saw it, once the jury had determined the fact of damages, it had "completed its constitutional task," and it fell to the court to apply the law.[66] This argument is perhaps at its most extreme in finding "the jury serves no function other than providing an individual his right to a trial by jury," and that the cap does not prevent the jury from "assessing damages," only from awarding them.[67] Russell cited the reasoning of the Ohio Supreme Court in *Arbino v. Johnson & Johnson*, which found that "[s]o long as the fact-finding process is not intruded upon and the resulting findings of fact are not ignored or replaced by another body's findings, awards may be altered *as a matter of law*."[68]

---

59. *Hilburn*, 442 P.3d at 516; *accord* Dodson v. Ferrara, 491 S.W.3d 542, 554 (Mo. banc 2016) ("*Sanders* court recognized that wrongful death is a purely statutory cause of action that did not exist at common law. As a result, 'the legislature has the authority to choose what remedies will be permitted' because it created the cause of action.").

60. *Hilburn*, 442 P.3d at 521 ("[L]ooking beyond our state borders, we note that, at the time *Miller* was decided, 19 states had addressed whether damages caps violated their state's constitutional jury protections, and not one had employed the quid pro quo test in its analysis.").

61. *Id.*

62. *Id.* at 521-22.

63. Watts v. Lester E. Cox Med. Centers, 376 S.W.3d 633, 649 (Mo. banc 2012) (Russell, J., concurring in part and dissenting in part).

64. *Id.*

65. David F. Maron, *Statutory Damage Caps: Analysis of the Scope of Right to Jury Trial and the Constitutionality of Mississippi Statutory Caps on Noneconomic Damages*, 32 MISS. C. L. REV. 109, 117 (2013).

66. *Watts*, 376 S.W.3d at 649.

67. *Id.* at 650.

68. *Id.* at 651 (citing Arbino v. Johnson & Johnson, 880 N.E.2d 420, 431 (Ohio 2007)).

Despite the reliance on this distinction by most states upholding legislative caps against "inviolate" right to trial by jury challenges,[69] the *Watts* majority refused to use this distinction to curtail a plaintiff's right to a jury's full and fair determination of damages,[70] citing a long recognition in Missouri that finding damages is amongst the jury's primary duties.[71] The legislative cap's "wholly independent" operation from the facts rendered it directly at odds with a jury finding of damages.[72] As a result, the cap "necessarily infringes" on the right to a trial by jury,[73] a right that is "substantial and valuable" and should be "carefully guarded against infringements."[74] To hold otherwise "would make constitutional protections of only theoretical value—they would exist only unless and until limited by the legislature."[75]

Despite acknowledging the "historical applicability of Section 5 to common-law tort actions," and that "the right of trial by jury shall be and remain as ample and complete as it was at the time when the constitution was adopted,"[76] Kansas' *Miller* majority reached the conclusion that legislative prerogative and availability of a substitute remedy excused an encroachment on the jury's determination as it existed at common law.[77] It was this point in particular that alienated Judge Beier.[78]

Judge Stegall's concurring opinion in *Hilburn* expressed his view that the fact-law distinction deserved more attention in the court's analysis.[79] His opinion acknowledged an "oblique" reference by the attorney general that a principal question to be addressed is whether the imposition of a cap on non-economic damages is substantive or procedural.[80] Stegall found that the legislature's insistence that the jury not be advised of the cap indicated an attempt to effect a "procedural interference with the inviolate right to a jury protected by section 5,"[81] as opposed to a substantive modification of the cause of action.[82] This action impermissibly substituted the legislature's judgment for that of the jury.[83] In doing so, the legislature "changed *who* decides, not *what* is being decided."[84] Had the legislature instead effected a substantive change, the enactment would have been subject to the more permissive § 18 "right to remedy" analysis.[85]

69. Hilburn v. Enerpipe Ltd., 442 P.3d 509, 522 (Kan. 2019).
70. *Watts*, 376 S.W.3d at 640 (majority opinion).
71. *Id.* at 639.
72. *Id.* at 640.
73. *Id.*
74. *Hilburn*, 442 P.3d at 513.
75. *Watts*, 376 S.W.3d at 643.
76. Miller v. Johnson, 289 P.3d 1098, 1137 (Kan. 2012) (Beier, J., concurring in part and dissenting in part) (noting the majority's concession toward the viability of the right to trial by jury).
77. *Hilburn*, 442 P.3d at 521 (citing the majority holding in *Miller*, 289 P.3d at 1117–18).
78. *Miller*, 289 P.3d at 1136 (Beier, J., concurring in part and dissenting in part) ("It is after its agreement on these two irrefutable points that the majority first goes astray.").
79. *Hilburn*, 442 P.3d at 526 (Stegall, J., concurring in part and dissenting in part).
80. *Id.* at 525.
81. *Id.*
82. *Id.*
83. *Id.* at 526.
84. *Id.*
85. *Id.* at 525.

V. RIGHTS AT COMMON LAW

Hilburn held that § 5 preserves the right to trial by jury as it existed at common law at the time of constitutional ratification.[86] A "fundamental" component of this right included the determination of non-economic damages.[87] The court found this right could not remain "inviolate" so long as an aggrieved plaintiff is not afforded "the jury's constitutionally assigned role of determining damages."[88] The majority found company in a like-minded Missouri Supreme Court, which held that giving the jury a "practically meaningless opportunity" to assess damages merely "pays lip service to the form of the jury but robs it of its function."[89] Instead, Kansans enshrined inflexible protection of the right to a trial by jury in their state constitution because "the people recognized the right to jury trial required protection from legislative efforts to modify it in ways that destroy the substance of that right."[90]

Despite agreeing "as a purely technical, theoretical matter" that legislatively applying a damage cap to a jury finding of factual damages is a matter of law, *Hilburn* held that the effect of this application is to improperly assign the determination of damages to someone or something other than the jury, whom the people of Kansas selected for this task in ratifying the Kansas Constitution.[91] Furthermore, although the Seventh Amendment to the U.S. Constitution has not been incorporated to the states,[92] *Hilburn* cited U.S. Supreme Court authority that more jury deference is to be afforded in the case of non-economic damages due to their less certain nature.[93]

Courts in states like Kansas are quick to recognize that legislatures have the power to alter the common law,[94] including the right to a jury assessment of damages.[95] To hold otherwise would severely curtail a legislature's power to enact or alter laws.[96] Despite this legislative authority, *Hilburn* adeptly pointed out the "fundamental" distinction between mere rights at common law, and the special class of common law rights that were specifically granted protection by the Kansas Constitution.[97] *Hilburn* cited the U.S. Supreme Court in finding the common law is typically flexible, but not in cases of constitutional protection of the right as it existed upon enshrinement.[98] In such cases, the court "is dealing with a constitutional provision that has in effect adopted the rules of the common law, in respect of trial by jury, as those rules existed" at the time of constitutional ratification.[99] An alteration

86. *Id.* at 514 (majority opinion).
87. *Id.*
88. *Id.* at 514–15.
89. *Id.* at 515 (quoting Watts v. Lester E. Cox Med. Ctrs, 376 S.W.3d 633, 642 (Mo. banc 2012)).
90. *Id.*
91. *Id.* at 523.
92. *Id.* ("United States Supreme Court jurisprudence on the Seventh Amendment's scope in civil trials, while not binding on the states, also provides some insight.").
93. *Id.* at 523–24 (citing Dimick v. Schiedt 293 U.S. 474, 479 (1935)).
94. *Id.* at 525 (Stegall, J., concurring).
95. Maron, *supra* note 65, at 119 ("It follows that the power to abolish causes of action includes the power to abolish causes of action for damages in amounts of above the statutory limit.").
96. *Id.*
97. *Hilburn*, 442 P.3d at 516 (majority opinion).
98. *Id.* (citing Dimick v. Schiedt 293 U.S. 474, 487 (1935)).
99. *Id.*

of these rules is in fact not an alteration of the common law, but of the constitution itself.[100]

In overturning Missouri's cap, the *Watts* court determined that the "heretofore enjoyed" language of Missouri's constitution provided an entitlement to a jury trial "in actions to which they would have been entitled to a jury when the Missouri Constitution was adopted."[101] The court found that statutory caps on damages "simply did not exist and were not contemplated by the common law" when Missourians ratified their constitution.[102] As a result, the right to a jury "as heretofore enjoyed" is not subject to legislative limits on jury-determined damages.[103] *Hilburn* cited *Watts* and like-minded states extensively in determining that "[g]iving the legislature the authority to limit damages by changing the common law, or otherwise, violates § 5 of the Kansas Bill of Rights by taking the damage question away from the jury."[104]

VI. QUESTIONING THE CAP'S PURPOSE

Following this decision, one may reasonably expect a sizable economic effect on consumers as insurance carriers brace for uncertainty and potentially massive judgments.[105] Following the opinion in *Hilburn*, many commentators predicted the worst, suggesting "the ruling will open the floodgates to high-dollar lawsuits that will drive up the cost of care for everyone."[106] Others lamented that the cap had "been effective in keeping costs down for small business owners" and produced a more favorable legal climate than Missouri, where a lack of caps "affected patient care and business costs."[107]

Nevertheless, the research on this issue is largely nonconclusive and filled with cherry-picked data that is often unreliable.[108] On one hand, some economic scholars argue that "[e]conomic principles, markets, and the results of empirical research indicate caps are effective in reducing medical liability insurance costs, thereby reducing health care costs."[109] The limited size of possible judgments reduces the incentive to bring lawsuits for personal injury and medical malpractice, promoting judicial economy.[110] For example, modeling suggests a non-economic damage cap

100. *Id.*
101. Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633, 637-38 (Mo. banc 2012) (quoting State *ex rel.* Diehl v. O'Malley, 95 S.W.3d 82, 85 (Mo. banc 2003)).
102. *Id.* at 639.
103. *Id.*
104. *Hilburn*, 442 P.3d at 516 (quoting Samsel v. Wheeler Transp. Servs., Inc., 789 P.2d 541, 562 (1990) (Herd, J., dissenting)).
105. Andy Marso, *Kansas Patients Can Now Win Big in Doctor Malpractice Suits*, CLAIMS J. (July 11, 2019), https://www.claimsjournal.com/news/midwest/2019/07/11/291924.htm ("The Kansas Medical Society, which represents doctors, said the state 'has enjoyed a stable medical malpractice environment for many years' but that was about to change thanks to the 'unfortunate and costly decision by the court.'").
106. *Id.*
107. John Breslin, *Business leaders bothered by Kansas Supreme Court's 'awful' decision to remove cap on damages,* LEGAL NEWSLINE (June 28, 2019), https://legalnewsline.com/stories/512673594-business-leaders-bothered-by-kansas-supreme-court-s-awful-decision-to-remove-cap-on-damages.
108. Francisco F. Guzman Andrade, Comment, *Tort Reform—How the Phrase "As Heretofore Enjoyed" Subjected Wrongful Death Plaintiffs to Noneconomic Damages Caps in Missouri*, 70 RUTGERS U. L. REV. 983, 987 n.30 (2018) (analyzing Dodson v. Ferrara, 491 S.W.3d 542 (Mo. banc 2016)).
109. Frech III, *supra* note 13, at 696.
110. *Id.*

of $250,000 may actually provide a medical malpractice plaintiff, such as that in *Hilburn*, with a *negative* expected recovery when considering the astronomical cost of pursuing the litigation.[111] On the other hand, despite the diminished incentives, caps do not seem to have a practical effect on judicial efficiency, as "[d]amage limits do not significantly reduce the number of lawsuits filed."[112]

In addition to judicial economy, legislatures have the effect on insurers and consumers in mind when enacting caps.[113] As above, the efficacy of caps in achieving this goal is unclear. Although modeling suggests caps "should" reduce insurance premiums,[114] this is not certain in practice. For example, despite surviving a pair of constitutional challenges in 1985,[115] California's cap on non-economic damages failed to prevent climbing insurance rates.[116] Scholars suggest that a meaningful correlation between damage caps and insurance premiums is hard to come by.[117] The lack of empirical consensus that caps keep costs down in exchange for the extreme burden placed on victims is of grave concern, as ineffective legislation would mean that "insurance companies reap increased profits through windfall legislation that reduces their exposure, while the pain and disability of malpractice victims persists uncapped."[118]

Many criticize the practice of imposing these caps in pursuit of the elusive goal of lowering premiums, as "damage caps, as currently implemented in the United States, are an ineffective means of resolving the medical malpractice crises that repeatedly plague the insurance system."[119] As another example of the failure of caps on non-economic damages to reign in soaring insurance premiums, between 2002 and 2003, Missouri saw a precipitous decline in non-economic damage awards reaching the state's cap, with a record low of five judgments in 2003 as well as a reduction in the amount of economic damage awards exceeding $1 million.[120] Despite the falling payouts, "medical malpractice insurance premiums doubled, rising from $113.5 to $227 million," a record high.[121] Former Missouri Insurance Director Jay Angoff found that the 15 largest medical malpractice insurers nationwide doubled their premiums from 2000 through 2004, despite an unremarkable change in payouts.[122]

The now-abrogated *Miller* decision, which upheld caps in Kansas just months following Missouri's invalidation of the same,[123] allowed for a post-*Watts* and pre-

111. *Id.* at 700.
112. *Id.*
113. Frank A. Perrecone & Lisa R. Fabiano, *The Fleecing of Seriously Injured Medical Malpractice Victims in Illinois*, 26 N. ILL. U. L. REV. 527, 530 (2006); McManus, *supra* note 8, at 905.
114. Frech III, *supra* note 13, at 706-07 ("Imposing caps on the states which currently do not have them would have reduced loss payments in 2004 by approximately $251 million.").
115. Hoffman v. United States, 767 F.2d 1431, 1437 (1985); Fein v. Permanente Med. Group, 695 P.2d 665, 683 (1985).
116. Kotur, *supra* note 12.
117. Morrisey, *supra* note 13, at 2124 ("No statistically significant evidence that noneconomic damage caps exerted any meaningful influence on the cost of employer-sponsored health insurance").
118. Perrecone & Fabiano, *supra* note 114, at 531.
119. Carrie Lynn Vine, *Addressing the Medical Malpractice Insurance Crisis: Alternatives to Damage Caps*, 26 N. ILL. U. L. REV. 413, 414 (2006).
120. McManus, *supra* note 8, at 912–13.
121. *Id*. at 913.
122. Perrecone & Fabiano, *supra* note 114, at 534.
123. *See generally* Watts v. Lester E. Cox Med. Centers, 376 S.W.3d 633 (Mo. 2012).

Hilburn period of comparison between Kansas and Missouri.[124] Although Missouri payouts exceeded those in Kansas between 2017 and 2018, Kansas' increase tracked the national average, while Missouri's increase was only 1% higher.[125]

The cap-imposed limitation on damages recoverable by aggrieved medical malpractice plaintiffs, combined with the substantially increased burden felt by physicians, calls into question who actually benefitted from the cap's protection. Despite the encroachment upon their right to trial by jury, plaintiffs have not reaped the benefit of these caps, even with assurances that this legislative limitation on potential judicial remedies would reduce the burden of insurance premiums.[126] Nor have physicians benefitted,[127] in spite of the promise of lower premiums for medical malpractice insurance and a resulting improvement of the quality of healthcare.[128] Some argue this tort reform has done more harm than good:

> the burden of this type of legislation "falls exclusively on those extremely unfortunate victims" who suffer the most serious and catastrophic injuries. A jury verdict in favor of the plaintiff for a limited amount has not received full compensation for their injuries if the legislature statutorily, and arbitrarily, caps the recovery at a lesser amount than their actual damages, without any tangible benefit to consumers.[129]

Moreover, this impact may be disproportionately borne by those who can least afford it.[130] This data and lack of foundational support for the notion that public economic interests are served by the imposition of damage caps undercuts their supposed purpose and calls into question whether such legislation should enjoy extensive deference and technical justification from the judiciary.

VII. TAKE A "BITE" OUT OF CONSTITUTIONAL INFRINGEMENTS

The above suggests that insurance companies have reaped a great benefit from state courts upholding legislative damage caps. The tenuous fact-law (or procedural-substantive) distinction rests on strained logic and results in extreme hardship for seriously injured victims, without consequent relief for physicians and other insureds. Missouri and Kansas, among others, have at last curtailed this reasoning and restored the promise of "inviolate" protection of the right to trial by jury. The

124. Stephen R. Clark, *Avoiding the Appearance of Impropriety: Missouri and Kansas Supreme Court Decisions on the Constitutionality of Caps on Noneconomic Damages Demonstrate the Need for Objective Procedures in the Selection of Special Judges*, 77 ALB. L. REV. 1441, 1450 (2014) ("The now-stark difference between the two states will provide an interesting laboratory for studying the effects of non-economic damages caps in medical malpractice cases on plaintiffs, defendants, medical professionals, insurance providers, and the judiciary.").

125. Lily Lieberman, *Kansas, Missouri medical malpractice payouts total $78.2M in 2018,* KANSAS CITY BUSINESS JOURNAL (April 4, 2019), https://www.bizjournals.com/kansas-city/news/2019/04/04/kansas-missouri-medical-malpractice-payouts-2018.html.

126. *See* Frech III, *supra* note 13, at 693

127. McNamus, *supra* note 121, at 913.

128. Kotur, *supra* note 12, at 893 ("The justification for caps on noneconomic damages is to reduce the cost of medical malpractice insurance, which in turn will retain doctors in the state and strengthen the quality of healthcare available in the state.").

129. *Id*.

130. *Id*. at 897 ("Reforms in Texas 'slammed the courthouse doors shut on those who can least afford it - children, stay-at-home moms and the elderly'").

several states still using this logic to maintain a legislative cap regime, especially those interpreting constitutions containing "inviolate" or similar language, should look to the reasoning of *Watts* and *Hilburn*. After years of experimentation, the results have shown that cap proponents' fears of astronomical judgments and frivolous lawsuits causing premium spikes were misplaced: the premiums rose anyway.

The dubious nature of caps' effect on rising premiums also raises questions regarding statutory presumptions of validity and rational basis review. As discussed above, *Hilburn* was decided in the context of a weakened presumption of statutory validity regarding fundamental constitutional interests.[131] With respect to those fundamental constitutional interests, the presumption of constitutionality no longer applies.[132] While *Miller* held that legislative enactments such as caps are subject to "rational basis" or clear error review,[133] it is clear that abridgments of constitutionally protected rights should be scrutinized for more than "whether a statutory classification bears some rational relationship to a valid legislative purpose."[134] In his concurring opinion in *Hilburn*, Judge Stegall highlighted the dispositive nature of standard of review to his own analysis of the case.[135] He wrote that he was "content, at present, to abandon our clear error standard of review in favor of de novo review in this case, as set forth by the majority,"[136] and suggested that Kansas courts should do so when any portion of the Kansas Constitution is implicated.[137] In arguing that Kansas should dispel with clear error review regarding enactments affecting constitutional rights, Judge Stegall discussed "rational basis with bite" review of legislative enactments.[138] He also questioned, while postponing an answer, whether Kansas courts should have a mandate to deem statutes unconstitutional when their constitutional violation is not clear "beyond a reasonable doubt."[139]

In due process challenges to statutes, most states undergo rational basis analysis, which involves an assessment of the reasonableness of a given statute.[140] Included in this reasonableness inquiry is an assessment of "the social and economic conditions that existed when the statute was enacted or at the time the case was decided."[141] Judge Stegall explained this was an appropriate analysis to undergo regarding the *Hilburn* § 5 challenge.[142] As a piece of "economic legislation," the damage cap is properly subject to rational basis review in that it must rationally relate to a "valid legislative purpose."[143] Under this standard, a court must analyze

131. Hodes & Nauser v. Schmidt, 440 P.3d at 499 (quoting State *ex rel.* Schneider v. Liggett, 223 Kan. 610 (Kan. 1978)) ("A more stringent test has emerged, however, in cases involving 'suspect classifications' or 'fundamental interests.'").
132. Hilburn v. Enerpipe Ltd., 442 P.3d 509, 513 (2019).
133. Miller v. Johnson, 289 P.3d at 1119.
134. *Id*.
135. *Hilburn*, 442 P.3d at 52 (Steagall, J., concurring in part and concurring in judgment).
136. *Id*. at 527.
137. *Id*. ("Perhaps courts should exercise de novo review over Kansas statutes when any portion of our Constitution is implicated, not only when judicially favored rights are involved.").
138. *Id*. at 529; *see also Hodes & Nauser v. Schmidt*, 440 P.3d at 550 ("Contrary to modern notions of 'rational basis' review, the judicial inquiry demanded by section 1 would look to the actual legislative record rather than to hypothetical reasons or any possible imagined rationale. The test has occasionally been described as 'rational basis with bite.'").
139. *Hilburn*, 442 P.3d at 528.
140. Maron, *supra* note 65, at 126.
141. *Id*.
142. *Hilburn*, 442 P.3d at 529.
143. Clark, *supra* note 125, at 1449.

the actual purpose of the legislature in enacting a given statute.[144] However, substantial deference is still required, and it can be difficult to strike down a statute such as a damage cap even when the apparent purpose—such as lowering premiums or healthcare costs—is dubious.[145]

In *Miller*, the Kansas Supreme Court found that the cap passed muster under rational basis review, finding it "reasonably conceivable" that the cap furthered "the objective of reducing and stabilizing insurance premiums by providing predictability and eliminating the possibility of large noneconomic damage awards."[146] As a result of this type of analysis, damage caps survive in many states despite courts remaining "unconvinced of the wisdom of limiting quality of life damages for severely injured victims."[147] Judge Stegall tacitly suggests "rational basis with bite," a standard under which "[i]n order to be a constitutional exercise of power, *every* act of our Legislature must be rationally related to the furtherance or protection of the commonwealth."[148] Given that the legislature does not have constitutional authority to "act in arbitrary, irrational, or discriminatory ways," and that a "rational basis with bite" standard would entail a hard inquiry into the true purpose of an enactment, Judge Stegall arguably opens the door to an economic analysis of whether faulty economic platitudes may justify the invalidation of statutes curtailing constitutional rights.[149]

This heightened scrutiny applied to statutes curtailing substantial rights afforded by constitutional protection would disallow such dubious economic legislation as the caps enacted by the Kansas legislature, with the stated purpose of lowering premiums for consumers and healthcare providers. This legitimate purpose review could ensure that legislation is rational and non-arbitrary and does not discriminate against the most vulnerable.[150] Such a standard could obviate the need for courts to undergo painstaking analysis of the technical and theoretical differences between substantive and procedural functions.

VIII. CONCLUSION

The Kansas Supreme Court boldly overturned precedent only seven years old in its landmark decision in *Hilburn v. Enerpipe Ltd.*, finding that its previous decision in *Miller v. Johnson* rested on weak foundation. Specifically, the *Hilburn* majority found that quid pro quo was an insufficient replacement for a constitutionally guaranteed "inviolate" right to a trial by jury, and although the legislature has the right to alter the common law, this prerogative does not extend to rights at common law that have been enshrined in the Kansas Constitution as they existed on the date

144. *Hilburn*, 442 P.3d at 529.

145. Maron, *supra* note 65, at 130, *quoting* Judd v. Drezga, 103 P.3d 135, 139 (Utah 2004) ("The court noted that 'the empirical truth of these findings is a matter of some dispute' and it was 'unconvinced of the wisdom of limiting quality of life damages for severely injured victims.' But because the issue was fairly debatable, the court could not conclude that 'the legislature [had] overstepped its constitutional bounds when it determined that there was a crisis needing a remedy.'").

146. Miller v. Johnson, 289 P.3d 1098, 1121 (2012).

147. Judd v. Drezga, 103 P.3d 135, 140 (Utah 2004).

148. Hodes & Nauser, MDs, P.A. v. Schmidt, 440 P.3d 461, 551 (2019) (Stegall, J., dissenting).

149. *Id.* ("Applying the necessary deference, a court must examine the actual legislative record to determine the real purpose behind any law in question before it can conclude the law is within the limited constitutional grant of power possessed by the State.").

150. Kotur, *supra* note 12, at 897.

of ratification. The "fact-law" distinction relied on by *Miller* and the majority of courts upholding caps on non-economic damages was appropriately discarded as legitimate in theory and technicality alone. *Hilburn* held that *stare decisis* and presumptions of statutory validity do not pave the way for the legislature to curtail fundamental constitutional rights. Further, Judge Stegall's dissenting opinion suggests a more appropriate standard of review for constitutional challenges of this nature, "rational basis with bite." Under this standard, courts would be free to assess economic legitimacy in finding whether an enactment bears a reasonable relation to the public welfare, and if not, would be able to invalidate the enactment on this basis alone.