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## LAW SUMMARY

# Missouri's Statutory Cause of Action for Medical Negligence: Legitimate Application of Legislative Authority or Violation of Constitutional Rights?

*Emily Mace\**

### I. INTRODUCTION

For hundreds of years, victims of medical malpractice have been authorized to file civil actions against negligent health care providers.<sup>1</sup> Missouri affirmed the presence of a medical negligence cause of action when the legislature adopted the common law practices of seventeenth-century England under Missouri Revised Statutes section 1.010 in 1825.<sup>2</sup> A right to trial by jury accompanied the cause of action and included the right to receive a damages award in accordance with a jury determination.<sup>3</sup>

In 1986, Missouri Revised Statutes section 538.210 capped noneconomic portions of jury awards in medical negligence cases at \$350,000.<sup>4</sup> The plaintiff in *Adams v. Children's Mercy Hospital*, a 1992 case, was first to challenge the statute on constitutional grounds. Section 538.210 survived, however; the Supreme Court of Missouri determined the fact-finding role of a jury remains uncompromised even when judges alter the awards.<sup>5</sup>

When caps were tested again in *Watts v. Lester E. Cox Medical Centers*, in 2012, the Supreme Court of Missouri took a different approach and ruled

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1. See *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633, 638 (Mo. 2012) (en banc) (“English common law [of 1607] recognized medical negligence as one of five types of ‘private wrongs’ that could be redressed in court.”).

2. Joseph Fred Benson, *Reception of the Common Law in Missouri: Section 1.010 as Interpreted by the Supreme Court of Missouri*, 67 MO. L. REV. 595, 599–600 (2002).

3. *Watts*, 376 S.W.3d at 639.

4. MO. REV. STAT. § 538.210.1 (Cum. Supp. 2013), *invalidated by Watts*, 376 S.W.3d at 633.

5. *Adams ex rel. Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 907 (Mo. 1992) (en banc), *overruled by Watts*, 376 S.W.3d at 633.

that noneconomic damages limitations did interfere with the right to trial by jury.<sup>6</sup> The court reasoned that imposing a cap on jury awards, when the cap would not have applied to identical causes of action in 1820, amounted to an unconstitutional alteration of the right to trial by jury.<sup>7</sup> The Missouri General Assembly responded by enacting Senate Bill 239 (“SB 239”), which attaches noneconomic damages caps to a new statutory cause of action for medical negligence.<sup>8</sup>

This Note discusses whether SB 239 is likely to survive future arguments against its constitutionality. Part II describes the bases upon which damages caps have been challenged in Missouri and the role of the right to trial by jury in analyzing damages caps. Part III then provides a short procedural history of SB 239. Finally, Part IV discusses whether SB 239 attempts to alter a common law cause of action in a way that renders the statute unconstitutional, or whether it abolishes and recreates the cause of action in a manner permitted by the Missouri Constitution.

## II. LEGAL BACKGROUND

Whether to limit the value of noneconomic damages recoverable by victims of medical negligence is a contentious issue and one Missouri courts and lawmakers have struggled to manage.<sup>9</sup> Such caps were first instituted in Missouri in 1986, after more than 150 years of practice without them.<sup>10</sup> In 2012, the law was overturned for constitutional reasons, but it recently returned in a slightly new form.<sup>11</sup> Under SB 239, medical malpractice – traditionally a common law tort<sup>12</sup> – became a statutory cause of action and is again accompanied by limitations on noneconomic damages.<sup>13</sup> This Part examines more closely the path leading to a statutory cause of action, including the origins of medical malpractice claims in Missouri and the cases related to caps on noneconomic damages.

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6. *Watts*, 376 S.W.3d at 641.

7. *Id.* at 638.

8. MO. ANN. STAT. § 538.210 (West 2015).

9. Carol J. Miller & Joseph Weidhaas, *Medical Malpractice Noneconomic Caps Unconstitutional*, 69 J. MO. B. 344, 344 (2013).

10. *Id.*

11. *Id.* at 345.

12. *Watts*, 376 S.W.3d at 638 (“Watts’ action for medical negligence . . . is the same type of case that was recognized at common law when the constitution was adopted in 1820.”).

13. § 538.210.

### A. Overview of Damages, Caps on Damages

As civil tort suits, today's medical malpractice claims allow awards of both compensatory and punitive damages.<sup>14</sup> Compensatory damages are categorized as economic damages – financial charges resulting from the injury, including lost wages and medical expenses – or noneconomic damages – intangible costs of the injury, such as physical impairment or the experience of pain.<sup>15</sup> Noneconomic damages are commonly considered compensation for “pain and suffering,” though the scope of these awards reaches far beyond the physical experience of pain.<sup>16</sup>

Medical malpractice lawsuits are unique among civil claims for the frequency with which states ascribe to them noneconomic damages caps.<sup>17</sup> At least thirty-seven states have at some time imposed limits on the amount of money that may be awarded to victims of medical negligence.<sup>18</sup> Such limitations first began appearing in the early 1970s, when the limited availability of medical malpractice insurance led to dramatically increased costs.<sup>19</sup> This “perceived crisis” caused many states to impose damages caps; legislatures hoped to stabilize the medical malpractice insurance market by decreasing risk, thereby encouraging companies to invest, which would increase insurance availability.<sup>20</sup>

Currently, damages in medical negligence cases are capped in thirty states.<sup>21</sup> Of these, twenty-five states – including Missouri – specifically cap noneconomic damages for medical malpractice or personal injury under statutes.<sup>22</sup> Five others employ broader caps covering more than the category of

14. Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. REV. 391, 398 (2005).

15. *Id.*

16. Neil Vidmar & Leigh Anne Brown, *Tort Reform and the Medical Liability Insurance Crisis in Mississippi: Diagnosing the Disease and Prescribing a Remedy*, 22 MISS. C. L. REV. 9, 27–28 (2002).

17. Sharkey, *supra* note 14, at 396.

18. Robert Miller & Kathleen Carrington, *Noneconomic Damages: A State-By-State Survey of Limiting Caps and Their Constitutionality*, INT'L ASS'N DEF. COUNSEL NEWSL. 1, 2–8 (2014), [http://www.iadclaw.org/assets/1/19/Product\\_Liability\\_June\\_2014.pdf](http://www.iadclaw.org/assets/1/19/Product_Liability_June_2014.pdf).

19. Leonard J. Nelson, III, Michael A. Morrisey & Meredith L. Kilgore, *Damages Caps in Medical Malpractice Cases*, 85 MILBANK Q. 259, 261 (2007).

20. *Id.* at 261–62.

21. *See infra* notes 22–23.

22. *See* ALASKA STAT. ANN. § 09.17.010 (West 2015); CAL. CIV. CODE § 3333.2 (West 2015); COLO. REV. STAT. ANN. § 13-64-302 (West 2015); FLA. STAT. ANN. § 766.118 (West 2015); HAW. REV. STAT. ANN. §§ 663-8.5, 8.7 (West 2015); IDAHO CODE ANN. § 6-1603 (West 2015); KAN. STAT. ANN. § 60-19a02 (West 2015); MD. CODE ANN., CTS. & JUD. PROC. § 11-108 (West 2015); MASS. GEN. LAWS ANN. ch. 231, § 60H (West 2015); MICH. COMP. LAWS ANN. § 600.1483 (West 2015); MISS. CODE ANN. § 11-1-60 (West 2015); MO. ANN. STAT. § 538.210 (West 2015); MONT. CODE ANN. § 25-9-411 (West 2015); NEV. REV. STAT. ANN. § 41A.035 (West 2015);

noneconomic damages.<sup>23</sup> Twenty states do not limit the amount of money recoverable by plaintiffs in medical malpractice cases.<sup>24</sup>

### *B. Medical Malpractice as a Cause of Action in Missouri*

Records of medical malpractice decisions in England date back to the twelfth century.<sup>25</sup> Such causes of action developed as part of the common law, acknowledging that injuries arising from physicians' or surgeons' "neglect or want of [s]kill" constituted a "private wrong" actionable in court.<sup>26</sup> Medical negligence lawsuits traveled with the English across the Atlantic, and in the 1800s began to appear in the United States.<sup>27</sup>

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N.C. GEN. STAT. ANN. § 90-21.19 (West 2015); N.D. CENT. CODE ANN. § 32-42-02 (West 2015); OHIO REV. CODE ANN. § 2323.43 (West 2015); OKL. STAT. tit. 23, § 61.2 (West 2015); S.C. CODE ANN. § 15-32-220 (West 2015); S.D. CODIFIED LAWS § 21-3-11 (West 2015); TENN. CODE ANN. § 29-39-102 (West 2015); TEX. CIV. PRAC. & REM. CODE ANN. § 74.301 (West 2015); UTAH CODE ANN. § 78B-3-410 (West 2015); W. VA. CODE ANN. § 55-7B-8 (West 2015); WIS. STAT. ANN. § 893.55 (West 2015).

23. See IND. CODE ANN. § 34-18-14-3 (West 2015); LA. STAT. ANN. § 40:1299.42 (2015); NEB. REV. STAT. ANN. § 44-2825 (West 2015); N.M. STAT. ANN. § 41-5-6 (West 2015); VA. CODE ANN. § 8.01-581.15 (West 2015).

24. See Miller & Carrington, *supra* note 18 (the twenty states without damages caps are Alabama, Arizona, Arkansas, Connecticut, Delaware, Georgia, Illinois, Iowa, Kentucky, Maine, Minnesota, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Wyoming). Legislatures in Connecticut, Delaware, Iowa, Maine, New Jersey, New York, Rhode Island, and Vermont have simply never touched the issue. *Id.* State constitutions in Arizona, Arkansas, Kentucky, Pennsylvania, and Wyoming prevent such limitations. See ARIZ. CONST. art. II, § 31 (West, Westlaw through 2015 legislative session); ARK. CONST. art. V, § 32 (West, Westlaw through 2015 legislative session); KY. CONST. § 54 (West, Westlaw through 2015 legislative session); PA. CONST. art. III, § 18 (West, Westlaw through 2015 legislative session); WYO. CONST. art. X, § 4 (West, Westlaw through 2015 legislative session). The Illinois and Minnesota legislatures chose to repeal noneconomic damages caps statutes that had been enacted. See 735 ILL. COMP. STAT. 5/2-1706.5 (repealed 2013); MINN. STAT. § 549.23 (repealed 1990). Alabama, Georgia, New Hampshire, Oregon, and Washington lack caps because their highest courts found the statutes imposing them unconstitutional. See *Moore v. Mobile Infirmity Ass'n*, 592 So. 2d 156 (Ala. 1991); *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218 (Ga. 2010); *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980), *overruled by* *Cnty. Res. for Justice, Inc. v. City of Manchester*, 917 A.2d 707 (2007); *Klutschkowski v. PeaceHealth*, 311 P.3d 461 (Or. 2013) (en banc); *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989) (en banc), *amended by* 780 P.2d 260 (Wash. 1989).

25. B. Sonny Bal, *An Introduction to Medical Malpractice in the United States*, 467 CLINICAL ORTHOPAEDICS & RELATED RES. 339, 339 (2009).

26. 3 WILLIAM BLACKSTONE, COMMENTARIES \*166, \*122.

27. Bal, *supra* note 25, at 339.

Settlers of European descent who came to Missouri chose to adopt laws similar to those with which they were already familiar.<sup>28</sup> In 1816, the Missouri territory enacted a reception statute, proclaiming that “[t]he common law of England . . . and all statutes made by the British parliament . . . prior to [1607] . . . shall be the rule of decision in this territory.”<sup>29</sup> Similar language was used in Missouri Revised Statutes section 1.010, a version of the rule enacted after Missouri became a state.<sup>30</sup> As a common law cause of action clearly present in England prior to 1607, the ability to bring claims against providers for medical negligence has existed in Missouri for more than 200 years.<sup>31</sup>

### C. The “Inviolable” Right to Trial by Jury

When a cause of action was created and whether it was a product of common law or statute has proven relevant in determining which rights accompany it – particularly when the right in question is that of a trial by jury.<sup>32</sup> This concept was illustrated by the Supreme Court of Missouri in *State ex rel. Diehl v. O’Malley*.<sup>33</sup> *Diehl* held that a claim for damages brought under the Missouri Human Rights Act was accompanied by the right to a jury trial.<sup>34</sup> The court’s decision focused on the nature of the claim: “Diehl has filed a civil action, for damages only, under the Missouri Human Rights Act. This action is neither equitable nor administrative in nature. Diehl’s civil action for damages for a personal wrong is the kind of case triable by juries from the inception of the state’s original constitution.”<sup>35</sup>

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28. Benson, *supra* note 2, at 597–98.

29. 1816 Mo. Laws 32. Scholars generally agree that the general assembly chose the year 1607 in reference to the founding of Jamestown, the first permanent English settlement in what is now the United States. Benson, *supra* note 2, at 599–600.

30. See Joseph Fred Benson, *Ages of the Law: A Brief Legal History of Missouri, Part I – 1803 to 1860*, 68 J. MO. B. 24, 25 (2011) (“The 1816 act lasted until 1825, when the General Assembly enacted the current reception statute. The 1825 statute . . . [only] omitted the 1816 phrase that read, The common law of England . . . made by the British parliament in aid of or to supply the defects of the said common law.”) (second alteration in original); see also MO. ANN. STAT. § 1.010 (West 2015) (the current reception statute) (“The common law of England and all statutes and acts of parliament made prior to the fourth year of the reign of James the First, of a general nature, . . . are the rule of action and decision in this state.”).

31. *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633, 638 (Mo. 2012) (en banc).

32. See *State ex rel. Diehl v. O’Malley*, 95 S.W.3d 82, 85–88 (Mo. 2003) (en banc); *Estate of Overbey v. Chad Franklin Nat’l Auto Sales N.*, 361 S.W.3d 364, 375–77 (Mo. 2012) (en banc).

33. *Diehl*, 95 S.W.3d at 82.

34. *Id.* at 92.

35. *Id.* at 92.

The court found that denying the plaintiff's request for a jury trial was unconstitutional, and that a jury should have been allowed to determine damages.<sup>36</sup>

In *Scott v. Blue Springs Ford Sales*, the Supreme Court of Missouri again stated that civil actions for damages are accompanied by the right to a jury trial.<sup>37</sup> There, the claim for damages was filed under the Missouri Merchandising Practices Act.<sup>38</sup> The court clarified that even a statutory claim holds the right to trial by jury if it is a claim for damages.<sup>39</sup> As a result, it is possible that the right to trial by jury is attached to a great many causes of action created throughout the last two centuries.

Missouri's Constitution states, "[T]he right of trial by jury as heretofore enjoyed shall remain inviolate."<sup>40</sup> The Supreme Court of Missouri has established that this phrase means the right to trial by jury "is 'beyond the reach of hostile legislation.'"<sup>41</sup> Interpretation of that phrase, however, varies between judges.

*Diehl* stated that by including the phrase "as heretofore enjoyed," the authors of the Missouri Constitution meant for the right to jury trial to remain in every way as it was in 1820; that is, the right should not deviate from "that which existed at common law before the adoption of the first constitution."<sup>42</sup> Therefore, any cause of action warranting a jury trial existing in 1820 is still accompanied by the right today.<sup>43</sup> That restricting the application of a jury award fundamentally limits the right to a jury trial a Missourian would have enjoyed in 1820 is an argument used in the fight against damages caps.<sup>44</sup>

#### D. Medical Malpractice Damages Caps in Missouri

Statutorily imposed caps on noneconomic damages in medical malpractice claims first appeared in Missouri in 1986, in Missouri Revised Statutes section 538.210.<sup>45</sup> The caps were passed as part of a larger bill codifying recovery of damages for "personal injury or death arising out of the rendering

36. *Id.* at 91.

37. *Scott v. Blue Springs Ford Sales, Inc.*, 176 S.W.3d 140, 142 (Mo. 2005) (en banc).

38. *Id.* at 143.

39. *Id.* ("[A] statute is not valid that provides for punitive damages but precludes a jury trial to determine those damages.").

40. Mo. CONST. art. I, § 22(a) (West, Westlaw through 2014 general election).

41. *Diehl*, 95 S.W.3d at 92 (quoting *Lee v. Conran*, 111 S.W. 1151, 1153 (Mo. 1908)).

42. *Id.* at 84–85; *Miller v. Russell*, 593 S.W.2d 598, 605 (Mo. Ct. App. 1979) ("Thus, the right to jury trial protected by the present constitution is that which existed at common law before the adoption of the first constitution.").

43. *Diehl*, 95 S.W.3d at 84–85.

44. *Miller & Weidhaas*, *supra* note 9, at 345.

45. *Id.* at 344.

of or failure to render health care services”<sup>46</sup> and limiting the payout for non-economic damages to \$350,000.<sup>47</sup> This amount was set to adjust for annual inflation in accordance with the U.S. Department of Commerce estimates and applied to each individual occurrence of malpractice for each defendant in the suit.<sup>48</sup> Noneconomic damages were defined as those “arising from nonpecuniary harm including, without limitation, pain, suffering, mental anguish, inconvenience, physical impairment, disfigurement, loss of capacity to enjoy life, and loss of consortium.”<sup>49</sup>

For nearly twenty years, the law remained unchanged. It did not, however, go unchallenged. In *Adams v. Children's Mercy Hospital*, Julia Adams filed suit after doctors administered nearly three times the proper amount of crystalloid solution while performing surgery on her eight-year-old daughter, Nicole.<sup>50</sup> Crystalloid solution is used during surgeries to replace fluids lost by the body, but the excessive amount introduced to Nicole's system led to significant swelling.<sup>51</sup> Because a doctor had removed the endotracheal tube maintaining Nicole's air supply, her throat closed and her brain spent six minutes without oxygen, leading to severe physical and mental impairments.<sup>52</sup> An award providing more than \$13 million in noneconomic damages accompanied a jury verdict for the plaintiff.<sup>53</sup> The court, in accordance with the law capping damages, subsequently lowered this amount.<sup>54</sup>

In her challenge of the award limitation, Adams argued that noneconomic damages caps for medical malpractice interfered with the fundamental right to trial by jury.<sup>55</sup> The Supreme Court of Missouri disagreed.<sup>56</sup> It stated that the jury's role is the finding of fact, including the determination of economic and noneconomic damages.<sup>57</sup> Enforcing damages caps, it reasoned, should be considered applying the law to the facts, which is the court's job.<sup>58</sup> Consequently, according to the *Adams* court, limiting damages is a performance of

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46. MO. ANN. STAT. § 538.210.1 (West 2015).

47. MO. REV. STAT. § 538.210.1 (2005), *invalidated by* *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633 (Mo. 2012) (en banc), *amended by* L.2015, S.B. No. 239, § A.

48. MO. REV. STAT. § 538.210.1 (1986), *amended by* L.2005, H.B. No. 393, § A.

49. MO. REV. STAT. § 538.205(7) (1986) (current version at § 538.205(8)).

50. *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 900 (Mo. 1992) (en banc).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 903.

56. *Id.*

57. *Id.* at 907.

58. *Id.*



legal duty completely separate from and subsequent to that of the jury.<sup>59</sup> The court retained Adams's reduced award and the caps remained in place.<sup>60</sup>

The original version of section 538.210 operated with no further constitutional challenges. Damages caps increased each year according to inflation, reaching \$579,000 in 2005.<sup>61</sup> At that time, the state legislature reexamined the caps and passed House Bill 393.<sup>62</sup> This bill ordered that the \$350,000 damages cap be reinstated as a hard limit; the cap would not be adjusted for inflation.<sup>63</sup> It also prevented the cap from addressing each occurrence of negligence separately, instead applying it to the whole injury without regard to the number of defendants.<sup>64</sup>

### *E. Relevance of the Common Law Status of Medical Negligence*

In 2012, the Supreme Court of Missouri considered a second challenge to the constitutionality of damages caps on medical negligence awards in *Watts v. Lester E. Cox Medical Centers*.<sup>65</sup> The plaintiff in this case alleged negligence on the part of doctors in providing prenatal care to herself and her son, Naython.<sup>66</sup> Approximately one week before her due date, Watts visited a clinic in response to cramps and decreased fetal movement.<sup>67</sup> A doctor examined Watts, but according to the court, "did not perform appropriate tests, failed to notify Watts of the significance of decreased fetal movement and failed to perform any further diagnostic monitoring."<sup>68</sup> Two days later, when Watts visited the hospital due to continued lack of fetal movement, doctors found indications of fetal hypoxia and acidosis.<sup>69</sup> Despite having knowledge of this diagnosis and being trained to perform immediate Caesarean sections in such situations, the doctor waited ninety minutes before delivering Naython.<sup>70</sup> The result was severe damage to Naython's brain.<sup>71</sup> The jury found in favor of Watts and awarded \$1.45 million in noneconomic damages.<sup>72</sup> Under section 538.210, the court reduced the award.<sup>73</sup>

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59. *Id.*

60. *Id.* at 908.

61. Miller & Weidhaas, *supra* note 9, at 344.

62. *Id.*

63. *Id.*

64. *Id.*

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

66. *Id.* at 636.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 635.

73. *Id.*

Like Adams, Watts contended that noneconomic damages caps should be declared unconstitutional because they violated the right to a jury trial.<sup>74</sup> She made no novel arguments and, instead, simply asked the court to reconsider whether the jury's role was compromised when the damages it awarded were reduced.<sup>75</sup>

The majority in *Watts* approached the language of article I, section 22 of the Missouri Constitution with “an originalist’s view.”<sup>76</sup> They used the reasoning found in *Diehl* to determine that the phrase “heretofore enjoyed” referred to causes of action which, prior to 1820, were accompanied by a right to trial by jury.<sup>77</sup> Because medical malpractice claims for damages existed at common law in 1820, the right to trial by jury attached to the cause of action at hand.<sup>78</sup> Caps on damages, however, were not part of Missouri common law in 1820.<sup>79</sup> The court stated that any change to the common law right constitutes failure of adherence to the stipulation that the right must “remain inviolate.”<sup>80</sup> It concluded that imposing caps on medical malpractice noneconomic damages “directly curtails the jury’s determination of damages,” effectively changing the right that existed at common law.<sup>81</sup> To the extent that section 538.210 capped the amount of money plaintiffs could receive from a jury award, it was struck down.

The reasoning of *Watts* was not confined to the medical malpractice world for long. In 2014, the Supreme Court of Missouri applied the holding in *Watts* to lawsuits involving merchandising practices.<sup>82</sup> In *Lewellen v. Franklin*, a jury awarded the plaintiff \$2 million in punitive damages when it found defendants engaged in fraudulent misrepresentation and unlawful merchandising practices.<sup>83</sup> The award far exceeded then-present caps on punitive damages and had thus been reduced by the trial court.<sup>84</sup> When the plaintiff challenged the cap placed on her common law fraud claim, the court unanimously determined the application of *Watts* to be appropriate and the cap to violate the right to trial by jury.<sup>85</sup>

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74. *Id.*

75. *Id.* at 637.

76. Miller & Weidhaas, *supra* note 9, at 346.

77. *Watts*, 376 S.W.3d at 638.

78. *Id.*

79. *Id.* at 639.

80. *Id.* at 638.

81. *Id.* at 640.

82. See *Lewellen v. Franklin*, 441 S.W.3d 136, 139 (Mo. 2014) (en banc).

83. *Id.* at 139.

84. *Id.* at 142.

85. *Id.* at 142–43.

## III. RECENT DEVELOPMENTS

The ruling in *Watts* incited an almost immediate response from state legislators. Before the end of 2012, the Missouri Senate began formulating a bill that would bring back noneconomic damages caps.<sup>86</sup> Under the proposed legislation, medical negligence would become a statutory cause of action.<sup>87</sup> Lawmakers may have had in mind the recent *Sanders v. Ahmed* decision, in which the Supreme Court of Missouri ruled that caps on noneconomic damages for statutorily created causes of action are constitutional.<sup>88</sup> The Senate's first attempt at passing such a law was unsuccessful; legislators in the House of Representatives also pursued the matter by proposing similar legislation.<sup>89</sup>

On January 14, 2015, Missouri State Senator Dan Brown presented the first draft of what would become the new rule of medical negligence.<sup>90</sup> The Senate passed the bill 28-2 on March 12, 2015, and the House passed it 125-27 on April 21, 2015.<sup>91</sup> On May 7, 2015, Governor Jay Nixon signed the bill, and it took effect August 28, 2015.<sup>92</sup>

SB 239 amends three sections of Missouri law related to medical negligence.<sup>93</sup> First, a statement added to section 1.010 specifically excludes medical malpractice claims from the body of English common law initially adopted by the State of Missouri, stating it is "the intent of the general assembly to replace those claims with statutory causes of action."<sup>94</sup> Second, a new definition has been incorporated into section 538.205 – that of "catastrophic personal injury."<sup>95</sup> Third, a special exception for catastrophic personal injuries was added.<sup>96</sup>

The new version of section 538.210 sets a cap of \$400,000 on medical malpractice noneconomic damages, to be increased at a rate of 1.7% annually.<sup>97</sup> It only applies to recovery for the injury as a whole and not to each individual occurrence or each defendant.<sup>98</sup> Most notably, the section designates

86. Zachary J. Cloutier, Comment, *What Watts Forgot to Mention: Equal Protection Analysis of Missouri's Noneconomic Damage Cap*, 83 UMKC L. REV. 403, 411–12 (2014).

87. *Id.*; see also S. 64, 97th Gen. Assemb., 1st Reg. Sess. (Mo. 2013).

88. *Sanders v. Ahmed*, 364 S.W.3d 195, 204 (Mo. 2012) (en banc).

89. See H.R. 112, 97th Gen. Assemb., 1st Reg. Sess. (Mo. 2013).

90. *History of Missouri Senate Bill 239*, LEGISCAN LLC, <https://legiscan.com/MO/bill/SB239/2015> (last visited Aug. 29, 2016).

91. *Id.*

92. *Id.*; see also MO. ANN. STAT. § 538.210 (West 2015).

93. See S. 239, 98th Gen. Assemb., 1st Reg. Sess. (Mo. 2015).

94. § 1.010.2.

95. Defined as quadriplegia, paraplegia, loss of two or more limbs, injuries to the brain resulting in permanent cognitive impairment, irreversible major organ failure, or severe vision loss. *Id.* § 538.205(1).

96. See *id.* and accompanying text.

97. *Id.* § 538.210.

98. *Id.* § 538.210.2.

medical negligence as a statutory cause of action, “replacing any such common law cause of action.”<sup>99</sup> Because the common law status of the medical negligence cause of action provided the basis for the ruling of unconstitutionality in *Watts*, it has been speculated that this change will protect SB 239 from a future finding of unconstitutionality.<sup>100</sup>

#### IV. DISCUSSION

In the last decade, an average of 14,538 cases of medical malpractice have been reported in the United States annually.<sup>101</sup> It is not unreasonable, then, to suspect that the act of medical negligence inspiring Missouri's next constitutional challenge to damages caps has already occurred. When that case reaches the Supreme Court of Missouri, its parties will almost certainly argue whether the legislature, in enacting the medical negligence statute, altered the right to trial by jury or abolished the common law cause of action and recreated it as a statutory cause of action. This Part explains how a statutory cause of action may retain the right to trial by jury and why SB 239 proves problematic in a constitutional analysis.

##### A. Implications of *Watts*

Decisions made by the Supreme Court of Missouri are “controlling in all other courts” in the state, making it the ultimate authority on legal interpretation in the state.<sup>102</sup> Jurisdiction over “cases involving the validity of a . . . provision of the constitution of [the] state” belongs exclusively to the Supreme Court of Missouri.<sup>103</sup> Though the court in *Watts* may have been politically colored in that the swing vote belonged to a Democrat-appointed guest judge replacing a Republican appointee, its decision carries the full weight of authority of the highest court in Missouri.<sup>104</sup>

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99. *Id.* § 538.210.1.

100. Greg Minana & Ashley Rothe, *Missouri Tort Reform Reformed Again: Medical Malpractice Damage Caps Reinstated*, HUSCH BLACKWELL HEALTHCARE L. INSIGHTS (May 11, 2015), <http://www.healthcarelawinsights.com/2015/05/11/missouri-tort-reform-reformed-again-medical-malpractice-damage-caps-reinstated/>.

101. See U.S. DEP'T OF HEALTH AND HUMAN SERVS. ET AL., NATIONAL PRACTITIONER DATA BANK: 2012 ANNUAL REPORT 1, 29 (Feb. 2014), <http://www.npdb.hrsa.gov/resources/reports/2012npdbannualreport.pdf>.

102. MO. CONST. art. V, § 2 (West, Westlaw through 2014 general election).

103. *Id.* § 3.

104. See Blythe Bernhard & Virginia Young, *Medical Malpractice Cap is Struck Down by Missouri Supreme Court*, ST. LOUIS POST-DISPATCH (Aug. 1, 2012), [http://www.stltoday.com/news/state-and-regional/missouri/medical-malpractice-cap-is-struck-down-by-missouri-supreme-court/article\\_7bb71afd-add3-5cde-a253-07faade808c.html](http://www.stltoday.com/news/state-and-regional/missouri/medical-malpractice-cap-is-struck-down-by-missouri-supreme-court/article_7bb71afd-add3-5cde-a253-07faade808c.html).

*Watts* required the court to interpret what the framers of Missouri's constitution intended when they said, "[T]he right to trial by jury as heretofore enjoyed shall remain inviolate."<sup>105</sup> The court determined that the clause attaches the right to a jury trial exactly as it would have been done in 1820.<sup>106</sup> It found all causes of action deserving a jury trial in 1820 still have that right today, and the right should be administered as it was at that time.<sup>107</sup>

It was correct for the court to interpret the constitution in such a strict manner. The right to trial by jury is one of the most unique and sacred elements of American jurisprudence and is deeply ingrained in our culture.<sup>108</sup> Every state constitution, and the U.S. Constitution, includes the right.<sup>109</sup> Juries are "instrument[s] for the protection of individual liberty," and, as such, courts should and do hesitate to interfere with their decisions.<sup>110</sup> The right to trial by jury is the Missouri Constitution's only guarantee accompanied by the language "shall remain inviolate." Clearly the framers firmly believed the right should not be altered.<sup>111</sup>

### *B. The Right to a Jury Trial Must Accompany Medical Negligence*

Labeling medical negligence a statutory cause of action indicates the Missouri General Assembly's belief that under *Watts*, the right to trial by jury adheres only to those 1820 causes of action existing in their identical form today. It appears that by altering the nature of the claim, the legislature seeks to establish medical negligence as a cause of action nonexistent in 1820, thereby escaping the reach of article I, section 22(a).

#### 1. A Right Untouchable by the Legislature

SB 239 conflicts with common law. At common law, medical malpractice is a cause of action for which noneconomic damages cannot be capped, as caps fail to maintain the jury trial right established in 1820.<sup>112</sup> Due to the passage of SB 239, medical malpractice is now deemed a statutory cause of action for which noneconomic damages can be capped; the statute operates as though the cause of action need not comply with the jury trial right established in 1820.

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105. *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633, 637 (Mo. 2012) (en banc).

106. *Id.* at 639.

107. *Id.* at 638–39.

108. See VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 31, 245 (2001) (describing the right to trial by jury as a "unique and fascinating institution" which is "deeply embedded in the American democratic ethos").

109. *Id.*

110. *Id.*

111. See MO. CONST. art. 1, § 22(a) (West, Westlaw through 2014 general election).

112. See *Watts*, 376 S.W.3d at 633.

According to the Supreme Court of Missouri, “[C]ommon law is the law of our land unless abrogated by statute or Constitution.”<sup>113</sup> Common law is generally subject to alteration; the legislature may determine a portion of the common law is no longer appropriate for use in the state and replace it with a statute.<sup>114</sup>

In Kansas, it has long been accepted that the ability of the legislature to change common law includes the power to “modify the right to a jury trial.”<sup>115</sup> Within the confines of the Kansas Constitution’s due process requirement, the right may be altered if it is believed “to promote the general welfare of the people of the state.”<sup>116</sup> Such standards apply despite the fact that Kansas, like Missouri, declares the right to trial by jury “shall be inviolate” in its constitution.<sup>117</sup>

It is because of the Kansas Legislature’s ability to affect the right to trial by jury that statutorily imposed noneconomic damages caps have survived constitutional challenges in Kansas.<sup>118</sup> In determining whether statutory limitations violate the right to trial by jury, Kansas courts do not ask if damages caps alter a common law right.<sup>119</sup> Instead, they ask if statutory limitations serve public interest and if the substitutionary remedy provided is adequate to survive due process and equal protection scrutiny.<sup>120</sup> In 2012, the Kansas Supreme Court provided affirmative answers to both questions, allowing noneconomic damages in medical negligence cases to remain uncapped.<sup>121</sup>

The Supreme Court of Missouri, however, has established that the Missouri General Assembly does not enjoy the same ability to alter the right to trial by jury. In 1916, the court clearly distinguished the right to trial by jury from other common law rights that could be affected by the General Assembly.<sup>122</sup> In *Elks Investment Co. v. Jones*, the court stated, “[n]o legislative change in procedure can impair it,” and “all the substantial incidents and consequences that pertained to the right of trial by jury [in 1820] are beyond the reach of hostile legislation.”<sup>123</sup>

To the extent that SB 239 allows legislative limitation of the right to a jury trial, it must be struck down.

113. *L. E. Lines Music Co. v. Holt*, 60 S.W.2d 32, 34 (Mo. 1933).

114. *Sanders v. Ahmed*, 364 S.W.3d 195, 205 (Mo. 2012) (en banc) (“The General Assembly has the right to create causes of action and to prescribe their remedies. The General Assembly may negate causes of action or their remedies that did not exist prior to 1820.”).

115. *Kan. Malpractice Victims Coal. v. Bell*, 757 P.2d 251, 258–59 (Kan. 1988).

116. *Manzanares v. Bell*, 522 P.2d 1291, 1300 (Kan. 1974).

117. KAN. CONST. B. OF R. § 5 (West, Westlaw through 2016 legislative session).

118. *Miller v. Johnson*, 289 P.3d 1098, 1109–10 (Kan. 2012).

119. *Kan. Malpractice Victims Coal.*, 757 P.2d at 260.

120. See *Manzanares*, 522 P.2d at 1300; *Miller*, 289 P.3d at 1109.

121. See *Miller*, 289 P.3d at 1121.

122. *Elks Inv. Co. v. Jones*, 187 S.W. 71, 74 (Mo. 1916).

123. *Id.*

## 2. A Right Attached to Analogous Actions

Simply changing the label on the medical malpractice claim has not substantively altered the theory of the tort. The two elements of an offense arising under SB 239 are “that the health care provider failed to use that degree of skill and learning ordinarily used under the same or similar circumstances by members of the defendant’s profession and that such failure directly caused or contributed to cause the plaintiff’s injury or death.”<sup>124</sup> These bear a striking resemblance to the common law rule requiring plaintiffs to prove that defendants breached the standard of care, thereby causing plaintiffs’ injuries.<sup>125</sup> For all practical purposes, besides awarding damages, medical malpractice claims remain the same.

Simply because a statute does not expressly grant the right to a jury trial does not eliminate the right. Following the historical precedent of attaching the right to trial by jury to legal actions, the Supreme Court of Missouri found the right “implied in all cases in which an issue of fact, in an action for the recovery of money only, is involved.”<sup>126</sup> The court provided further guidance when it attached the right to trial by jury to claims “‘analogous to’ actions brought at the time of the state’s original 1820 Constitution,” which were granted the right.<sup>127</sup> It is the character of the action that must be considered when assessing whether the right to a jury trial exists, not simply the language used.<sup>128</sup>

Effectively, medical negligence claims filed in Missouri today meet the “analogous” requirement; in application, they are identical to the 1820 cause of action. Medical negligence existed as a legal cause of action for monetary damages in 1820. Its substance, as well as the relief sought, is analogous to the current statute and thus remains accompanied by the right to a jury trial.

## 3. A Right Unaffected by the Statutory Nature of a Claim

It has been established that the change in status of the medical negligence cause of action does not insulate the cause of action from the full right to be decided before a jury. The Supreme Court of Missouri has said, “The fact that an action is brought pursuant to statute, whether in existence at the time of the 1820 Constitution or enacted later, does not exclude the prospect

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124. See MO. ANN. STAT. § 538.210.1 (West 2015).

125. See *Washington ex rel. Washington v. Barnes Hosp.*, 897 S.W.2d 611, 615 (Mo. 1995) (en banc) (“To make a submissible case in a medical malpractice action, plaintiffs must prove that defendants failed to use that degree of skill and learning ordinarily used under the same or similar circumstances by members of defendants’ profession and that their negligent act or acts caused plaintiffs’ injury.”).

126. *Briggs v. St. Louis & S.F. Ry. Co.*, 20 S.W. 32, 33 (1892).

127. *State ex rel. Diehl v. O’Malley*, 95 S.W.3d 82, 86 (Mo. 2003) (en banc) (quoting *Bates v. Comstock Realty*, 267 S.W. 641, 644 (Mo. 1924)).

128. *Briggs*, 20 S.W. at 33.

of a right to jury.”<sup>129</sup> If the substance is analogous, the right exists “whether the right or liability is one at common law or is one created by statute.”<sup>130</sup>

The 2014 *Lewellen* decision reinforces the principle that the right to trial by jury is not tied to the common law or statutory label of a claim.<sup>131</sup> Though the cause of action in *Lewellen* was one of common law, the court did not use that fact to justify its ruling.<sup>132</sup> Instead, it stated, “[A]ny change in the right to a jury determination of damages as it existed in 1820 is unconstitutional.”<sup>133</sup> In speculating why punitive damages for the statutory cause of action were not challenged, the court stated damages limitations may be applied “to statutory claims . . . [when those] claims did not exist in 1820.”<sup>134</sup> The statutory nature of the claim, however, is not the reason for its subjection to damages caps.

Interestingly, wrongful death is a statutory cause of action accompanied by damages caps that the Supreme Court of Missouri has approved.<sup>135</sup> It is distinguishable from medical malpractice, however, in that wrongful death was not recognized as a common law cause of action in Missouri in 1820; it first became a claim for damages under statute in 1939.<sup>136</sup> Legislatures define permissible remedies for causes of action they create, but simply labeling medical negligence a statutory, rather than a common law, cause of action does not create a new claim.

#### 4. A Right Including the Determination of Damages

Juries had full discretion to determine noneconomic damages for medical negligence in 1820.<sup>137</sup> As the court in *Watts* stated, “[S]tatutory caps on damage awards simply did not exist and were not contemplated by the common law when the people of Missouri adopted their constitution in 1820.”<sup>138</sup>

129. *Diehl*, 95 S.W.3d at 86.

130. *Briggs*, 20 S.W. at 33.

131. *See* *Lewellen v. Franklin*, 441 S.W.3d 136, 144 (Mo. 2014) (en banc) (“Because section 510.265 changes the right to a jury determination of punitive damages as it existed in 1820, it unconstitutionally infringes on Ms. Lewellen’s right to a trial by jury protected by article I, section 22(a) of the Missouri Constitution.”).

132. *Id.* at 143.

133. *Id.*

134. *Id.* at 142 n.9.

135. *Sanders v. Ahmed*, 364 S.W.3d 195, 204 (Mo. 2012) (en banc); *Dodson v. Ferrara*, No. SC 95151, 2016 WL 1620102, at \*4–6 (Mo. Apr. 19, 2016). This Note does not examine the wrongful death cause of action in depth, recognizing that while it bears a resemblance to medical negligence, it is a separate issue requiring independent analysis.

136. *Id.* at 203; *see also* MO. REV. STAT. § 537.080 (2012).

137. *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633, 639 (Mo. 2012) (en banc).

138. *Id.*



Juries alone determine the damages awards given to medical malpractice victims, experiencing no interference from the judiciary.<sup>139</sup>

*Watts* affirmed that the right to trial by jury should apply in both form and function as it did in 1820.<sup>140</sup> The right not only accompanies all causes of action that deserved a jury trial in 1820, but also retains its practical applications.<sup>141</sup> As it was applied at the enactment of the Missouri Constitution, so also will it be applied today.<sup>142</sup> Referencing “a long-standing reluctance in the common law to tamper with the jury’s constitutional role as the finder of fact,” the court said that to preserve the right as it was in 1820 meant preserving the effect of juries’ damages awards.<sup>143</sup> Ensuring the right to trial by jury remained inviolate and thus required doing away with damages caps.<sup>144</sup>

### C. *Affecting the Right to Trial by Jury*

SB 239 prevents plaintiffs from experiencing the right to trial by jury as it existed in 1820, changing a constitutional right using improper means. Constitutional change requires fulfilling the constitutional amendment process.<sup>145</sup> Statutes are easier to modify due to the frequency with which the legislature meets, but because “the constitution is organic, intended to be enduring until changed conditions of society demand more stringent or less restrictive regulations,” the ability to change it “is remote.”<sup>146</sup>

Power to modify the Missouri Constitution ultimately lies not with the legislature but with the people.<sup>147</sup> Constitutional amendments may be proposed by the legislature, but they must be “submitted to the electors for their approval or rejection by official ballot title as may be provided by law.”<sup>148</sup> If a majority of voters approve, the amendment passes, and the constitutional change is made.<sup>149</sup>

Allowing the legislature to confine an established constitutional right, especially one so valued as the right to trial by jury, offends the very heart of the Missouri Constitution. Missouri law dictates a very specific method for changing the “organic law” of our state, rooted in the free will of the people, which has been circumvented here. SB 239 is a clear example of the legislature overstepping its bounds, attempting to affect constitutional rights via

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139. *Id.*

140. *Id.* at 638–39.

141. *Id.*

142. *Id.*

143. *Id.* at 639.

144. *Id.*

145. See MO. CONST. art. XII (West, Westlaw through 2014 general election).

146. *Mountain Grove Bank v. Douglas Cty.*, 47 S.W. 944, 947 (Mo. 1898).

147. See MO. CONST. art III, § 49 (West, Westlaw through 2014 general election) (“The people reserve power to propose and enact or reject laws and amendments to the constitution by the initiative, independent of the general assembly.”).

148. *Id.* art XII, § 2(b).

149. *Id.*

sub-constitutional means, with the only lawmaking power it exclusively holds.

## V. CONCLUSION

Regardless of its existence as a statutory or common law cause of action, negligence of a health care provider resulting in injury may give rise to a medical malpractice lawsuit. As long as *Watts* remains good law, successful reinstatement of caps on noneconomic damages in such cases will require altering the nature of the claim from that which existed at the adoption of the Missouri Constitution in 1820. SB 239 attempts this alteration by stating that medical negligence has become a statutory cause of action, completely replacing previously existing common law on the matter.<sup>150</sup> It appears to align with the court's 2012 statement that noneconomic damages caps are permissible when the relevant cause of action is "statutorily created."<sup>151</sup>

In holding that damages caps may attach to "statutorily created" causes of action, however, the court was referring to those causes of action that had never existed before the creation of a statute.<sup>152</sup> The court's intention was for the legislature to be able to limit damages where the legislature itself was specifically and originally responsible for condemning the actions of guilty defendants.<sup>153</sup>

The nature of a claim extends beyond mere labeling, and the substance of the medical negligence cause of action has not changed. Because "[t]he judiciary has the duty to . . . protect those rights to jury trial as existed prior to 1820," it cannot allow damages caps to coexist with *Watt's* ruling.<sup>154</sup> Until Missouri imposes damages caps via constitutional amendment, legislation like SB 239 will remain vulnerable to court challenges.

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150. MO. ANN. STAT. § 538.210 (West 2015).

151. *Sanders v. Ahmed*, 364 S.W.3d 195, 205 (Mo. 2012).

152. *Id.*

153. *Id.* ("The remedy available in a statutorily created cause of action is 'a matter of law, not fact, and not within the purview of the jury.' To hold otherwise would be to tell the legislature it could not legislate; it could neither create nor negate causes of action, and in doing so could not prescribe the measure of damages for the same.") (internal citation omitted).

154. *Id.*

