COMMENT

THE END OF TORT REFORM?: THE CONSTITUTIONAL BATTLE LOOMS OVER MISSISSIPPI

Thirty years ago, rising health care costs sparked a panic in state legislatures.[1] As a result, states began looking for ways to tame increasing health care costs.[2] Many, including insurance companies and health care providers, attributed the rising costs to increased litigation, excessive jury verdicts, and rising insurance premiums.[3] As a result, legislatures turned to statutory caps on noneconomic damage as the preferred method to control these costs.[4] The basic reasoning behind these caps was that increasingly large jury verdicts for pain and suffering and other noneconomic damages ultimately caused insurers to greatly increase the cost of insurance, or alternatively, stop offering coverage altogether due to high costs.[5] In turn, proponents argued that physicians withdrew from states without caps or otherwise switched which fields they operated in, ultimately leaving the public without access to much needed health care.[6]

Beginning in the 1970s, a wave of tort reform swept through the country and resulted in a patchwork of different statutory schemes that sought to control health care costs through caps on noneconomic damages and other means.[7] In 2004, Mississippi joined the party and statutorily capped noneconomic damages awards at $500,000 in medical malpractice

[1] *See* David A. Matsa, *Does Malpractice Liability Keep the Doctor Away? Evidence from Tort Reform Damage Caps*, 36 J. LEGAL STUD. S143, S144 (Supp. 2007).

[2] *Id*. at S143-44.

[3] Giana Ortiz, *Medical Malpractice Damage Caps--Constitutional Per Se in Texas, But at What Price? A Look at Alternative Patient Compensation Schemes*, 43 HOUS. L. REV. 1281, 1284, 1288 (2006).

[4] *Id*. at 1285-88. For an overview of the history of caps on noneconomic damages, see Carly N. Kelly & Michelle M. Mello, *Are Medical Malpractice Damages Caps Constitutional? An Overview of State Litigation*, 33 J.L. MED. & ETHICS 515 (2005).

[5] Freidin Dobrinsky, *Non-Economic Damage Caps Unfairly Punish the Injured*, FINDLAW KNOWLEDGEBASE, Jan. 22, 2010, http://knowledgebase.findlaw.com/kb/2010/ Jan/72478.html.

[6] *Id*.

[7] Kelly & Mello, *supra* note 4, at 515-18.

cases.[8] Mississippi also extended the protection to general civil litigation, enacting a $1,000,000 cap for other civil cases.[9]

Despite this surge, the tide of tort reform may very well be turning. A growing amount of research suggests that caps on noneconomic damages do not actually help control insurance costs.[10] Further, in the span of the last year, two state supreme courts have struck down their state's caps on noneconomic damages in medical malpractice cases as unconstitutional.[11] On February 4, 2010, the Illinois Supreme Court declared that such caps violated the separation of powers clause of the state constitution.[12] Shortly thereafter, the Georgia Supreme Court followed suit and struck down its caps on March 22, 2010, as a violation of the state constitutional right to a trial by jury.[13] In doing so, these two states joined the growing minority of courts that have struck down caps on noneconomic damages as impermissible limitations under their state constitutions.[14] Additional constitutional challenges are pending in both Missouri and Kansas.[15]

Recently, Mississippi faced its own challenge to caps on noneconomic damages in *Double Quick v. Lymas*. In *Double Quick*, the plaintiff argued before the Mississippi Supreme Court that Mississippi's general $1,000,000 cap on noneconomic damages was unconstitutional based on the right to a trial by jury, separation of powers, and open courts provisions of the Mississippi Constitution.[16] However, the Court declined to reach the constitutionality of the caps after deciding the case based on an underlying premises liability issue.[17] This left the constitutionality of the caps undecided in Mississippi. However, the issue is now before the Mississippi Supreme Court again, as the Fifth Circuit Court of Appeals has asked the Court to decide the constitutionality of the caps in the case of *Learmonth v. Sears, Roebuck & Co*.[18] As such, the arguments raised by the plaintiff in *Double Quick* remain potential grounds for overturning

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[8] MISS. CODE ANN. § 11-1-60 (West 2008).

[9] *Id*.

[10] *See infra* notes 67-76 and accompanying text.

[11] *See infra* notes 12-13.

[12] Lebron v. Gottlieb Mem'l Hosp., 930 N.E.2d 895, 908 (Ill. 2010).

[13] Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218, 224 (Ga. 2010).

[14] *See generally* Kelly & Mello, *supra* note 4 (outlining various state challenges to caps on noneconomic damages).

[15] Mesothelioma & Asbestos Awareness Center, *Georgia Finds Damage Caps Unconstitutional*, Mar. 23, 2010, http://www.maacenter.org/blog/georgia-finds-damage-caps-unconstitutional.html.

[16] Brief of Appellee-Cross Appellant Ronnie Lymas at 50-65, Double Quick v. Lymas, No. 2008-CA-01713 (Miss. Sept. 9, 2009).

[17] Double Quick v. Lymas, 50 So. 3d 292, 293, 297 (Miss. 2010).

[18] *Mississippi Governor Urges Court to Uphold Damages Cao*, INS. J., Mar. 4, 2011, http://www.insurancejournal.com/news/southeast/2011/03/04/188979.htm.

the caps. Given that both of section 11-1-60's caps are flat damage cut-offs, this means that both the $500,000 and $1,000,000 caps could fall at the same time. Ultimately, if the caps are overturned, then the implications could be huge for businesses, doctors, individual plaintiffs, and attorneys alike.

To begin, this comment looks at the justifications behind the caps and the opposition to them.[19] Next, the comment examines the constitutional arguments set forth in *Double Quick* and analyzes their likelihood of success based on Mississippi case law and the results demonstrated in other states.[20] Lastly, the comment outlines the necessary implications behind both possible rulings and offers alternative schemes.[21]

I. JUSTIFYING MISSISSIPPI TORT REFORM AND ITS CAPS ON NONECONOMIC DAMAGES

In 2004, newly elected Mississippi Governor Haley Barbour called the legislature in for a special session in order to address tort reform.[22] Ultimately, the session ended with monumental change in Mississippi: a new law that set $500,000 caps on noneconomic damages awards in medical malpractice cases and $1,000,000 caps on noneconomic damages awards in all other civil actions.[23] Under the statute, capped noneconomic

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[19] *See infra* Parts I-II.

[20] *See infra* Part III.

[21] *See infra* Part IV.

[22] Insurance Law Alerts, *Mississippi Tort Reforms Go Into Effect But Immediate Relief Is Not In Sight*, NIXON PEABODY, LLP, Mar. 10, 2003, *available at* http://www.nixonpeabody.com/linked_media/publications/ILA_03102003.pdf [hereinafter Peabody].

[23] MISS. CODE ANN. § 11-1-60(2)(a)-(b) (West 2008). Specifically, the statute provides that:

> (2)(a) In any cause of action . . . for injury based on malpractice or breach of standard of care against a provider of health care, including institutions for the aged or infirm, in the event the trier of fact finds the defendant liable, they shall not award the plaintiff more than Five Hundred Thousand Dollars ($500,000.00) for noneconomic damages.
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> (b) In any [other] civil action . . . [the jury] shall not award the plaintiff more than One Million Dollars ($1,000,000.00) for noneconomic damages.

Id.

damages are broadly defined;[24] however, actual economic damages, such as loss of income and medical expenses, are not capped by the act.[25]

Ultimately, Mississippi tort reform was set into motion by both medical and business interests. From the business perspective, Mississippi had attracted a "deluge of negative publicity [that] characteriz[ed] the state's legal system as 'jackpot justice'."[26] This publicity came in the wake of a series of damage verdicts that exceeded $100 million.[27] In fact, awards were so high that several Fortune 500 companies informed Governor Barbour that unless the current system was fixed they would not consider operating in the state.[28] From a broader perspective, Mississippi Senator Charlie Ross described Mississippi's tort system as:

> [A]nything but fair, and in many cases [the tort system] resulted in patently unjustified awards. . . . [P]eople had lost confidence in getting a fair hearing at the trial court level. There was no confidence that the appellate courts would correct abuses. In essence, there was total unpredictability. The sky was the limit on damages. There was even a perception that fundamentals of the rule of law were being threatened.[29]

Eventually, conditions worsened to such a degree that the United States Chamber of Commerce even issued an advisory not to conduct business in the state.[30]

The medical field was especially strained. Due to high awards, health care related lawsuits found ample breeding ground in Mississippi.[31] In fact, in Jefferson County, which became renowned as "the lawsuit capital of the country," a single pharmacist was named in over 1000 law-

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[24] *Id*. at § 11-1-60(1)(a). Noneconomic damages are defined as:

> [S]ubjective, nonpecuniary damages arising from death, pain, suffering, inconvenience, mental anguish, worry, emotional distress, loss of society and companionship, loss of consortium, bystander injury, physical impairment, disfigurement, injury to reputation, humiliation, embarrassment, loss of the enjoyment of life, hedonic damages, other nonpecuniary damages, and any other theory of damages such as fear of loss, illness or injury.

Id.

[25] *Id*. at § 11-1-60(1)(b).

[26] Peabody, *supra* note 22.

[27] *Id*. Mississippi Governor Haley Barbour even described Mississippi as "America's No. 1 judicial hell hole for jackpot jury verdicts" and commented that "[f]or trial lawyers, [Mississippi] was the state you wanted to come to if you wanted to sue someone." Stephen Moore, *Mississippi's Tort Reform Triumph*, WALL ST. J., May 10, 2008, at A9.

[28] Moore, *supra* note 27.

[29] Charlie Ross, *Jackson Action: In Mississippi, Tort Reform Works*, WALL ST. J., Sept. 15, 2005, at A21.

[30] Peabody, *supra* note 22.

[31] Moore, *supra* note 27.

suits.[32] This same county, with plaintiffs outnumbering its citizens, even produced a $1 billion verdict against a pharmaceutical company that sold the diet pill Pondimin.[33] This enormous verdict was awarded to a single family.[34]

As a result of high awards, proponents claimed that the health care field was reeling from a "full-blown medical crisis" attributable to skyrocketing insurance costs.[35] Facing twenty-five percent annual increases in malpractice premiums, many doctors simply could not afford to practice in Mississippi.[36] Further, with some insurance companies fleeing the state and others refusing to write new policies, liability insurance became unavailable in some instances.[37] Ultimately, this exposed some doctors to limitless liability, a decidedly huge disincentive to practice in the state. In some cases, proponents claimed that the resulting exodus of physicians forced some residents to drive as a far as 100 miles to find a doctor.[38]

The Mississippi legislature sought to remedy the situation through a broad reform highlighted by caps on noneconomic damages.[39] The general idea behind the caps was that by making "liability exposure . . . predictable and governed by reasonable rules, risk [could] be better assessed, and insurance companies [would be] more likely to offer coverage."[40] In turn, businesses and medical professionals alike would face lower costs and subsequently expand operations in the state.[41] Additionally, proponents argued that by "discouraging litigation, caps on noneconomic damages and other tort reform measures also reduce[d] defensive medicine and its costly play-it-safe tests and procedures. . . ."[42]

After the passage of the bill, proponents claimed that its effects were almost immediate; that almost overnight, the rate of lawsuits subsided and businesses began to enter Mississippi.[43] After the reform, Federal Express spent $1.1 billion on a new Mississippi facility, and Toyota selected "Mississippi over about a dozen other states for a new $1.2 billion, 2000-

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[32] *Id*.
[33] *Id*.
[34] *Id*.
[35] Peabody, *supra* note 22.
[36] Moore, *supra* note 27.
[37] Ross, *supra* note 29.
[38] Moore, *supra* note 27.
[39] *See supra* notes 22-25 and accompanying text.
[40] Ross, *supra* note 29.
[41] *Id*. Whether the caps have been successful, however, has been much debated. *See generally infra* notes 67-76 and accompanying text.
[42] Robert Lowes, *Georgia Supreme Court Strikes Down Caps on Noneconomic Damages*, MEDSCAPE MED. NEWS, Mar. 22, 2010, http://www.medscape.com/viewarticle/ 718938.
[43] Moore, *supra* note 27.

worker auto plant."[44] Further, Governor Barbour, a strong supporter of the caps, claimed that in the first four years after the caps, 60,000 jobs were created in the state compared to 30,000 jobs that were lost in the previous four years.[45] Although, this upswing may be due to the fact that at this time the United States economy as a whole was on the rise.[46] Additionally, the reform was also touted as reducing business litigation expenses.[47]

Looking at health care, medical malpractice litigation also took a nosedive.[48] After enactment of the caps, medical malpractice lawsuits fell by an incredible ninety percent.[49] In this same period, the cost of medical malpractice insurance has fallen by thirty to forty-five percent across the state.[50] Proponents claim that this has resulted in the increased availability of health care in Mississippi.[51]

II. QUESTIONING THE EQUITIES AND RESULTS OF TORT REFORM'S CAPS ON NONECONOMIC DAMAGES

Despite the broad support for tort reform, it has been countered by equally entrenched opposition. Many oppose caps on noneconomic damages due to the fact that they have the potential to impose a tremendous cost on the victim.[52] As one commentator noted, with statutory caps, "no matter what value a jury places on a human life, the loss of a limb, the ability to see, or other catastrophic injury, the [victim's damages] *must* be reduced to an arbitrary limit imposed by the Legislature."[53] In Mississippi,

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[44] *Id*. However, despite this investment, Toyota has indicated that it would pull out of Mississippi if tort reform were overturned. *Id*.

[45] *Id*.

[46] *See generally* Recession.org, *U.S. Retail Sales Collapse Graph*, http://recession.org/library/graphs/retail-sales-collapse (last visited Aug. 5, 2010).

[47] Ross, *supra* note 29. For example, Haley Barbour has said that "[t]he CEO of one Mississippi company . . . told [him] that [the] company's legal bills were reduced by $70,000 a month as a result of the reform." *Id*.

[48] Moore, *supra* note 27.

[49] *Id*.

[50] *Id*. In the year after the passage of the bill, the Medical Assurance Company of Mississippi, which provided sixty percent of the medical malpractice coverage in Mississippi, did not raise its rates despite raising them twenty percent in the year prior to the reform. Ross, *supra* note 29.

[51] Ross, *supra* note 29. Further, proponents also say that caps have "begun to restore credibility to [Mississippi] courts in the mind of the public and business, and have thus [also] restored trust to government in Mississippi in general." *Id*.

[52] Ortiz, *supra* note 3.

[53] Benjamin S. Persons IV, *Georgia Medical Malpractice Damages Caps Ruled Unconstitutional by the Georgia Supreme Court (Nestlehutt Case)*, MARIETTA INJURY LAW. BLOG, Mar. 22, 2010, http://www.mariettainjurylawyer.com/2010/03/medical-malpractice-damages-ca.html (emphasis added). This comment does not delve into the role of the jury. Proponents of the caps argue that the

no matter how severe the injury or how grave the loss, injured victims are limited to $500,000 or $1,000,000 in noneconomic damages depending on whom the party at fault is.[54] Further, by capping noneconomic damages, section 11-1-60 essentially prevents the victim from being fully compensated for the harm done to them.[55] While doctors, businessmen, and insurance companies stand to benefit from the caps, they do so only at the direct expense of the injured plaintiff.[56] In fact, the greater the victim's losses, the more they are hurt by the caps, and the more other parties, including the party responsible for the harm, benefit from their application.[57] Another similar fear is that meritorious lawsuits may be deterred in the face of caps on noneconomic damages.

The horizontal inequities resulting from the caps are unfavorable. As mentioned, a victim of medical malpractice in Mississippi is limited to $500,000 in noneconomic damages regardless of whether a jury, in its fact finding capacity, has valued the victim's damages at $500,000 or $3,000,000.[58] However, to the east and west of Mississippi, neither Arkansas nor Alabama place caps on noneconomic damages.[59] The same is true if you were to drive north to Tennessee or to enjoy a day of boating in federal waters just off the Mississippi coast.[60] In these areas, a victim

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caps simply curb out of control juries, while opponents argue that a jury's award is the proper amount of damages. The remaining portion of the comment is written on the belief that the amount decided by the jury is largely the proper amount due to the injured victim; however, runaway jury verdicts are an ever-present problem for defendants. It is important to note that both sides have credible arguments.

[54] *See* MISS. CODE ANN. § 11-1-60(2)(a)-(b) (West 2008).

[55] Kelly & Mello, *supra* note 4, at 516. Generally, the goal of a damage verdict is to make the victim whole. *Id*. In medical malpractice cases, the verdict is typically composed of three types of damages: economic damages, noneconomic damages, and punitive damages. *Id*. While punitive damages exist to punish the wrongdoer and deter future conduct, both economic damages and noneconomic damages operate as compensatory damages that seek to restore the victim to the same position they were in before the harm. *Id*. In such, capping either results in the victim receiving less than the harm done to them. *Id*. This problem is even worse when the victim is a child, student, or elderly citizen. Dobrinsky, *supra* note 5. In these situations, the victim's economic losses might be minimal, but because of a catastrophic injury, their noneconomic losses may be great. *Id*.

[56] Dobrinsky, *supra* note 5. Further, some argue that the parties responsible for the harm also receive a windfall as a result of the caps. *See* Matsa, *supra* note 1, at S145-47. Having caused the harm, they have essentially incurred a debt to the victim, which basic tort principles command that they repay, but caps arbitrarily reduce this liability.

[57] For example, if a jury values a malpractice victim's pain and suffering at $3,000,000, then in Mississippi, the victim would only receive $500,000 of that amount. *See* MISS CODE. ANN § 11-1-60. The insurance company's liability would be decreased by $2,500,000, and theoretically, the negligent doctor would benefit from lower insurance premiums.

[58] MISS. CODE ANN. § 11-1-60(2)(a)-(b) (West 2008).

[59] *See* Kelly & Mello, *supra* note 4, at 515.

[60] *See* Kelly & Mello, *supra* note 4, at 515-17. Currently, there are no federal caps on noneconomic damages nor does Tennessee place caps on noneconomic damages. *Id*.

with $3,000,000 in noneconomic damages would be fully compensated for the harm done to them as decided by a panel of their peers. Yet, if you traveled from Mississippi to Texas, not only would you not collect the full amount of damages, you would, in some instances, be further limited to only $250,000.[61] Hence, based merely on geographic location, victims with the exact same grievous injuries are likely to receive vastly different amounts.[62]

Another argument is that these caps serve to both protect the wrongdoer and to reduce incentives to exercise care. The basic principle of tort law is to hold parties responsible for the harm that they have caused; however, by placing caps on damages, the wrongdoer escapes the full extent of personal responsibility.[63] Further, by insulating these individuals, the state essentially fails to protect members of the public from the possibility of receiving the same negligent care.[64] The caps, by lowering the damages resulting from negligence, essentially lower the cost of not being careful, resulting in less incentive to exercise care.[65] It can also be argued that because defendants in medical malpractice and commercial litigation are often the parties who stand to benefit financially from the original transaction, they should also be the ones who bear the risk of mistakes and the resulting costs. Shifting the burden to the injured victim may eliminate the financial costs to the defendant; however, the very real and uncompensated noneconomic costs to the victim would still exist.[66] In other words, opponents to the caps argue that caps on noneconomic damages have not reduced overall costs; they have merely shifted the costs to a different form, no less important, and a different payer, the innocent victim.

Another argument is that caps on noneconomic damages actually do not help to control the cost of business and medical malpractice insurance premiums. This has been an area of hot debate and conflicting empirical studies. In one university study, researchers looked at state medical malpractice reform legislation from 1975 to 2004 and determined that in states with caps on noneconomic damages in medical malpractice cases,

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[61] *See* TEX. CIV. PRAC. & REM. § 74.301 (Vernon 2004).

[62] As caps on noneconomic damages become common knowledge, this could even give rise to Mississippi medical patients who, fearing the chance of being a victim of malpractice, choose to have procedures done in states without caps in order insure against this result. Thus, while caps might be advantageous to doctors in litigation, they might also operate to their detriment in the form of a mobile, informed patient base.

[63] Dobrinsky, *supra* note 5.

[64] *Id*.

[65] *See generally*, Matsa, *supra* note 1, at S143-45.

[66] *Id*.

average malpractice insurance premiums decreased by 17.3% for internal medicine, 20.7% for general surgery, and 25.5% for obstetrics/gynecology.[67] However, to the detriment of Mississippi's caps, this study also found that caps between $500,000 and $750,000 *actually increased premiums by 7.9 percent*, with even higher premium increases for caps above $750,000.[68] The belief is that higher caps might result in higher initial bargaining points, or plaintiffs may see "cap[s] as a minimum for which they try to settle."[69] Thus, "[l]arger caps would increase the minimum and could lead to inflated settlements, pushing malpractice insurance premiums upward."[70] Still, these arguments seem to clash with the fact that proponents claim insurance rates have dropped in Mississippi as a result of the caps. Although, this discrepancy can be reconciled by viewing the other aspects of Mississippi Tort Reform as being responsible for the drop in rates.

Other studies have found that caps on noneconomic damages have had little to no effect on the cost of insurance premiums. In one such study, researchers found that limiting noneconomic damages resulted in increased awards for economic damages, and further, it was unclear whether insurance premiums were even affected by the caps.[71] Ultimately, the study concluded the severity of the injury was the main determinate of the jury's verdict, not whether there were caps on noneconomic damages.[72] The American Bar Association (ABA) has opposed the caps on the basis that there is little reliable empirical evidence that shows caps actually result in lower health care premiums.[73] Further, even the country's largest medical malpractice insurer, GE Medical Protective, has indicated that caps on noneconomic damages only result in minimal savings.[74] Recently, the American Association for Justice Institute has also

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[67] ROBERT WOOD JOHNSON FOUNDATION, *Insurance Premiums Decline in States Capping Malpractice Payouts, Alabama University Study Finds*, (Dec. 2007), http://www.rwjf.org/reports/grr/050298.htm.

[68] *Id*.

[69] *Id*.

[70] *Id*.

[71] Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Caps*, 89 N.Y.U. L. Rev. 391, 396, 407-08 (2005).

[72] *Id*. at 396.

[73] Dobrinsky, *supra* note 5.

[74] ConsumerAffairs.com, *GE: Malpractice Caps Don't Work*, Oct. 27, 2004, http://www.consumeraffairs.com/news04/malpractice_ge.html. In 2003, Texas capped noneconomic damage awards at $250,000, yet six months after the caps were enacted, GE sought to raise physician's premiums by nearly twenty percent. *Id*. GE's defense was that "[n]on-economic damages [were] a small percentage of total losses paid" and capping damages would only show savings of 1.0%. *Id*. GE had previously touted the caps as a way to remedy the crisis. *Id*.

published a paper which purports to debunk the major "myths" about medical malpractice reform.[75] The five major myths were: (1) that there are too many "frivolous" lawsuits; (2) malpractice litigation drives up healthcare costs; (3) doctors are fleeing states; (4) malpractice litigation drives up doctors insurance premiums; and (5) tort reform will lower insurance rates.[76]

Alternatively, even if gains have been made from Mississippi Tort Reform, these gains may not be solely attributable to caps on noneconomic damages. Mississippi Tort Reform, in seeking to curb mass tort suits, frivolous lawsuits, and excessive jury awards, also enacted various other provisions including rules regarding venue selection, joint liability, the protection of innocent sellers, punitive damages, products and premise liability, and the allocation of fault.[77] Much of the real benefit from tort reform, if any, could be attributable to these additional provisions. Consequently, the removal of caps on noneconomic damages might not be the doomsday that its opponents make it out to be.

Ultimately, opponents of the caps, fueled by the inequities resulting from their application, have seized upon arguments that caps on noneconomic damages may not pass constitutional scrutiny. Some of these arguments headed to the Mississippi Supreme Court in *Double Quick Inc. v. Lymas*; however, due to a procedural issue, the court did not address the constitutionality of the caps.[78]

III. CHALLENGING THE CONSTITUTIONALITY OF MISSISSIPPI'S CAPS ON NONECONOMIC DAMAGES

Since the enactment of section 11-1-60, the Mississippi Supreme Court has not addressed the constitutionality of the section's caps on noneconomic damages. In *Double Quick, Inc. v. Lymas*, the court did not reach the issue; however, the arguments raised by the plaintiff could serve as a platform for a future attack on the caps. When the court eventually

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[75] *See* Salavatore J. Zambri, *New Paper Debunks Medical Malpractice Myths*, DC METRO AREA MED. MALPRACTICE L. BLOG (Dec. 8, 2009) http://www.dcmedmalblog.com/ medical-malpractice-new-paper-debunks-medical-malpractice-myths.html).

[76] *Id*.

[77] MISS. CODE ANN. §§ 11-1-60 (2004 & Supp. 2010), 11-1-63 (2004 & Supp. 2010), 11-1-65 (2004 & Supp. 2010), 11-11-3 (2004), & 85-5-7 (2004 & Supp. 2010). For a great discussion of the various provisions of Mississippi Tort Reform, *see* Robert P. Wise, *Mississippi Commercial Litigation After Tort Reform: Limits On Mississippi Punitive and Noneconomic Damages, Joinder, Venue, Joint Liability, Products Liability Actions, and Appeal Bond Requirements*, WISE CARTER CHILD & CARAWAY, P.A., Apr. 2006, http://www.mslawyer.com/rwise/articles/MS_Com_Lit_Tort_Reform.pdf.

[78] Double Quick, Inc. v. Lymas, 50 So. 3d 292, 292-93, 297 (Miss. 2010).

addresses the issue, Mississippi will either bolster the shrinking ranks of states with caps on noneconomic damages or join the growing minority of state that have overturned the caps as constitutionally impermissible limitations.[79] Presumably, both the $1,000,000 caps in general civil cases and the $500,000 caps for medical service providers will stand or fall together given that they are both flat cutoffs.

In *Double Quick*, the plaintiff challenged the caps set forth in section 11-1-60 on three separate grounds.[80] First, the plaintiff argued that the caps violated the right to a jury trial granted by both the Mississippi and United States constitutions.[81] Next, the plaintiff argued that the caps violated both the separation of powers and open courts provisions of the Mississippi Constitution.[82] All three arguments have served as constitutional grounds for overturning caps on noneconomic damages in other states.[83]

As a preliminary matter, the path to winning a constitutional challenge in Mississippi is not an easy one.[84] First, in the face of a constitutional challenge, all statutes are presumed to be constitutional.[85] Second, the challenging party ultimately bears the burden of proving that the statute is unconstitutional.[86] Third, the statute cannot be struck down unless "it appears *beyond all reasonable doubt* that such statute violates the constitution."[87] Nevertheless, in those instances,

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[79] *See* Kelly & Mello, *supra* note 4, at 516-18 (outlining state litigation). For a list of the states with caps on noneconomic damages, *see* Lebron v. Gottlieb Mem'l Hosp., 930 N.E.2d 895, 913 (Ill. 2010). Currently, Ohio, Alabama, Georgia, Illinois, New Mexico, New Hampshire, Wisconsin, and Kansas have all rejected the caps on noneconomic damages in medical malpractice cases. Dobrinsky, *supra* note 5; Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218, 224 (Ga. 2010).

[80] Brief of Appellee-Cross Appellant, *supra* note 16, at 50-65. In this case, Ronnie Lee Lymas brought an action for negligence and inadequate security after being attacked on the grounds of a Double Quick store in Humphreys County, Mississippi. *Id.* at 1-3. Following trial, the jury found in favor of Lymas and awarded him $4,179,350.49; however, this award was reduced to $1,679,717 after the court implemented section 11-1-60(2)(b)'s $1,000,000 cap on noneconomic damages. *Id.*

[81] *Id*. at 50-62.

[82] *Id*. at 62-65.

[83] *See infra* Part III.A-C. Other potential grounds for challenging the statue include Equal Protection guarantees and Due Process protections; however, this comment does not address those, as they were not raised on appeal by the plaintiff in *Double Quick*. Brief of Appellee-Cross Appellant, *supra* note 16, at 50-62. Still, these grounds might be fodder for a constitutional attack. For a broad overview of the different strategies as well as a state by state break down of constitutional challenges, see Kelly & Mello, *supra* note 4.

[84] *See* Alyson Bustamante Jones, *Mississippi Tort Reform Faces "Judicial Nullification" Effort*, 19 WASH. LEGAL FOUND. (Feb. 12, 2010), http://www.wlf.org/Upload/legal studies/legalopinionletter/02-15-10Jones_LegalOpinionLetter.pdf/.

[85] Wells *ex rel.* Wells v. Panola County Bd. of Educ., 645 So. 2d 883, 888 (Miss. 1994).

[86] *Id*.

[87] *Id*. (emphasis added).

> [W]here a claim is presented that [legislative actions] contravene rights secured by the constitutions of the United States or of this state, it is the responsibility of the judiciary to act, notwithstanding that political considerations may motivate the assertion of the claims nor that [the court's] final judgment may have practical political consequences.[88]

A. The Right to a Trial by Jury

In *Double Quick*, the plaintiff argued that caps on noneconomic damages violated the "fundamental right" to a trial by jury by usurping the jury's fact finding and ability to determine what damages are due to the victim.[89]

Broadly, the Seventh Amendment to the United States Constitution guarantees a federal right to a trial by jury;[90] however, the United States Supreme Court has held that this provision is not binding on the states.[91] Thus, it is up to each individual state to determine the scope of any right to a trial by jury secured by their respective constitutions. In Mississippi, article 3, section 31 of the Mississippi Constitution provides that "[t]he right of trial by jury *shall remain inviolate*."[92] Since 1841, Mississippi has viewed the right to a trial by jury as a fundamental right on the same basis "with the inalienable rights of life, liberty, and the pursuit of happiness."[93] Further, the right to a trial by jury "is not granted as a privilege, but [is] established as a subsisting right, over which the legislative power can exercise no control."[94] This right is said to be "'preserved' just as it existed at common law in 1817."[95]

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[88] Tuck v. Blackmon, 798 So. 2d 402, 407 (Miss. 2001).

[89] Brief of Appellee-Cross Appellant, *supra* note 16, at 52.

[90] U.S. CONST. amend. VII.

[91] Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211, 218-20 (1916). Nevertheless, states can still look to federal rulings for guidance. For example, in *Tull v. United States*, the Supreme Court found that under one federal statute, which authorized the imposition of a "noncompensatory" civil penalty, the right to a trial by jury only required a jury termination of liability and not the amount of damages. 481 U.S. 412, 428 (1987).

[92] MISS. CONST. art. III, § 31. (emphasis added). Black's Law Dictionary defines "inviolate" as "[f]ree from violation; not broken, infringed, or impaired." BLACK'S LAW DICTIONARY 904 (9th ed. 2009). Under the Mississippi Constitution, the only exception placed on the right is that "the legislature may, by enactment, provide that in all civil suits tried in the circuit and chancery court, nine or more jurors may agree on the verdict and return it as the verdict of the jury." MISS. CONST. art. III, § 31.

[93] Lewis v. Garrett's Adm'rs, 6 Miss. (5 Howard) 434, 439 (Miss. 1841); *see* Brief of Appellee-Cross Appellant, *supra* note 16, at 51.

[94] *Lewis*, 6 Miss. (5 Howard) at 439.

[95] Brief of Appellee-Cross Appellant, *supra* note 16, at 51. Early on in Mississippi, it was settled that only the jury had the power to determine the amount of damages, and the jury, in its discretion, was to weigh all the circumstances of the case and determine accordingly. *Id.* at 52 (quoting S.R.R. Co. v. Kendrick, 10 Miss. 374 (Miss. 1866)).

Currently, several courts have rejected caps on noneconomic damages as violating the right to a trial by jury; however, other courts have failed to find the caps in violation of this right.[96] In states where this issue has been raised, courts have ultimately diverged over what exactly it means to have a "right to a trial by jury."[97] Ultimately, several different approaches have been developed.

One approach, which was taken by Oregon in 1999, was to disallow caps on noneconomic damages in actions that existed at common law when the state's constitution was adopted.[98] Using this approach, Oregon interpreted case language, which purported that the right was preserved just as it was at common law, meaning that the plaintiff had the same right to receive full jury-determined damages as existed under common law.[99] Under this approach, caps on noneconomic damages would apply to statutorily created causes of action, such as wrongful death, but not to common law medical malpractice or other personal injury claims.[100] Since Mississippi also purports that the right to a trial by jury is "preserved just as it existed at common law," this approach is a viable path for Mississippi.[101]

A second approach, which was used to uphold caps on noneconomic damages in Virginia in 1989, was to focus the inquiry on the timing of a jury trial compared to the timing of caps on damages.[102] Using this approach, Virginia viewed the function of a jury as limited to fact-finding, and even though this entailed determining damages, the right to a trial by jury was not violated by caps because statutory caps were only applied *after* the jury had determined damages.[103] Under this approach, "[o]nce the jury has ascertained the facts and assessed the damages . . . the constitutional mandate [was] satisfied," and thus, subsequent caps on noneco-

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[96] *See* Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218, 224 (Ga. 2010) (finding $350,000 caps on noneconomic damages in medical malpractice cases to violate right to a trial by jury); Lakin v. Senco Prods., Inc., 987 P.2d 463, 475 (Or. 1999) (finding a $500,000 cap on noneconomic damages in personal injury and wrongful death cases to violate the right to a trial by jury under the Oregon constitution); Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 164, 170 (Ala. 1991) (finding a $400,000 cap on noneconomic damages in medical malpractice cases to violate equal protection and the right to a trial by jury in the Alabama Constitution); Sofie v. Fireboard Corp., 771 P.2d 711, 715-23 (Wash. 1989) (finding caps on noneconomic damages in personal injury and wrongful death cases to violate the right to a trial by jury); Kelly & Mello, *supra* note 4, at 517-18.

[97] Kelly & Mello, *supra* note 4, at 521.

[98] *Id.* (citing *Lakin*, 987 P.2d at 475).

[99] *See id*. at 521.

[100] *Id.* (citing *Lakin*, 987 P.2d at 475).

[101] *See supra* note 95 and accompanying text.

[102] Kelly & Mello, *supra* note 4, at 52 (citing Etheridge v. Med. Ctr. Hosp., 376 S.E.2d 525, 529 (Va. 1989)).

[103] *Id*.

nomic damages did not infringe on the right to a trial by jury.[104] Nevertheless, other jurisdictions, such as Alabama, have balked at this approach.[105] The Alabama Supreme Court found it disturbing that under this approach a jury would be permitted to determine damages but that their determination would be given no legal effect.[106]

A third approach, one adopted by Alabama and Washington, is to view the jury's function as including both the factual assessment of the amount of damages and the actual awarding of the damages.[107] Under this approach, caps are viewed as infringing on the jury's sole province to award damages, and thus, they violate the right to a trial by jury.[108]

Related to this approach, and perhaps telling of what will happen in Mississippi, is the recent approach adopted in Georgia. In a unanimous, 7-0 opinion, the Georgia Supreme Court found that caps on noneconomic damages violated the right to a trial by jury because they nullified the jury's finding of fact as to damages and therefore undermined the basic function of the jury.[109] The Georgia Supreme Court held that "flat caps on noneconomic compensatory damages" violate the constitutional guarantee that this right "shall remain inviolate."[110] Oregon has also relied on this reasoning, finding that because its constitution states that the right to a jury trial in civil cases is "inviolate," caps on damages which infringe upon the jury's fact finding are unconstitutional.[111] Importantly, the right to jury trial provisions in Alabama, Mississippi, Oregon, and Georgia are all identical, stating that the "right of trial by jury shall remain inviolate."[112] Ultimately, the Mississippi Supreme Court could take this same approach, and in the process, invalidate section 11-1-60's caps on noneconomic damages.

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[104] *Id*. (quoting *Etheridge*, 376 S.E.2d at 529).

[105] *Id*. (citing Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 164 (Ala. 1991)).

[106] *Id*. (citing *Moore*, 592 So. 2d at 164).

[107] *Id*. (citing Sofie v. Fireboard Corp., 771 P.2d 711, 720-23 (Wash. 1989)).

[108] *Id*. (citing *Sofie*, 771 P.2d at 720-23).

[109] Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218, 223-24 (Ga. 2010) (declaring the state's $350,000 caps on noneconomic damages in medical malpractice cases to be unconstitutional).

[110] *Id*. at 226 (Nahmias, J., concurring) (citing GA. CONST. art. I, § 1). Chief Justice Carol W. Hunstein for the unanimous court wrote that "[t]he very existence of the caps, in any amount, is violative of the right to trial by jury." *Id.* at 223 (majority opinion).

[111] Lakin v. Senco Prods., Inc., 987 P.2d 463, 469-75 (Or. 1999).

[112] *See* MISS. CONST. art. III, § 31; *Atlanta Oculoplastic Surgery*, 691 S.E.2d 218; Kelly & Mello, *supra* note 4. However, at least one state with the same language has rejected the right to a trial by jury argument. *See* Kelly & Mello, *supra* note 4.

B. Separation of Powers

In *Double Quick*, the plaintiff also argued that caps on noneconomic damages violated the separation of powers provision of the Mississippi Constitution.[113] The Separation of Powers clause in the Mississippi Constitution provides that "[t]he powers of the government of the State of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another."[114] Further, "[n]o person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others."[115]

Overall, the basic argument centers over whether the caps interfere with a judicial function[116] or whether the caps are a matter of law and thus within the legislature's power, which includes the right to "forbid the creation of new rights, [and] the abolition of old ones recognized by the common law, [in order] to attain a permissible legislative object."[117]

Until recently, separation of powers arguments had not found much success as grounds for overturning caps on noneconomic damages. However, in a recent Illinois opinion, the Illinois Supreme Court cited the separation of powers clause as grounds for overturning the caps.[118] In *Lebron v. Gottlieb Memorial Hospital*, the Illinois Supreme Court focused on the fact that the caps acted as a form of legislative remittitur.[119] In doing so, the caps violated the separation of powers clause because they "unduly encroache[d] upon the fundamentally judicial prerogative of determining whether a jury's assessment of damages [was] excessive within the meaning of the law."[120] Similarly, the Mississippi Supreme Court has said that a Mississippi court can overturn a jury if its assessment is "excessive *or inadequate* for the reason that the jury was influenced by bias,

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[113] Brief of Appellee-Cross Appellant, *supra* note 16, at 62 (commenting that with statutory caps, "the legislature sits on the judge's bench, grabbing the gavel while . . . ignoring the evidence in particular cases").

[114] *See id*.; MISS. CONST. art.1, § 1.

[115] MISS. CONST. art.1, § 2.

[116] *See* Brief of Appellee-Cross Appellant, *supra* note 16, at 62.

[117] Jones, *supra* note 84 (citing Walters v. Blackledge, 71 So. 2d 433, 441 (Miss. 1954)).

[118] Lebron v. Gottlieb Mem'l Hosp., 930 N.E.2d 895, 906-07 (Ill. 2010) (holding that a $500,000 cap against doctors and a $1 million cap against hospitals violated the separation of powers clause under the state constitution).

[119] *Id*. at 905-06.

[120] *Id*. at 906.

prejudice, or passion, so as to shock the conscience."[121] Flat caps, which artificially fix the jury's verdict, seemingly contradict this right.

The Mississippi Supreme Court has also recently shown that it is willing to actively enforce the separation of powers clause.[122] In an en banc administrative order dated Jan. 29, 2010, the Court overturned an attempt by the State Fiscal Officer to reduce the judiciary's budget.[123] Citing the legislature's duty to fund the judiciary, the court found that any attempt to reduce the judiciary's budget violated separation of powers.[124] As further guidance, in debating the damages due to a land owner whose land was taken by eminent domain, the Mississippi Supreme Court has ruled that "the ascertainment of the amount of damages sustained by the owner . . . *[was] a judicial[,] and not a legislative act."*[125]

As a complicating matter, Mississippi Supreme Court Justices face periodic elections. In such, they may face pressures from politically powerful figures such as Governor Barbour to uphold the caps.[126] Nevertheless, the Mississippi Supreme Court has been clear that unconstitutional statutes must be voided regardless of political motivations or whether the court's "final judgment may have practical political consequences."[127] Further, in Georgia, where Justices are also subject to elections, a conservative supreme court still struck down caps on noneconomic damages.[128] It did so even in the face of opposing political pressures and a historical reluctance to strike down statutes.[129]

C. Open Courts

Lastly, the plaintiff in *Double Quick* also argued that caps on noneconomic damages violated the open courts provision of the Mississippi Constitution.[130] This provision provides that "[a]ll courts shall be open; and every person for an injury done him in his lands, goods, person, or

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[121] Junior Food Stores, Inc. v. Rice, 671 So. 2d 67, 76 (Miss. 1996) (emphasis added).
[122] *See In re* Fiscal Year 2010 Judicial Branch Appropriations, 27 So. 3d 394 (Miss. 2010).
[123] *Id*. at 395-96.
[124] *Id*. at 395.
[125] Isom v. Miss. Cent. R.R. Co., 36 Miss. 300 (Miss. Err. & App.) (1858) (emphasis added).
[126] *See generally* Jones, *supra* note 84; Moore, *supra* note 27.
[127] Tuck v. Blackmon, 798 So. 2d 402, 405 (Miss. 2001).
[128] Jason Sheperd, *. . .and that's not* [C]onstitutional [E]ither*!*, PEACH PUNDIT, Feb. 11, 2009, http://www.peachpundit.com/2009/02/11/and-thats-not-constitutional-either/ (last visited Aug 6, 2010).
[129] *Id*.
[130] Brief of Appellee-Cross Appellant, *supra* note 16, at 65.

reputation, shall have remedy by due course of law, and right and justice shall be administered without sale, denial, or delay."[131]

Although the plaintiff in *Double Quick* did not expand upon this argument in his brief, similar provisions have been successful in at least three states.[132] In Texas, the Texas Supreme Court found that caps on noneconomic damages violated its open court provision because they denied catastrophically injured victims full compensation without offering an alternate remedy.[133] Nevertheless, the majority approach is to construe such provisions narrowly, and it is unclear how Mississippi will interpret this provision.[134]

IV. RECOVERING FROM THE VERDICT: IMPLICATIONS AND ALTERNATIVE SOLUTIONS

A. Passing Constitutional Scrutiny

If the caps are upheld, then presumably the general status quo will continue in Mississippi. Nevertheless, fairness issues still exist. In fact, with each passing day, Mississippi's statute will continue to compensate capped victims less and less. With inflation, the real value of $500,000 is less every year, and as a result, each new victim whose award is capped will be compensated less than the one before him. To remedy this result, Mississippi should, at the very least, build some flexibility into its system by tying its caps to an inflation index as other states have done.[135]

Additionally, Mississippi could amend §11-1-60 in order to allow the judge to relax the caps in situations where the injury is especially grave. This approach has been adopted in Florida, Massachusetts, and Nevada.[136] Under the Florida Model, caps on noneconomic damages are relaxed to some extent based on the harm done.[137] For example, if a victim dies or is left in a permanent vegetative state, then the caps are automatically increased from $500,000 to $1,000,000 for medical practitioners and from $750,000 to $1,500,000 for non-practitioners.[138] Further, Florida law also allows the judge to remove the caps if a "manifest injustice" would otherwise result based on the gravity of the victim's noneconomic harm and

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131 MISS. CONST. art. 3, § 24.
132 Kelly & Mello, *supra* note 4, at 519.
133 *Id*. at 517.
134 *Id*.
135 *See generally* Ortiz, *supra* note 3.
136 *See* Kelly & Mello, *supra* note 4, at 517.
137 *See* Dobrinsky, *supra* note 5.
138 *Id*.; FLA. STAT. ANN. § 766.118 (West 2010).

the presence of a "catastrophic injury."[139] This option would allow the judge to control against frivolous lawsuits while at the same time, more fully compensate victims who truly have egregious injuries. Such a system is clearly more preferable than one that cuts off all victims at a single arbitrary amount of noneconomic damages.[140]

Another option is for the Mississippi legislature to repeal the caps in light of the potential inequities and the lack of hard empirical proof showing that caps benefit the state as a whole. Though this is unlikely, opponents to the caps can draw hope from that fact that Mississippi legislators did not unanimously support the caps when they were enacted.[141] During debate, one legislator commented:

> I don't think it's a good idea to take a blanket approach to setting limits on the amount someone can sue for- . . . [s]ome cases of neglect, product defects, and malpractice are more severe than others. And even though I support some reform in the justice system, I can't support some of these proposed changes that seem to be targeted against the poor and working class people. These are my constituents that I am standing up for.[142]

Ultimately, with increasing numbers of studies indicating that caps on noneconomic damages do not work, public opinion could turn and eventually make repeal a viable option as politicians seek to please their constituents.

B. Failing Constitutional Scrutiny

If the caps are declared unconstitutional, then, for some, the effects will be immediate. Injury victims will be fully compensated for their jury-determined damages and no longer bear the cost of receiving inadequate medical care. Additionally, attorneys on both sides of the aisle will benefit, as claims that were previously deterred will now head to court. For physicians and businesses, costs could increase; however, as at least

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[139] FLA. STAT. ANN. § 766.118 (West 2010). "Catastrophic injury" is defined as "spinal cord injur[ies] involving severe paralysis of an arm, a leg or the trunk; amputation of an arm, a hand, a foot, or a leg . . .; severe brain or closed-head injur[ies] . . .; or second-degree or third-degree burns [covering at least] 25% or more of the total body surface or third-degree burns of 5% or more to the hands or face." *Id*.

[140] Another positive of the Florida System is that it builds in lower caps for Emergency Medicine. While such caps can leave the victim of malpractice less than fully compensated, they at least reflect a goal by the state to protect specific fields which may benefit more than the public is harmed. This might be easier for opponents to accept than blanket protections for a massive industry.

[141] Earnest McBride, *Tort Reform in Mississippi Legislature Dies, Revives[,] and Dies Again*, 2004, http://www.coax.net/people/lwf/Tort_Reform.htm.

[142] *Id*. (quoting Bryant Clark, Mississippi representative of Ebenezer).

one study has suggested, getting rid of the caps might actually reduce insurance premiums.[143] Furthermore, it is also possible that physicians and businesses will see no adverse affects due to the various other provisions of the Mississippi Tort Reform package that may play a greater role in the cost of insurance. The 2004 Tort Reform, among other things, placed caps on punitive damages tied to a defendant's net worth, enacted venue rules which eliminated non-resident abuse of the Mississippi court system, largely did away with joint and several liability, and enacted products liability protections for innocent sellers.[144] Certainly, such changes have altered the potential liability of Mississippi businesses and medical providers. While further study is needed to show what effect these provisions have had on the rate of lawsuits in Mississippi and the cost of insurance, it is unlikely to be minimal.

In the event that the caps are declared unconstitutional, one option available is that the legislature could call a constitutional convention in order to amend the constitution such that it would expressly permit caps on noneconomic damages.[145] This was the approach taken in Texas after the Texas Supreme Court declared that caps on noneconomic damages were unconstitutional under the state's open courts provision.[146] This approach has also been advocated in Georgia and Illinois in the wake of their courts' decisions. However, if the Mississippi Supreme Court were to decide the case on separation of powers grounds, then this option may not be available. This possibility stems from the fact that the Mississippi Supreme Court has held that "[t]he separation of the legislative, judicial, and executive powers of government is a fundamental principle of American constitutional jurisprudence, and cannot be violated even by a constitutional convention."[147]

Another viable option, perhaps one that strikes at the root of the problem, is insurance reform. Proponents of insurance reform claim that "states that have implemented insurance reform have had greater success

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[143] *See supra* notes 67-70 and accompanying text.

[144] MISS. CODE ANN. §§ 11-1-65 (2004 & Supp. 2010), 11-1-60 (2004 & Supp. 2010), 11-1-63 (2004 & Supp. 2010), 11-11-3 (2004), 85-5-7 (2004 & Supp. 2010); *see* Wise, *supra* note 77.

[145] A constitutional convention could also be an option in the event that the caps are declared constitutional. As of 2010, Arizona, Kentucky, and Pennsylvania have all codified constitutional provisions that expressly prohibit the enactment of any laws that limit the damages a party may recover for personal injury or death. *See* Kelly & Mello, *supra* note 4, at 516-18 (outlining state provisions regarding caps on damages).

[146] Ortiz, *supra* note 3, at 1293; TEX. CONST. art. III, §66(b).

[147] Lawson v. Jeffries, 47 Miss. 686 (Miss. 1873) (finding an ordinance passed by the 1868 Mississippi constitutional convention unconstitutional and void because it "grant[ed] new trials upon certain classes of final judgments and decrees referred to, and on certain conditions therein named" which was not "a legislative, but a judicial, act.").

lowering the overall costs of medical malpractice insurance than those that have implemented only caps."[148] In fact, one California study concluded that the state's caps on malpractice awards merely lined the pockets of insurance companies; and it was not until the state enacted hard and fast rules regarding premiums and rate changes that actual savings were seen.[149] Further, the need for insurance reform can be seen in the fact that the nation's largest malpractice insurer pushed for caps on noneconomic damages in Texas as a way to remedy rising health care costs; but then, after the caps were in place, claimed that they had minimal effect. [150]

V. CONCLUSION

As of today, growing empirical evidence suggests that caps on noneconomic damages do not help reduce insurance premiums and may even contribute to higher costs. Around the country, several states that have imposed caps on noneconomic damages have since repealed them. Ohio, Alabama, Illinois, New Mexico, New Hampshire, Wisconsin, Georgia, and Kansas have all struck down caps on noneconomic damages as unconstitutional limitations. Ultimately, equity and justice suggest that Mississippi should follow suit, and in doing so, restore its injured citizens to their rightful position.

Fixed caps on noneconomic damages, caps that arbitrarily ignore the evidence in a case, the severity of the injury, and the value a jury places on a human life, are simply not the answer. In a perfect world, plaintiffs would not be injured; however, the closest we can get to this ideal situation is to fully compensate victims for the harm done to them, or at least balance the needs of the public with the needs of the medical and business community by adopting a system that takes into account the passage of time and the reality that some injuries deserve larger noneconomic compensation than others. A system that builds in judicial flexibility on a case-by-case basis is preferable to one that is simply a flat, arbitrary cutoff. Additionally, other elements of tort reform or insurance reform may help achieve the desired goals on both sides of the aisle. Ultimately, any reform is better than one that shifts the cost of negligence onto the shoulders of the injured victim.

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[148] Dobrinsky, *supra* note 5.

[149] *See* ConsumerWatchdog.org, *How Insurance Reform Lowered Doctors' Medical Malpractice Rates in California and How Malpractice Caps Failed*, Mar. 7, 2003, http://www.consumerwatchdog.org/documents/1008.pdf.

[150] *See supra* notes 67-70 and accompanying text.

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