



September 10, 2019

HILBURN V. ENERPIPE AND STATUTORY DAMAGES CAPS

This memorandum provides a brief history of statutory caps on non-economic damages in common-law tort cases in Kansas, analyzes the June 14, 2019, opinion issued by the Kansas Supreme Court in *Hilburn v. Enerpipe*, and identifies selected policy considerations for the Kansas Legislature in the wake of that opinion.

Non-Economic Damages Limitations

Kansas has had some form of restraint on noneconomic damages in certain common-law tort cases since 1986. The 1986 cap applied exclusively to medical malpractice lawsuits, capped both non-economic damages and total damages, and included an annual adjustment to the cap based on the consumer price index. This cap was later found unconstitutional.

The following year, the Legislature enacted a cap of \$250,000 for non-economic damages in all personal injury cases other than medical malpractice cases. This cap did not limit total damages or include a consumer price index adjustment.

In 1988, the Legislature merged the two caps into a single cap of \$250,000 for non-economic damages with no consumer price index adjustment.

The 2014 Legislature, in response to a Kansas Supreme Court decision questioning the cap having been unadjusted since its creation in 1988, enacted legislation that would phase-in increases to the cap, ultimately reaching \$350,000 for causes of action accruing on or after July 1, 2022.

Opinion in *Hilburn v. Enerpipe*

The Kansas Supreme Court issued its opinion in the case of *Hilburn v. Enerpipe*, ___ Kan. ___, 442 P.3d 509, on June 14, 2019. The opinion held the non-economic damages cap under KSA 60-19a02 violated the right to a jury trial protected by Section 5 of the *Kansas Bill of Rights* within the *Kansas Constitution* because it intrudes upon the jury's determination of the compensation owed to plaintiffs to redress their injuries. The case was decided with three justices in the majority, one justice concurring in part and concurring in judgment, two justices dissenting, and one justice not participating. Accordingly, the opinion of the Court is a majority opinion on all issues with which the concurring opinion concurs and a plurality opinion on all other issues.

Opinion of the Court

The Court first addressed the appropriate standard of review for the case and, in finding the right to a jury trial protected by the *Kansas Bill of Rights* to be a fundamental interest, declined to apply a presumption of constitutionality to statutes challenged under this section.

The Court then determined the statutory cap necessarily infringes upon this constitutional right and held the *quid pro quo* test previously applied to challenges to the cap was not appropriate as it “transforms what the people made inviolate into something violable at will.”

The Court reiterated it is within the power of the Legislature to modify the common law, from which the right to a jury trial originally arose, but determined the inclusion of Section 5 in the *Kansas Bill of Rights* elevated the right to a jury trial above the common law to an enumerated constitutional guarantee.

The Court next concluded the doctrine of *stare decisis*, under which courts generally follow the rule of law established in their earlier cases, does not require upholding the statutory cap because such a rule is not applicable when considering precedent that is plainly and unmistakably the result of mistake and error. The Court determined previous applications of the *quid pro quo* test did not withstand scrutiny and the cost-benefit analysis involved in evaluating the wisdom of following precedent did not weigh in favor of maintaining the precedent. Accordingly, the Court abandoned the *quid pro quo* test for claims pursuant to Section 5 of the *Kansas Bill of Rights*.

Additionally, the Court determined the plaintiff did preserve her challenge to the applicability of the *quid pro quo* test for Section 5 analysis and rejected the argument advanced by the Attorney General that the non-economic damages cap did not implicate the role of the jury, which is to resolve contested facts, but rather established the outer limits of a remedy provided by the common law and not enumerated within the *Kansas Constitution*.

Concurring Opinion

Justice Stegall authored a concurring opinion in which he discussed the appropriate standard of review in questions concerning the constitutionality of a statute and ultimately decided the majority opinion’s use of a *de novo* standard of review is appropriate in this case, and possibly in all cases concerning the *Kansas Constitution*.

Next, the concurrence determined the means adopted by the Legislature to cap non-economic damages—being procedural rather than substantive—is not permitted by Section 5 of the *Kansas Bill of Rights*. The concurrence takes the position that a statutory cap limiting what may be decided in personal injury cases would be constitutional, but a statutory cap substituting the statute’s limitation for the decision of the jury is not. While the concurrence notes the cap has the effect of substantively limiting all causes of action for non-economic damages, its operation is that of a procedural substitution.

Dissenting Opinion

Justice Luckert dissented from the majority's holding and was joined by Justice Biles in her dissent. The dissent differed from the majority on two threshold questions before then determining the *quid pro quo* test was satisfied.

As an initial matter, the dissent disagreed that the plaintiff had preserved her challenge to the *quid pro quo* test for Section 5 challenges and thus determined the *quid pro quo* test should have been applied by the Court for lack of an appropriate challenge to the test.

Next, the dissent determined the doctrine of *stare decisis* should apply in this case to promote system-wide stability and continuity and because the dissent is not clearly convinced the previous holding regarding the cap was originally erroneous or is no longer sound because of changing conditions. The dissent specifically noted innumerable insurance policies and indemnity contracts had been executed relying on previous decisions and *stare decisis* is more important in cases involving property and contract rights.

Upon making those two threshold determinations, the dissent conducted the *quid pro quo* analysis for the Section 5 claim and concluded the various statutes and regulations relating to motor carrier liability insurance and the non-economic damages cap are reasonably necessary in the public interest to promote the public welfare, and mandatory motor carrier liability insurance provides an adequate substitute remedy for whatever rights are curtailed by KSA 60-19a02.

Policy Considerations

The following public policy considerations either are directly raised by the *Hilburn v. Enerpipe* decision or may arise as the decision is applied in subsequent cases.

Medical Malpractice

As an initial matter, this case was not a medical malpractice case and there is a history in both Kansas and other states of considering statutory caps for medical malpractice separately than those for all other personal injury actions. However, since 1988, Kansas has not statutorily differentiated between the caps. Additionally, the case the majority opinion specifically declined to apply as precedent in this case, *Miller v. Johnson*, was a medical malpractice case.

Statutory Revival of the Cap

Justice Stegall's concurring opinion raised the possibility of alternative statutory pathways to effectuate the purpose of the cap. Pursuant to the terms of the concurrence, such an approach would seemingly necessarily eliminate the provision disallowing the jury from being informed of the existence of the cap and likely should change the terms of the cause of action rather than the award formulated by a court for the cause of action.

Other Areas of Law Potentially Impacted

The dissenting opinion raised the possibility that the case could lead to concerns regarding the constitutionality of other areas of law that might be challenged under Section 5 or Section 18 of the *Kansas Bill of Rights*. The dissent specifically raises concerns related to workers compensation, no-fault automobile insurance coverage, medical malpractice, and general tort litigation.

Constitutional Amendment

As the case concerns constitutional issues, it necessarily raises the question of whether the most effective avenue for the Legislature to consider responding to this case is to submit to the citizens of Kansas the opportunity to restate their position on the common law right to a jury trial in the form of a proposed constitutional amendment. A proposed constitutional amendment could likely take various possible forms.