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Tort Reform Setback

Analyzing the impact of the July 31 Missouri Supreme Court decision

The July 31 Missouri Supreme Court decision nullifying the cap on non-economic damages in medical malpractice cases was a major setback for physicians.

Tort reform has been an issue in Missouri for many years. In 2002 the largest medical malpractice carrier left the state because the tort "reforms" that had been in place in Missouri since 1986 had been significantly eroded by court decisions. Malpractice coverage became difficult to obtain and, when available, extremely expensive, particularly for those in high-risk specialties like OB/GYN, trauma, and neurosurgery. The practice of medicine in Missouri was truly in a crisis.

Significant reforms were enacted in 2005 with the passage of House Bill 393. These included generally restricting where doctors could be sued to the county in which they practice, requiring a meaningful "affidavit of merit" before a lawsuit could proceed, insulating benevolent gestures from liability, and, most significantly, reinstituting and limiting non-economic caps. Under the 2005 law, non-economic damages were restored to the $350,000 cap, not subject to adjustment for inflation, and were restricted to one such award in total per case, no matter how many defendants, plaintiffs or purported acts of negligence existed.

When then-Gov. Matt Blunt signed the bill while surrounded by physicians proudly clad in their white coats, it was a glorious day, not only because of the reforms, but also because it showed that physicians were willing and able to become involved in the political process for the benefit of their patients and their profession.

As a result of the 2005 reforms, several new medical malpractice carriers, including mutual companies, have entered the Missouri market. Premiums have stabilized and declined, saving physicians over $27 million. Insurance carriers have actually competed for business. More than 1,000 doctors have come to Missouri to practice medicine. The number of negligence cases filed against physicians has dropped by 57%. The "crisis" that was ongoing in 2002 was stemmed and, to some degree, reversed.

The July 31 Decision

However, on July 31, 2012, the Missouri Supreme Court struck down the $350,000 cap on non-economic damages as an unconstitutional infringement on the right to a trial by jury. The court found that since medical negligence cases existed as part of the common law when Missourians adopted our constitution in 1820, the attendant right to have a jury determine resultant damages could not be abridged by simple legislation. The decision was by a 4-3 vote, and the strongly-worded dissent pointed out that the Supreme Court had previously rejected an identical challenge to the non-economic caps contained in the 1986 tort reform.

The case decided in July by the Supreme Court was *Watts v. Cox Medical Center, et al.* The suit was brought against the hospital and its associated physicians alleging negligent prenatal care to Deborah Watts had caused catastrophic brain injuries to her son. The jury found in favor of Ms. Watts and awarded her $3.35 million for future medical expenses and $1.45 million for non-economic damages. The trial court applied the 2005 tort reform law and reduced the non-economic award to $350,000. The Supreme Court then reversed the trial court's reduction and reinstated the entire $1.45 million non-economic damages award.

A common aphorism is that "bad facts make bad law." The *Watts* tragedy provided an appropriately egregious setting for the Supreme Court's decision, but it was not unforeseeable. For one thing, lawyers who typically represent plaintiffs in medical malpractice cases ("plaintiffs' lawyers") have been attacking the non-economic caps since they were first adopted in 1986, trying to find the best legal argument and best case for their fight. Second, plaintiffs' lawyers have been extremely politically active and have backed candidates who share their views on this topic. And, to be completely honest, there are many honorable people, including some doctors, who oppose any limits on recoveries for injured patients. It was only a matter of time until judges appointed by governors generously supported by plaintiffs' lawyers comprised a majority on the

Supreme Court. Third, the result was foreshadowed in another Supreme Court decision in April of this year, *Sanders v. Ahmed*, in which two judges argued that that the cap on non-economic damages was unconstitutional in a case and in which a patient died as a consequence of medical negligence.

The full explanation of why the non-economic cap would be **unconstitutional** in a case for straight damages but **constitutional** in a case in which the patient died is beyond the scope of this article. The shorthand explanation is that when a patient dies, the physician must be sued under a legal theory known as wrongful death, and the cause of action for wrongful death was created by the Legislature in 1855. Thus, the Legislature has the power to limit recovery of damages under that legal theory but not under a theory that existed before Missouri came into being. We know that is confusing to most, lawyers as well as doctors, and we would be happy to explain it if you contact us.

Some Reforms Not Impacted

Yet, in spite of the *Watts* ruling, physicians still benefit from some of the 2005 tort reforms. The good news is they still can be sued generally only where they practice (the statute limits venue to the county in which the "first injury occurred"). This is a tremendous advantage to the SLMMS members who practice in St. Louis County. While every case presents many challenges and risks, our experience is that jurors in the county are more inclined to favor doctors and much less disposed to be punitive. Many of our friends who are circuit judges share this belief from what they routinely witness from the bench. The absolute requirement that plaintiffs file an "affidavit of merit" from a qualified practitioner definitely helps to obtain early dismissals of questionable lawsuits. A physician can still say "I'm truly sorry" without it being used as an admission of liability. And, as held in *Sanders*, the cap on non-economic damages is still in place for wrongful death actions.

Upsurge in Cases Expected

Now the bad news. We should expect an upsurge in the number of cases being filed. The limitation that had been in effect on non-economic damage had resulted in some cases being less desirable to many plaintiffs' attorneys, so fewer cases were filed. We estimate that it costs a plaintiff's attorney more than $100,000 to properly prepare a relatively uncomplicated medical malpractice case for trial. If a case looked like the primary damages would be non-economic, and the cap was $350,000, a lawyer was forced to weigh the risk of spending six figures when the maximum possible net recovery, to both the attorney and his client, after incurring those expenses was $250,000 or less. Consequently, those cases were far less likely to be filed.

For example, assume that a young child is disfigured as a result of medical negligence. The child will incur very little in the way of economic damages because she will not have lost any wages and her medical expenses will often have been paid by some collateral source. Under the 2005 reforms, she could recover a maximum award of $350,000 for her pain and suffering and the lifetime of emotional distress resulting from her disfigurement – and this would be reduced by the cost to bring the case to trial and pay her attorney's fees. Now, she will receive whatever a jury believes is fair, and that could be millions of dollars depending on the nature of her injury, her likeability, the personality of the defendant physician, the skill of her lawyer, and the sympathy level of the jurors. A similar scenario can easily be woven for an injury suffered by a retired person or someone not in the work force who cannot be compensated for lost wages.

Some have speculated that a push will be made to re-open cases where the juries' awards of non-economic damages were reduced to $350,000 by implementation of this now discredited tort reform. While courts have traditionally favored the finality of judgments, some believe that it would be inequitable for a court to refuse to provide relief from the impact of an unconstitutional law. We would hope that the courts will decline to revisit closed cases; but this issue will likely be litigated, and the results are unpredictable.

As a consequence of this lawsuit's impact, we should expect that medical malpractice premiums will increase to reflect the new reality of more medical negligence lawsuits and higher judgments. More problematically, we should anticipate that some carriers will withdraw from the Missouri market completely. We know of two carriers that were preparing to come into Missouri that are now taking a very hard look at their plans because of this ruling. Reduced competition is rarely a good thing.

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Welcome New Members

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Tort Reform

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Possible Remedies

What can be done? Most importantly, physicians need to regain the enthusiasm and activism that led to the 2005 reforms. We have heard from well-placed sources that legal scholars are investigating innovative ways that might allow the General Assembly to reinstate non-economic caps. Others believe the Legislature cannot reinstate the caps because they were found to be unconstitutional. If the latter proves to be the case, an amendment to the Missouri Constitution is the only remedy. Any amendment would need to be approved by Missourians.

There are several ways to place an amendment on a ballot for consideration by Missouri voters, but we believe the most direct and quickest way is to ask the General Assembly to pass a referendum reinstituting caps for non-economic damages. This type of referendum does not require the approval of the governor, and we know legislators who are enthusiastic to bring this issue to the fore. We believe that the cap should be proposed at a level that will appeal to the voters as fair and reasonable. The biggest drawback to this solution is that this amendment could not be considered by Missouri's voters until 2014.

Physicians should take two steps immediately on a personal level. They need to meet with their insurance brokers to review whether their current malpractice limits are sufficient in light of this change in the law. Since there is now no limit on non-economic damages, what formerly were adequate limits may no longer be so. As an illustration, the jury in *Sanders v. Ahmed* awarded $9.2 million in non-economic damages. Also, physicians need to meet with their lawyers and financial advisers to make sure their personal assets are protected to the greatest extent possible. There are several perfectly legitimate methods to ensure that one's life's work is not lost because of a single maloccurrence or bad outcome.

We sincerely hope that we will be able to submit another article for publication in this magazine trumpeting the return of non-economic caps. It cannot come soon enough.

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