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# Will Constitutional Challenges Pop the Lid?

*1994 pain and suffering caps helped insurers and trial lawyers seek new road to fat judgements*

**By David Ottenwess & Daniel Dulworth**

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Mention the words "tort reform" at a social gathering and, unless it's a gathering of personal injury lawyers, you can almost hear brains click the snooze button. But talk about the $30 million judgment awarded to plaintiffs in a St. Louis case against American Suzuki Motors Corp. involving its Suzuki Samurai vehicle, or the $100 million judgment against General Motors' Chevy Truck in the infamous side-saddle fuel tank case, and conversation becomes animated. Everyone has an opinion on the impact of pain and suffering awards, and many of the opinions hold that juries are crazy to award tens and hundreds of millions of dollars in personal injury cases.

We know that the cost is paid by insurers and business, that the awards have a long-term effect on personal cost of insurance, loss of business opportunity and a chilling effect on regional economic growth where such awards are made. Opinions can change if the pain and suffering question comes closer to home. It's easy to deplore the economic impact of a distant $20 million decision, yet harder to separate the emotions when the case is local. And when it comes down to personally agreeing that there should be a limit on money damages for pain and suffering caused to you, as an individual. — well, we can simply say that it's a tough sell.

The question is far from academic in Michigan right now. Limits to pain and suffering awards are under challenge by interest groups that benefit from unlimited pain and suffering damages. Their attack is framed by a question on the constitutionality of limits to such awards in cases currently under review.

### Constitutional right to money?

Individuals tend to assume there's a constitutional right to very big pain and suffering payments should they be harmed in any way, by almost anything. The fact, though, is that most states and the federal government have moved to specifically "cap" pain and suffering awards.

It's hard to separate the myth and folklore from the reality of case law on pain and suffering damages over more than 30 years. The assumption that any injury means a bonanza in damages developed over the years as plaintiffs' attorneys became skilled at seeking out government, business and insurers with so-called "deep pockets" to pay injury cases. It also developed because the increasing costs of litigation meant that, in some cases, insurers found it cheaper to pay up front rather than risk the costs of a trial.

At its height in the 1980s, the phenomenon seemed to involve almost any institution with money, no matter how incidental it may have been to the case at hand. Poorer, urbanized areas where jurors were likely to empathize with the plight of the plaintiffs as powerless victims of a faceless, greedy "system" became popular venues for such cases. Indeed, Wayne County developed a national reputation as a jurisdiction where huge pain and suffering awards were likely to be granted. Personal injury liability judgements soared, compared to other jurisdictions, as juries increasingly agreed with self-proclaimed "victims."

The media also plays a major part in the perception of a tort "crisis." The larger the verdict, and the more ridiculous the

facts, the more publicity a given case will garner in the media. Hurt because you tried to pick up your rotary lawn mower to use it as a hedge trimmer? Tap the engine manufacturer's insurer for pain and suffering damages — even though the manufacturer had no control over how their engine, sold wholesale, was used. Spill a cup of coffee in your lap while trying to drive your car? Sue the restaurant that sold the coffee and claim it was "too hot."

As a result of the perceived explosion in judgments and settlements, many states enacted various statutes dubbed "tort reform," in an effort to limit the filing of lawsuits and to cap damage awards. The rationale for tort reform is that pain and suffering awards were literally killing the industries that employed people, and limiting the insurance available to back growth and important public services.

Michigan was one of the states that adopted tort reform. The April 1994 act in Michigan brought a provision for insurance caps limiting medical malpractice pain and suffering ("non-economic") damages to $280,000 ($500,000 in the case of neurological damage). Death is not an exception to the cap. Michigan also enacted statutes capping pain and suffering damages in product liability cases at

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$280,000 ($500,000 in the case of death or "permanent loss of a vital bodily function"). "Economic" loss, such as lost wages and other out-of-pocket expenses, are not capped.

### The Cap Challenge

Challenging the caps are plaintiff law firms and their organization, particularly the Michigan Trial Lawyers Association, which lobbied hard but ultimately unsuccessfully against the 1994 legislation. From an outside perspective, it's easy to see why — every cap dollar saved by insurer, and passed on in the form of lower or stabilized rates to consumers — is directly related to lower trial awards, as well as settlements, for pain and suffering.

Plaintiffs' lawyers in Michigan, where so-called "punitive damages" in civil suits are prohibited, have often used pain and suffering awards to send a message to civil suit defendants. The mere threat of a large pain and suffering award is enough to drive many insurance companies and corporations to settle rather than try the merits of a lawsuit. In an effort to preserve their ability to recover damages in excess of the cap limits — not to mention to retain the threat and possibility of an unlimited pain and suffering award — personal injury attorneys, in numerous cases currently pending in Michigan courts, are attacking the caps by challenging their constitutionality on various grounds.

### Three-Prong Attack

The plaintiff bar, through the Michigan Trial Lawyers Association, has fashioned a three-part attack to the constitutionality of the damage caps that were enacted as part of the 1994 Tort Reform legislation: a separation of powers attack, and equal protection of law attack and a due process attack. This legal strategy was arrived at by analyzing successful challenges to arguably analogous laws in the Michigan appellate system. The plaintiffs' attorneys hope that the Michigan appellate courts will follow the decisions in other states that have struck down similar caps as unconstitutional.

As of the date of the publishing of this article, appellate courts in 21 states have decided the constitutionality of damage caps. Eight states have upheld such constitutionality: California, Indiana, Louisiana, Missouri, Nebraska, South Dakota, Virginia and West Virginia. The appellate court in 13 other states, on the other hand, have held that damage caps violate equal protection or other constitutional protections: Alabama, Florida, Idaho, Kansas, Montana, New Hampshire, New Mexico, North Dakota, Ohio, South Carolina, Texas, Utah and Washington. The Michigan Trial Lawyers Association has concentrated on the arguments utilized in these latter 13 states in presenting their challenge to the Michigan caps.

The separation of powers challenge is based on Article III, Section 2 of the Michigan Constitution, which prohibits any person exercising the powers of one branch of government from exercising those powers properly belonging to another branch of government. In a rather technical argument, the plaintiffs' attorneys charged that the legislature has interfered with the rules of practice of the Michigan court system. The Michigan appellate courts have already held that certain parts of the 1986 Tort Reform, which addressed the qualifications of medical expert witnesses, are unconstitutional because they conflict with the rules of evi-

dence as adopted by the Michigan Supreme Court, and thus infringe upon the Supreme Court's rule-making authority. However, in a more recent appellate decision in Michigan, the Court of Appeals upheld the constitutionality of the "notice" period of the 1993 Tort Reform that must be observed prior to filing a medical malpractice complaint.

The plaintiffs' attorneys argue that the damage caps violate the separation of powers provision of the Constitution by conflicting with court rules that allow trial courts to reduce or increase a jury verdict, to grant new trials and to instruct the jury on pertinent law before allowing the jury to deliberate. Regarding the new trial and jury instruction rule, the plaintiffs are not likely to be successful because the new damage caps do not even arguably interfere with these rules. The argument regarding the caps' conflict with the rule pertaining to reducing or increasing a jury verdict, on the other hand, has more merit. The plaintiffs submit that a judge's discretion to increase a jury verdict that he or she feels is too low and does not conform to the evidence is hampered by the artificial caps enacted by the legislature. Thus, according to the Michigan Trial Lawyers Association, the court rule allowing judges to increase or reduce jury verdicts is unconstitutionally infringed upon by the statute imposing damage caps.

The plaintiffs' attorneys' due process arguments focus upon Article I, Section 14 of the Michigan Constitution, which guarantees the right to a jury trial. The plaintiffs argue that the damage caps unconstitutionally impose upon the right to a fair jury trial by prohibiting juries to fulfill their functions of deciding the facts of a given case. In this regard, a jury's traditional duty is to decide the facts of a case, apply the law thereto and arrive at a verdict. This function has been usurped by the legislature, argue the plaintiffs' attorneys, because the damage caps in medical malpractice and product liability cases prevent an award of non-economic damages in excess of the applicable limits. As the argument goes, the legislature has unfairly concluded that under no factual circumstances should a "victim" of medical malpractice or product liability be awarded compensation for non-economic damages in an amount that exceeds what the legislature, ignoring the facts in the case, has already determined to be the fixed limit on compensation. The plaintiffs further argue that the legislature does not trust juries to fulfill their constitutional roles of awarding fair compensation to

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victims. Finally, the plaintiffs claim that the legislature has enlisted the judiciary in a "scheme" to deceive the jury by passing legislation forbidding the courts to inform juries that whatever compensation they may deem fair and just will be negated by the legislature's own imposed limitation on damages — consequently misleading the jury.

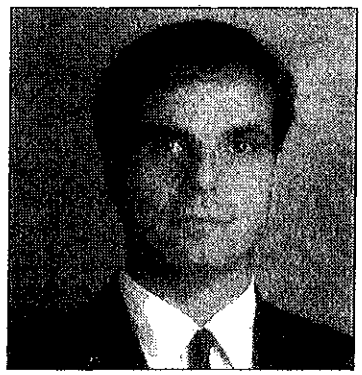
Similarly, plaintiffs' attorneys continue the theme that the damage caps are unfair by also arguing that the caps deny equal protection of law in violation of Article 1, Section 2 of the Michigan Constitution. According to this theory, "victims" of medical malpractice and product liability are treated differently from "victims" of premises negligence, defects in highways, drunken drivers and other tortious behavior. For instance, if a drunken driver causes an accident resulting in the loss of the leg of a victim, that individual can recover whatever damages the jury determines is fair. However, if a defective product or a negligent physician causes the loss of a leg, the jury is limited by the caps in awarding damages. The result is discrimination between different classes of individuals who have been injured — medical malpractice and product liability victims versus all others. Additionally, the plaintiffs argue that the caps do not affect those with less serious injuries; thus, the caps discriminate against the most seriously injured.

The plaintiffs' attorneys accuse the government of attempting to assure the availability of liability insurance at reasonable rates by compelling the most catastrophically injured to underwrite the costs of reducing premiums. They claim that this is a form of "social engineering" in which the legislature has engaged to advance the economic interest of certain groups of citizens, i.e., manufacturers, healthcare providers and their insurers, at the expense of depriving another group of citizens — the catastrophically injured — their right to recover compensation for injuries as determined by juries.

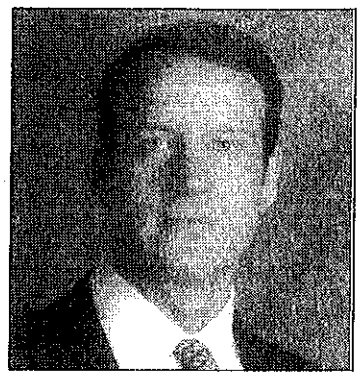
The plaintiffs' attorneys acknowledge that the legisla-

ture has the right to achieve a permissible goal, but only through legitimate and objectively reasonable means. They agree that the legislature may enact laws seeking to lower insurance rates, but they argue that the legislature cannot constitutionally attempt to lower insurance rates by arbitrarily denying one select group of citizens the right to recover damages for one type of injury while other citizens enjoy these same rights. And the plaintiffs' attorneys point to other appellate court decisions in Michigan and other states that have found as unconstitutional laws that discriminate between similarly situated tort victims.

Finally, the Michigan Trial Lawyers Association stresses that limiting recovery for non-economic loss in medical malpractice cases has no measurable effect whatsoever on medical malpractice insurance premiums or on the overall cost of health care because paid out damage awards constitute only a small portion of the total medical malpractice insurance premium costs and relatively few individuals in medical malpractice cases will suffer non-economic damages in excess of the amount of the caps. The plaintiffs' attorneys rely upon "unbiased" studies that have shown that the so-called medical malpractice "crisis" is illusory and that the primary influence upon



*David Ottenwess*



*Daniel Dulworth*

insurance premiums is not the actual payment of claims — which they maintain have remained steady and consistent over time — but rather the influences of the market place upon insurance industry investments. They conclude that there is no evidence that prohibiting the recovery of non-economic damages above a legislatively dictated cap has any realistic influence upon the availability or affordability of liability insurance, and thus, there is no justification for imposing this singular burden upon a selected class of citizens (again, the "catastrophically" injured).

### What Will the Michigan Supreme Court Do?

Will the plaintiffs' attorneys and the Michigan Trial Lawyers Association succeed in their arguments? The answer may not be known for years given the time it takes for a case to wind its way through the appellate system. If one were forced to guess at how the Michigan Supreme Court would rule on these arguments, however, one would start with the fact that the Michigan Supreme Court, as it is currently comprised, is conservative, pro-business and therefore likely to observe the general legal proposition that a challenged legislative judgment is accorded a presumption of constitutionality. The Supreme Court will also be able to rely upon sensible and logical arguments that the damage caps do not conflict with rules of evidence and procedure, do not deny equal protection of law and do not deny due process. There is precedent in Michigan already that other provisions of tort reform are constitutional because they bear a rational relationship to the objective of securing adequate and affordable health care for state residents. Additionally, the legislature has the power to determine social and economic policy and, if it wishes, it can constitutionally create, modify or even completely abolish existing statutory and common laws — including medical malpractice and products liability actions. Therefore, if it decides to allow these actions, the legislature can also place limits upon recovery.

The Supreme Court's only role is to determine whether the laws implemented are rationally related to achieving the goals of encouraging healthcare providers to remain in this state, encouraging insurance providers to continue doing business in Michigan, in securing adequate and affordable health care for state residents and in lowering liability insurance premiums for manufacturers and the healthcare profession.

In the end, if the Michigan Supreme Court were to decide this issue in 1998 or 1999, given its present conservative make-up, it would likely uphold the constitutionality of the caps. If Michigan's economy begins to slow down and judicial elections result in a turnover on the court with the replacement of Republican justices with Democrats, it is possible that the caps could be struck down. ■

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*David Ottenwess is the managing partner and Daniel Dulworth is an associate in the Detroit law firm of Wulfmeier & Ottenwess, PLC. The firm specializes in many aspects of insurance defense. They may be reached at (313) 965-2121 or via e-mail at law@wulf-ott.com.*