Damage Without Damages Caps [*Hilburn v. Enerpipe Ltd.*, 442 P.3d 509 (Kan. 2019).]

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The Kansas Supreme Court ruled that capping the recovery of noneconomic damages violates the right to a jury trial found in the Kansas Constitution. In so ruling, the court disregarded precedent, violating the doctrine of stare decisis. This ruling could result in invalidating laws that are beneficial to the public and the undermining of judicial stability.

I. INTRODUCTION

Because it is difficult to measure the amount of money a person's pain is worth, Kansas placed a statutory cap on the amount of money a person may be awarded for pain and suffering in personal injury actions.[1] However, the Kansas Supreme Court, in *Hilburn v. Enerpipe Ltd.*, ruled the statutory cap is unconstitutional because it violates the right to a jury trial.[2] Although this law promoted the public's interest to keep insurance rates affordable,[3] the court's ruling will inevitably increase insurance costs for Kansans.[4] Additionally, because the court failed to follow its own precedent on this settled legal issue, the court's ruling erodes system-wide stability in the law.[5]

1. KAN. STAT. ANN. § 60-19a02 (West, Westlaw through 2019 Reg. Sess.), *declared unconstitutional by* Hilburn v. Enerpipe Ltd., 442 P.3d 509 (Kan. 2019).

2. *See Hilburn*, 442 P.3d at 511.

3. *See* Hilburn v. Enerpipe, Ltd., 370 P.3d 428, 556 (Kan. App. 2016), *rev'd*, 442 P.3d 509 (Kan. 2019) ("[T]he damages cap operates in a broader scheme of mandatory insurance and the State maintains an interest in that insurance remaining available and affordable to compensate accident victims . . . .").

4. *See* Andy Marso, *Landscape Changed for Kansas Medical Malpractice Suits with Court Ruling*, INS. J. (July 12, 2019) https://www.insurancejournal.com/news/midwest/2019/07/12/531955.htm [https://perma.cc/S4BW-LLXB].

5. *See* Wallace B. Jefferson, *Reflections on the Principle of Stare Decisis from the Perspective of Judge and Advocate*, 73 ADVOC. (TEX.) 9, 9 (2015).

II. BACKGROUND

A. An Overview of Hilburn v. Enerpipe Ltd.

In 2010, Diana Hilburn was injured when her car was hit by a semi-truck owned by Enerpipe Ltd. and subsequently filed suit.[6] With Enerpipe admitting liability, the case went to trial to determine how much money was owed to Mrs. Hilburn.[7] After a jury awarded her $335,000 in total damages, with $301,509.14 being noneconomic losses, the court subsequently reduced the noneconomic losses to $250,000 in order to comply with Kansas law.[8] Hilburn appealed the modification of the jury award as a violation of her right to a jury trial.[9] The Kansas Court of Appeals affirmed the trial court's decision, stating that they were bound to the precedent set in *Miller v. Johnson*.[10] Although *Miller* was a similar case that had upheld the modification of a jury award, the Kansas Supreme Court ultimately overruled the appellate court.[11]

B. Legal Background

The primary legal issue in *Hilburn* was whether section 5 of the Kansas Bill of Rights prohibited the law that capped a jury award of damages at $250,000.[12] Past cases addressing this issue used the quid pro quo test to determine if the legislature improperly limited a right.[13] The quid pro quo test determines whether the legislature passed a reasonably necessary law and provided an adequate substitute for a right that is infringed.[14] The test has two elements: (1) the law being analyzed must be reasonably necessary in the public interest to promote the public welfare, and (2) the law must adequately substitute the right that is disturbed by the law.[15] If both elements are satisfied, the court will conclude the law is permissible, and no right has been improperly limited.[16]

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6. *Hilburn*, 442 P.3d at 511. "While Diana K. Hilburn rode home with her husband, a truck owned and operated by Enerpipe, Ltd. (Enerpipe) rear-ended their car. The collision negatively impacted Hilburn's recovery from a recent back surgery, resulting in a second surgery and chronic pain." *Id.* at 431.
7. *Id.* at 511.
8. *Id.* at 512.
9. *Id.*
10. *Hilburn*, 370 P.3d at 431.
11. *Hilburn*, 442 P.3d at 524; Miller v. Johnson, 289 P.3d 1098, 1112 (Kan. 2012), *abrogated by Hilburn*, 442 P.3d 509.
12. *See Hilburn*, 442 P.3d at 512.
13. *Miller*, 289 P.3d at 1112–13.
14. *Hilburn*, 442 P.3d at 515.
15. *Id.* at 512.
16. *Id.*

i. History of Noneconomic Damage Caps

Since 1986, Kansas has maintained laws limiting noneconomic damages for various causes of action.[17] One of the goals of noneconomic damage caps is to make various insurance costs more affordable, including mandatory automobile insurance and medical malpractice insurance.[18] Although the original laws were ruled unconstitutional because they did not satisfy the quid pro quo test, new legislation was enacted and upheld.[19] A few major cases address statutory caps on damages.[20]

In 1988, a group of malpractice plaintiffs in *Kansas Malpractice Victims Coalition v. Bell* sought a declaratory judgment ruling that a law limiting total and noneconomic recovery in medical malpractice cases was unconstitutional.[21] The court in *Bell* ruled that the law was unconstitutional because it did not provide an adequate substitution for the infringed-upon jury trial right, and not because a cap on noneconomic damages was facially unconstitutional.[22] Even in this case where the court struck down a cap on damages, the court recognized that the legislature may "modify the right to a jury trial through its power to change the common law."[23]

Then, in 1990, a federal district court asked the Kansas Supreme Court to determine whether the statute capping noneconomic damages violated the Kansas Constitution.[24] The Kansas Supreme Court in *Samsel v. Wheeler* stated that "this court recognizes that the legislature's decision to modify the common law, by setting a limit on noneconomic damages, is a legislative decision that does not violate our state constitution."[25] Consequently, the Kansas Supreme Court believed the cap on damages was consistent with prior decisions.[26]

As recently as 2012, the Kansas Supreme Court ruled in *Miller v. Johnson*, a medical malpractice case, that a cap on noneconomic damages did not violate the Kansas Constitution.[27] The *Miller* court upheld the law

17. KAN. LEGIS. RSCH. DEP'T, HILBURN V. ENERPIPE AND STATUTORY DAMAGES CAPS 1 (Sept. 10, 2019) [hereinafter DAMAGES CAPS], http://www.kslegresearch.org/KLRD-web/Publications/Resources/Documents/2019SpcFI&I/HilburnV.Enerpipe.pdf [https://perma.cc/2P2Z-CSEU].

18. *See Hilburn*, 442 P.3d at 541 (Luckert J., dissenting).

19. *See* Kan. Malpractice Victims Coal. v. Bell, 757 P.2d 251 (1988), *abrogated by Hilburn*, 442 P.3d 511; DAMAGES CAPS, *supra* note 17.

20. *See Bell*, 757 P.2d 251; Samsel v. Wheeler Transp. Servs., 789 P.2d 541 (Kan. 1990), *abrogated by Hilburn*, 442 P.3d 509; Miller v. Johnson, 289 P.3d 1098 (Kan. 2012), *abrogated by Hilburn*, 442 P.3d 509.

21. *Bell*, 757 P.2d at 258.

22. *Id.*

23. *Id.*

24. *Samsel*, 789 P.2d at 543–44.

25. *Id.*

26. *Id.* at 558.

27. Miller v. Johnson, 289 P.3d 1098, 1112–13 (Kan. 2012), *abrogated by* Hilburn v. Enerpipe Ltd., 442 P.3d 509 (Kan. 2019).

capping noneconomic damages, citing the past cases that resulted in the same conclusion.[28] The court was "not clearly convinced" the established quid pro quo approach was erroneous or unsound, as applied to caps on noneconomic damages.[29]

ii. Use of the Quid Pro Quo Test

The Kansas Supreme Court has previously held that the law capping noneconomic damages is constitutional, so long as it passes the quid pro quo test.[30] When the legislature impairs or changes a common law right, the quid pro quo test requires that the law is reasonably necessary and provides a substitute remedy for the infringed right.[31] Courts have applied the quid pro quo analysis in various contexts, including workers' compensation, no-fault automobile insurance, medical malpractice, and general tort litigation.[32] In each of these contexts, plaintiffs challenged the constitutionality of the cap on noneconomic damages under section 5.[33] Under each context, the court generally upheld the challenged law.[34] The Kansas Supreme Court has stated the "legislature can modify the right to a jury trial through its power to change the common law."[35] This power to change a common law element found in the Kansas Constitution was subjected to the quid pro quo test.[36]

III. COURT'S DECISION

Hilburn overruled the existing law and eliminated the quid pro quo analysis as applied to laws that cap damages.[37] The court held that the damages cap violated section 5, which states that "[t]he right of trial by jury shall be inviolate[,]" and a quid pro quo test as applied to an express constitutional right was incorrect.[38] The court stated that the application of a quid pro quo test "transforms what the people made inviolate into something violable at will."[39]

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28. *Id.* at 1110–13.
29. *Id.* at 1113.
30. *Id.*
31. *Id.* at 1113.
32. *See id.* at 1112 (citing cases).
33. *Id.*
34. *Id.* at 1112–13. The cap on damages was ruled unconstitutional in *Kansas Malpractice Victims Coalition v. Bell*, then an altered law capping the damages was upheld. *See* Kan. Malpractice Victims Coal. v. Bell, 757 P.2d 251 (1988), *abrogated by Hilburn*, 442 P.3d 511; *Miller*, 289 P.3d 1098.
35. *Miller*, 289 P.3d at 1110 (quoting *Kan. Malpractice Victims Coal.*, 757 P.2d at 259).
36. *Id.*
37. Hilburn v. Enerpipe Ltd., 442 P.3d 509, 524–25 (Kan. 2019) (Stegall, J., concurring).
38. *Id.* at 511, 521 (majority opinion) (quoting KAN. CONST. § 5).
39. *Id.* at 515 (quoting *Miller*, 289 P.3d at 1137).

The court addressed that it was not following the doctrine of stare decisis by framing the earlier decisions on damages caps as plainly the result of mistake and error.[40] Under the doctrine of stare decisis, a court of last resort follows its own precedent, unless those rulings are the result of plain mistake or error.[41] The court identified the error of the previous decisions, stating it did not identify the right to jury trial, found in section 5, as a distinct right separate from other general common law rights.[42]

Once the damages cap law was framed as violating an express constitutional right, the court could circumvent the obligation to adhere to established law.[43] The court reasoned that the obligation to follow precedent was weakest when the decision involves a constitutional issue because such "mistakes cannot be easily corrected by ordinary legislation."[44] Therefore, the court overruled direct precedent and declared caps on noneconomic damages as a violation of section 5, which makes the laws imposing such caps unconstitutional.[45]

IV. COMMENTARY

The court should not have departed from settled law capping noneconomic damages, because the law was necessary to keep insurance affordable and adherence to past decisions allows for public reliance.[46] This ruling will harm Kansas in at least two ways. First, one of the primary purposes of the law was to keep insurance affordable for Kansas citizens and businesses.[47] Second, this ruling undermines the stability of existing law.[48]

A. Rising Insurance Costs in Kansas

Without a cap on noneconomic damages, it is all but certain that insurance costs will increase.[49] The noneconomic damages cap created greater certainty for insurance companies because it provided a maximum amount they would be required to pay in lawsuits.[50] Insurance companies

40. *Id.* at 517.
41. *Id.*
42. *See id.* at 517−18.
43. *Id.*
44. *Id.* at 517 (quoting *Miller*, 289 P.3d at 1142 (Beier, J., concurring in part and dissenting in part)).
45. *Id.* at 524.
46. *See Miller*, 289 P.3d at 1110; Marso, *supra* note 4; Jefferson, *supra* note 5.
47. *See* Marso, *supra* note 4.
48. *See* Jefferson, *supra* note 5.
49. *See* Marso, *supra* note 4 (quoting Tom Bell, the president of the Kansas Hospital Association). "[T]he court's ruling] 'will undoubtedly create upward pressure on medical liability insurance rates, and it will certainly not help how Kansas is perceived during the recruitment of healthcare providers.'" *Id.*
50. *Id.*

price premiums based largely on the average probability of a loss, or how much they might have to pay.[51] Without the cap, there will be greater uncertainty, thus, creating more difficulty in predicting the probability of a loss.[52] Noneconomic damages are, by their nature, impossible to measure monetarily, meaning that the lack of cap might result in wide and unpredictable awards of noneconomic damages.[53] Without the predictability that the law provided, insurance companies will likely be forced to increase premiums for Kansans.[54]

Other states that do not have a cap on noneconomic damages have higher insurance costs.[55] Because medical providers must increase their insurance coverage, they will transfer that cost on to their patients.[56] States with caps on noneconomic damages have experienced an increase in the number of physicians seeking to practice within those states.[57] The *Hilburn* decision similarly will hurt Kansas's efforts to recruit healthcare providers.[58] Consequently, the now unstable medical malpractice environment will likely discourage some doctors from choosing to practice in Kansas.[59]

Under the same rationale affecting the medical field, all other business entities operating in Kansas will likely see their insurance costs rise due to the possibility of being sued for uncertain sums.[60] Because many business entities and individuals may be sued by plaintiffs seeking noneconomic damages, these entities and individuals will ultimately bear the increased insurance costs associated with the heightened uncertainty of potential liability.[61] They too will likely cope by increasing prices or moving to another state.[62]

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51. *See* ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 47 (6th ed. 2016).

52. *See* Marso, *supra* note 4.

53. *See Non-Economic Damages*, JUSTIA, https://www.justia.com/injury/negligence-theory/non-economic-damages/ [https://perma.cc/8YSL-EZXH] (last updated Apr. 2018). "Since there is no direct economic loss and no hard evidence of bills or receipts on which to base the award, it can be difficult for juries to assign a monetary value to the losses." *Id.*

54. Kan. Med. Soc'y, *Kansas Supreme Court Strikes Down Key Tort Law*, KAN. PHYSICIAN, https://us9.campaign-archive.com/?u=8b8dc3deef29327977905b092&id=8ef44c7348 [https://perma.cc/RAD6-U26S] (last visited Aug. 24, 2020).

55. Marso, *supra* note 4.

56. *See id.*

57. Anca M. Cotet, *The Impact of Noneconomic Damages Cap on Health Care Delivery in Hospitals*, 14 AM. L. & ECON. REV. 192, 192 (2012). "[S]tates that have adopted noneconomic damages caps experienced an increase in the number of physicians." *Id.*

58. Marso, *supra* note 4.

59. *See* Cotet, *supra* note 57, at 192.

60. *See* COOTER & ULEN, *supra* note 51, at 47. "One of the most important behavioral implications of risk aversion is that people will pay money to avoid having to face uncertain outcomes." *Id.*

61. *See id.*; Joanna M. Shepherd, *Tort Reforms' Winners and Losers: The Competing Effects of Care and Activity Levels*, 55 UCLA L. REV. 905, 916 ("[U]ncertainty can cause insurers to charge potential tortfeasors 'ambiguity premiums' that increase insurance prices.").

62. *See* COOTER & ULEN, *supra* note 51, at 28 (discussing market equilibrium).

B. The Ruling Subverts Expectations of Stability and Consistency within the Judiciary

A cornerstone in sound jurisprudence is the doctrine of stare decisis, which requires adhering to established law, so long as the established law is not clearly erroneous.[63] The Kansas Supreme Court has said that:

> Stare decisis operates to promote system-wide stability and continuity by ensuring the survival of decisions that have been previously approved by a court . . . . The application of stare decisis ensures stability and continuity—demonstrating a continuing legitimacy of judicial review. Judicial adherence to constitutional precedent ensures that all branches of government, including the judicial branch, are bound by law.[64]

The United States Supreme Court has stated stare decisis "is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[65] Thus, the Kansas Supreme Court's past rulings relating to damages caps should be final so that Kansas citizens know how to conduct their affairs.[66] Instead, by flip-flopping on the issue of noneconomic damages caps, the court has promoted confusion and uncertainty, doing a disservice to parties who have depended on previous decisions.[67]

Other areas of law, such as workers' compensation, that use the quid pro quo test serve as examples of the uncertainty caused by failing to follow precedent.[68] For example, the Kansas Supreme Court has previously used the quid pro quo test to analyze Kansas workers' compensation laws and to hold that Kansas workers' compensation laws do not infringe on the right to a jury.[69] Because the quid pro quo analysis, as applied to the right to a jury, has been overruled, the future of workers' compensation laws is made less stable.[70] The failure to adhere to recently-settled law will likely prompt speculative relitigation of settled issues such as the constitutionality of workers' compensation laws in Kansas.[71]

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63. Crist v. Hunan Palace, Inc., 89 P.3d 573, 579 (Kan. 2004).

64. *Id.* (quoting Samsel v. Wheeler Transp. Servs., Inc., 789 P.2d 543 (1990)).

65. Payne v. Tennessee, 501 U.S. 808, 827 (1991).

66. *See* Jefferson, *supra* note 5, at 9 ("[A]bsent compelling circumstances . . . the Court's construction of a statute should be final so that . . . citizens know how to conduct their affairs . . . ." (internal quotations omitted)).

67. *See id.*

68. *Hilburn*, 442 P.3d at 534 (Luckert, J., dissenting) ("The majority's decision today upends caselaw addressing jury trial limitations imposed in workers compensation [sic] . . . .").

69. Miller v. Johnson, 289 P.3d 1098, 1109–10 (Kan. 2012), *abrogated by Hilburn*, 442 P.2d 511.

70. *See Hilburn*, 442 P.3d at 534 (Luckert, J., dissenting).

71. *See id.* at 535 ("[A] quid pro quo analysis would—and has—served as a basis for upholding the constitutionality of the Workers Compensation Act."); Jefferson, *supra* note 5, at 9 ("[O]verruling existing precedent can encourage 'speculative relitigation' of settled issues.").

The court should have followed stare decisis because many Kansans have entered into agreements relying on the court's past decisions.[72] People should be able to rely on the Kansas Supreme Court's past rulings when crafting agreements and contemplating future litigation or settlements.[73] By upending its own rulings on the issue of noneconomic damages caps, the court has unsettled years of private agreements and created an injustice to those parties whose jury-awarded damages have been reduced.[74] The court should have given more consideration to those relying on its past decisions and upheld its own precedent.[75]

V. CONCLUSION

The court likely increased the costs to Kansans and decreased the reliability of the judicial branch with its ruling in *Hilburn v. Enerpipe.* The law limiting noneconomic damages is an important part of providing stability for any person who needs liability insurance, and the court has eliminated this stability by ruling caps on noneconomic damages are unconstitutional. The damages caps provided greater certainty of outcomes which, in turn, allowed insurance providers to price their insurance lower. Further, recruiting doctors to Kansas will prove more difficult because medical malpractice insurance costs will rise without caps on statutory damages.[76] The court's flip-flopping reduces its reliability because the court might change its mind the next time a legal issue is raised. In order to preserve trust in the judicial branch and keep insurance rates in Kansas stable and competitive with other states, the court should have followed its previous decisions and upheld the well-settled law.

72. *Hilburn*, 442 P.3d at 534–35 (Luckert, J., dissenting).
73. *See* Jefferson, *supra* note 5, at 9.
74. *See Hilburn*, 442 P.3d at 534–35 (Luckert, J., dissenting).
75. *Id.* at 534.
76. *See supra* Part IV.