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## Landmark Kansas Supreme Court Decision Strikes Down Damage Caps in Personal-Injury Suits

A divided Kansas Supreme Court recently invalidated the State's cap on noneconomic damages in personal injury cases. In *Hilburn v. Enerpipe LTD.*, the Court held that the damage caps as set forth in K.S.A. 60-19a02 violates the right to a jury trial under section 5 of the Kansas Constitution Bill of Rights. In so holding, the Court overturned decades of its established precedent upholding damage caps against similar constitutional challenges in several contexts. Specifically, the Court overturned its decision in *Miller v. Johnson*, 295 Kan. 636 (2012), and abandoned the *quid pro quo* test it previously applied to uphold the caps in a medical malpractice action. As a result, Kansas healthcare providers now face unpredictable and likely greater potential malpractice liability at least in the interim. However, a recently decided medical malpractice suit may soon resolve some unpredictability created by the *Hilburn* decision.

### The *Hilburn* Case and Supreme Court Ruling

In 2010, Diana Hilburn suffered injuries after a semi-truck driven by an employee of Enerpipe, LTD. rear-ended the vehicle she and her husband were riding in. As a result of the incident, Hilburn filed suit against the trucking company for vehicular negligence. The jury returned a verdict for Hilburn totaling \$335,000. The jurors named \$33,490.86 for medical expenses and \$301,509.14 for noneconomic damages.

Over Hilburn's objection, the trial court applied the statutory damage cap in K.S.A. 60-19a02 and reduced the verdict for noneconomic damages to \$250,000. Hilburn appealed from this ruling, arguing that K.S.A. 60-19a02 violated her rights under both section 5 and 18 of the Kansas Constitution Bill of Rights.

A fragmented Kansas Supreme Court agreed with Hilburn and held that the statutory cap on noneconomic damages is unconstitutional. In so holding, the Court relied on the language of section 5 of the Kansas Constitution Bill of Rights, which states that "[t]he right of trial by jury shall be inviolate." The Court interpreted this inviolability as prohibiting the Legislature from interfering with the jury's historical function, which includes determining the amount of damages based on the facts of each case.

The Court reasoned that the effect of applying the damage cap is to substitute the Legislature's determination of damages for the jury's determination. The Court explained that "[t]he people deprived the Legislature of that power when they made the right to trial by jury inviolate." Consequently, the Court found that K.S.A. 60-19a02 interferes with the original meaning of section 5 and is therefore unconstitutional.

### Future Implications

Kansas healthcare providers now face unpredictable and likely greater malpractice liability following the Court's decision in *Hilburn*. The plurality opinion of the Court makes clear that jury verdicts which result from personal injury actions will no longer be subject to a noneconomic damages cap. Simply put, a plaintiff in a personal injury case may now receive more than \$350,000 in pain, suffering and other noneconomic damages.

While healthcare providers now face the prospect of enormous potential liability in individual cases, the ultimate effect of the *Hilburn* decision is to remove what predictability healthcare providers previously enjoyed in determining their potential liability in malpractice actions. Unlike economic damages which include measurable expenses like medical bills and lost wages, noneconomic damages or pain and suffering is inherently subjective and unpredictable. Accordingly, healthcare providers should expect insurance carriers to increase medical liability insurance rates at least in the interim given this unpredictability.

Additionally, the *Hilburn* decision has already encouraged renewed efforts to challenge Kansas' other statutory damage caps which only confounds the current unpredictability. The *Hilburn* decision does not directly implicate other similar damage caps on punitive damages and noneconomic damages in wrongful death actions as different statutes govern both. However, the *Hilburn* decision may provide a rubric for successfully challenging those laws. As previously mentioned, both the plurality opinion and Justice Stegall's concurrence interpreted section 5's inviolability as preserving the right to a jury trial as it existed in common law at the time Kansas Constitution was ratified. Given that Kansas' wrongful death statute existed before the State adopted its Constitution, there is a strong possibility that healthcare providers will soon face the real prospect of also being exposed to uncapped noneconomic loss in wrongful death cases.

Above all, the *Hilburn* decision adds unpredictability to an already unpredictable situation for healthcare providers. There even remains ambiguity regarding the decision's application to other types of personal injury cases, like medical malpractice suits, given that the *Hilburn* Court was split. Nevertheless, a recently decided medical malpractice suit in Sedgwick County, Kansas will soon provide an opportunity for Kansas courts to clarify many questions raised by *Hilburn*.

### Recent Application to Medical Malpractice Suit

In 2015, Lindsay Perez died from asphyxiation due to complications following the birth of her son at Wesley Medical Center in Wichita. The Perez family brought suit against Wesley Medical Center, the hospital's parent company, and nine physicians alleging medical negligence on the part of the hospital and its staff in connection with Perez's death. In August of this year, a jury returned a verdict for the Plaintiffs totaling \$6.5 million. The jurors named \$5.05 million in economic damages and a total of \$1.5 million in non-economic damages which included \$500,000 to Perez's estate for pain and suffering Perez experienced prior to her death and \$1 million to her family for grief and bereavement experienced by her family.

The trial court, following the *Hilburn* decision, declined to apply the statutory damage cap in K.S.A. 60-19a02 to the noneconomic damages awarded to Perez's estate. However, the trial court applied the statutory damage cap in K.S.A. 60-1903, which limits noneconomic damages in wrongful death actions, and reduced the verdict for grief and bereavement from \$1 million to \$250,000. The Perez family intends to challenge the constitutionality of the damage cap in K.S.A. 60-1903. It is also expected that the Defendants will challenge the trial court's decision concerning the noneconomic damages awarded to Perez's estate. Healthcare providers should plan on monitoring this case as it moves through the appellate court process.

### Additional Information

For further information or questions about the decision in *Hilburn v. Enerpipe LTD.* or state laws regarding damage caps, please contact any member of Kutak Rock's [National Healthcare Practice Group](#) or one of the authors listed below. For more information regarding our practices, please visit us at [www.KutakRock.com](http://www.KutakRock.com).

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