

Missouri Tort Reformers Flunk History Test As Court Strikes Down Damage Caps

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The Missouri Supreme Court's recent decision **striking down** a law capping damages for medical malpractice injuries because it violated the state constitutional right to trial by jury highlights ironies and inconsistencies in the views of conservative supporters of so-called "tort reform." Damage caps are a key feature in the **playbook** of corporate-funded tort reform organizations such as ALEC, the American Legislative Exchange Council, but they do little to address the problems their supporters claim they can solve: rising health care costs and shortages of doctors. Also, because caps restrict the historical role of juries as established by the federal and state constitutions, their popularity with many conservatives illustrates the selective and outcome-oriented nature of much conservative "originalism."

In its decision, *Watts v. Cox Medical Centers, et al.*, the Missouri Supreme Court struck down a controversial 2005 state law that limited non-economic damages in medical malpractice cases to \$350,000. Naython Watts was born with "catastrophic brain injuries" which a jury found were a result of malpractice by the doctors treating his mother during her pregnancy. The jury also found that Naython had suffered \$1.45 million in noneconomic damages, which, under the damage caps law, were reduced to the statutory limit of \$350,000. His mother challenged the law on his behalf, arguing that it violated the Missouri constitution, which provides that "the right of trial by jury as heretofore enjoyed shall remain inviolate." A majority of the Missouri Supreme Court, based its reading of the historical role of Missouri juries dating back to the adoption of the state constitution in 1820, agreed.

Medical malpractice is a serious problem. As Sanjay Gupta, the associate chief of neurosurgery at Grady Memorial Hospital, (and chief medical correspondent for CNN), noted in a July 31 *New York Times* *op-ed*:

According to a 1999 report by the Institute of Medicine, as many as 98,000 Americans were dying every year because of medical mistakes. Today, exact figures are hard to come by...[b]ut a reasonable estimate is that medical mistakes now kill around 200,000 Americans every year. That would make them one of the leading causes of death in the United States. [*The New York Times*, 7/31/12]

By reducing incentives for quality care, damage caps threaten to make the malpractice problem worse. As economist Shirley Svorny, an adjunct scholar at the Cato Institute, has **written**, "[m]uch of the protection consumers have against irresponsible and negligent behavior on the part of health care providers hinges on oversight and incentives created by the medical professional liability insurance industry." By limiting damages, caps reduce the incentives insurers have to engage in costly and time consuming oversight of physician behavior. Thus, according to Svorny, damage caps can "result in more cases of negligence and substandard care."

Supporters of damage caps ignore or downplay this incentives issue and point instead to the supposed benefits of caps: lower health care costs and an increased supply of physicians. A recent *St. Louis Business Journal* **article** on the *Watts* decision quotes an insurance company spokesperson who said of the decision, "Eliminating the cap will increase health care costs and could ultimately drive physicians out of the state, limiting Missourians access to high quality care." But what has experience with caps in Missouri and other states actually shown?

Damage caps have proven ineffective in reducing health care costs. Dr. Atul Gawande's *New Yorker* **article** examining highest-in-the-nation health care costs in McAllen, Texas found that although damage caps adopted in that state greatly reduced medical malpractice lawsuits, health care costs continued to rise sharply. In addition, a 2009 study from Americans for Insurance Reform found that **Missouri's longstanding damages cap** (the state has capped damages since the mid-1980s, with the 2005 law at issue in the *Watts* decision merely being the latest version) failed to keep the state's medical malpractice insurance premium costs from exceeding that of neighboring Iowa, which has no cap on damages.

Texas' experience with caps also calls into question their effectiveness in increasing the supply of physicians. A recently released study of the issue in Texas concludes that damage caps have failed to increase physician supply:

Does state tort reform affect physician supply? Tort reformers certainly believe so. Before Texas adopted tort reform in 2003, proponents claimed that physicians were deserting Texas in droves. After tort reform was enacted, proponents claimed there had been a dramatic increase in physicians moving to Texas due to the improved liability climate. We find

no evidence to support either claim. Physician supply was not measurably stunted prior to reform, and it did not measurably improve after reform. ["Does Tort Reform Affect Physician Supply? Evidence from Texas," 6/14/12]

Damage caps also place many conservative supporters of tort reform on a collision course with their often-expressed belief in the importance of constitutional history. As Susan Saladoff, Producer and Director of the award-winning documentary *Hot Coffee*, has **written**:

What is so ironic is that groups like ALEC espouse the tea party agenda which is supposed to be about our constitutional rights. They seem to remember the 2nd amendment about guns but fail to remember the 7th amendment, which gives each American the right to a trial by jury. Having our cases decided by a jury of our peers is a fundamental right of our democracy, which is being taken away by these laws that restrict a jury to decide what a fair and adequate amount of damages should be in a tort case.

The "originalist" case against damage caps is even stronger in Missouri, because the state constitution's guarantee of the right to trial by jury expressly forbids subsequent narrowing of the role of juries as established in 1820 when the constitution was adopted. Thus, the court in *Watts* found that the law establishing damage caps violated **Article I, Section 22(a)** of the Missouri Constitution ("the right of trial by jury as heretofore enjoyed shall remain inviolate ...").