

# The Practical Consequences of Caps on Damages

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**STEPHEN DANIELS:** All right, I am going to use some visual aids because they help me think. I also have a few numbers, so that's often easier to do with a visual presentation. I do want to say I may be the only nonlawyer that you're going to hear from today. I'm a political scientist, so I study the politics of courts, tort reform. I'm going to talk about research my colleague Joanne Martin and I have been doing in Texas. One of the main areas we looked at is the impact of a \$250,000 hard cap on noneconomic damages in medical malpractice cases. And we study plaintiffs' lawyers; we wanted to know what was the impact on them of the cap? Because they're the gatekeepers. You have a serious personal injury case, or almost any kind of damage case, [and] if you don't have a lawyer, your rights aren't worth anything. I don't care what's on the books or the like. Lawyers are the gatekeepers. If you're a plaintiffs' lawyer, it's a contingency fee system. So if the lawyer can't get something out of it, can't make a living, again your rights don't make any difference.

And if you look at some of the real goals of caps in some states, it is to go after the plaintiffs' lawyers, go after the people who bring the cases. You'll have fewer cases whether you have a jury or not, but there are some other things that happen as well, and that comes from the title [on the slide being displayed] that we have, "The Juice Isn't Worth the Squeeze in Those Cases Anymore." That's from a very experienced, successful plaintiffs' side med mal specialist commenting on how he was going to change his practice after the cap. He was going to handle fewer medical malpractice cases, but equally important, he says, "I'm going to handle fewer cases with certain kinds of people: children who die or are killed by medical negligence, women, especially if they're stay-at-home-moms (they don't have an income), and the elderly." What some people call the "hidden victims" of tort reform, especially with medical malpractice.

All right, so this just a list of quotes from lawyers we interviewed in Texas, plaintiffs' lawyers, but the idea is to get across that caps can have a serious impact on a lawyer's practice; as a result, that means not just, again, fewer med mal cases, but fewer opportunities for access for certain kinds of people.

"There's no case in the system as expensive as medical malpractice."

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product liability, Board of Director claims, premises liability claims, automobile and trucking claims, governmental liability claims, trademark and copyright claims, real property disputes, general liability claims, and business litigation.

“The hardest case to win at trial in Texas.”

And if you look at win rates, in medical malpractice cases in Texas, if you can find a county of any size, going back a generation, even in the so-called “hey days” of plaintiffs’ lawyers in Texas, [and] find me a county that had a win rate, at trial, for medical malpractice above twenty-five percent—I’ll buy you dinner.

One lawyer said, “Last year we spent in excess of \$100,000 in cases that we didn’t take.”

Screening is very severe, and it’s expensive.

“We always escrow \$300,000 for each case.”

Put the money where you have it to have it. If you’re a plaintiffs’ lawyer, you lose. You eat the cases—you eat the cost.

“You know, I think the most I’ve had invested in a medical malpractice case was around \$600,000 or \$700,000.”

Luckily, he said, we won this one. But then, the kind of, the key, on this list:

“There are many cases we can’t take that are legitimate cases, but they’re not economically viable because you’re going to spend more working up that case than you can hope to get under the caps.”

For a while his practice was over ninety percent—med mal was over ninety percent of this practice. It went down to fifty percent, and this is one of the top med mal specialists in Texas after the turn of the century.

“Basically, they’ve essentially closed the courthouse door to negligence that would kill a child, a housewife, or an elderly person.”

“Unless there’s a way to make money practicing law, rights don’t make any difference.”

And as my favorite title of a law review article done by David Hyman and Charlie Silver on medical malpractice [says], very simple, *It’s the Incentives, Stupid*.<sup>1</sup> You go after the damages. You cut the available fee and recovery of costs for the plaintiffs’ lawyers. They cannot afford to take certain kinds of cases and certain kinds of clients.

All right, median impact, practical implications—after a \$250,000 hard cap, do you get fewer medical malpractice cases? The answer is yes. Now, I have Harris County, which is Houston, here because you cannot get hard figures on filing statewide for medical malpractice

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<sup>1</sup> David A. Hyman & Charles Silver, *Medical Malpractice Litigation & Tort Reform: It’s the Incentives, Stupid*, 59 VAND. L. REV. 1085 (2006).

before 2010 in Texas. These—we were able to get from the clerk in Harris County. So in 1997 to 2002, the five years before the cap, you had an average of 435 malpractice cases filed in those five years, per year. After the cap, it's cut almost in half. You want to look at jury trials in the last time period, the most recent, 2012 to 2016, there are an average of four to five med mal jury trial[s] in Harris County. If I go back to earlier data that we collected, for another project we had jury verdict data from Harris County for the five-year period 1981 to 1985. There were five times more jury trials in the early 80s and far more cases filed. So, the median practical implication? Fewer cases. Real simple.

But what about the hidden victims? One of the things we did in one of two surveys we did of plaintiffs' lawyers in Texas—this was the second survey, in 2006—we wanted to find out about this hidden victims idea. So, we set up kind of a quasi-experiment in the survey, looking at whether they would take certain kinds of clients in two very different kinds of cases. We set the comparison up after consulting with about a dozen litigators in Texas to make sure we were kind of on the right track. But our potential clients were a seventy-year-old male, a forty-five-year-old male with children at home and a pretty good paying job, and a forty-five-year-old female who was working at home with kids—a stay-at-home mom, no income. We asked them whether they would take that—each of these clients—in an eighteen-wheeler crash case—big truck hits [a] car, lots of money. As one of the consultants we worked with said, “There's a lot of meat on the bones in those cases,” and another said, “Even Republicans will vote for us on a jury in these cases.” So, this is a case—this is the “gimme.” And then the other was a med mal case. In each of them, there was a substantial amount of physical impairment and disfigurement, so you had your noneconomics in there for each. And so, we asked them, would you take each of these clients in the truck crash before the cap, and after? And in med mal before and after? We wanted to use the crash case because, you know, what's kind of a control? Are these clients ever of interest to a plaintiffs' lawyer?

The answer is yes—both before and after the cap, they'd still take each of these clients almost all the time.

We said, what about med mal? Would you take these clients in a med mal case before the cap? The answer is yes. Pretty much on an equal par with the truck crash case. But what about after the cap? And you can see the difference. A little over a quarter would take the

seventy-year-old male; a little over a third would take the stay-at-home mom, but even still you only had just over two-thirds who would take the best client. So you have fewer med mal cases coming in and certain clients becoming almost toxic. And, in fact, for an elderly person, it was getting damned impossible when we interviewed lawyers, following up on this, to find anyone who would say they would take an elderly client, male or female. They just can't afford the workup and the risk that's involved when there are no noneconomic damages. The loss is too great; the risk is too high.

Now, so those are the kind of practical implications we were interested in with these kind[s] of hidden victims who were taking the brunt of the caps. And there's an interesting kind of equal protection idea in there: why should these people pay the price, so to speak, for the supposed gains of the cap in Texas?

Now, but there is the question, practical implication, on the other side. Do the caps lower the cost—bend the cost curve—for medical care? The answer is no from the best empirical work out there, done by a team of researchers from the University of Texas, Illinois, and Northwestern, looking at Medicare cost figures and closed-claims data from the Texas Department of Insurance. Every year they put out a big data set on closed claims. That includes medical malpractice. The cost did not go down.

Are more docs coming into the state? One of the big things: "We're losing docs! We can't get 'em." No. What about the unique specialties, neurosurgeons, OB/GYNs, and the like? No. "We're getting more docs in rural areas, traditionally underserved." No. So, the best empirical evidence says, in terms of practical implications, none of the stated goals were being hit. And, in fact, that same team of researchers also went back using closed-claims data to see, was there ever this big skyrocketing increase in noneconomic damages? And the answer was no.

So, you're looking at situation in which a lot of the political rhetoric got way ahead of the practicalities. You have fewer medical malpractice cases—if that was your goal, you've succeeded. You have fewer lawyers interested in taking these cases—was that your goal? You've succeeded. And, I'll put my political scientist hat on, do you want to make it harder for your opponents to put larger amounts of money into political campaigns in Texas? You go after the plaintiffs' lawyers, you've succeeded. Since the unions have started pretty much dying away, the single largest contributor to democratic candidates in the State of Texas, as in many other places, are

plaintiffs' lawyers. So, if the idea is we want to go after the greedy plaintiffs' lawyers—you wanna claw that money back that they're taking from all of us—they've succeeded.

But the question is why should some identifiable sets of people pay the price for those political goals?

And the last thing, interesting, is [a] quote from Deborah Hankinson, a former member of the Texas Supreme Court. She was appointed by George W. Bush, Republican, in good standing to this day and, at one point in time, a proponent of tort reform. This cap drove her to the other side. And she had remarked

“The [cap] amendment”—

*(—and again, this was done through a constitutional amendment, none of this, “let’s talk about Texas constitutional law now.” No subtlety here. Amend the constitution, overrule similar provisions to the one you have in Oregon about open courts and jury trials, and just do away with it altogether. For Justice Hankinson), “[the cap] amendment wasn’t designed to cut off bad—that is, frivolous—lawsuits. It was designed to cut off lawsuits by people with legitimate claims by restricting access to the courthouse. This tort reform went too far . . . I view it as something that deprives people of their constitutional rights.”*<sup>2</sup>

So yes, it means fewer jury trials. It means fewer cases. But it also means that there’s an identifiable set of people who are paying the price. And if you go look at those closed-claims studies in Texas to see what the impact has been, especially on the elderly, far fewer claims are coming in, and when the elderly does get some money, it has gone way down. So it’s hit the elderly especially hard.

So those are the kind of practical implications we’ve looked at in terms of lessons from Texas. As someone who does a lot of empirical work on this, I hate to say it, but in this environment the empirical work doesn’t make a damn bit of difference.

**CATHERINE SHARKEY:** Thank you. I’m very pleased—I’m Catherine Sharkey, I’m from NYU—and I’m very pleased to be here today. I have two comments that I want to make and really just one issue that was briefly discussed in the first panel that I want to give a little bit more sustained attention to.

So the two comments are first, drawing from Dean Chemerinsky’s wonderful opening and drawing it together with Justice Walters’

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<sup>2</sup> Mimi Swartz, *Hurt? Injured? Need a Lawyer? Too Bad!*, TEXASMONTHLY (Nov. 2005), <https://www.texasmonthly.com/politics/hurt-injured-need-a-lawyer-too-bad/>.

lunchtime talk, about the, not only the ambivalence towards the civil jury, but I think Dean Chemerinsky was trying to encourage people to think constructively—what to do in the face of that. And I think Justice Walters gave a response, at least in terms of talking about some of the endeavors here, with the streamlined jury, expedited process, et cetera.

So my thought, or comment, to add to that, is first. It is the case that at NYU we have this “Civil Jury Project.” And we realized, looking around, that there were many people who seem to be interested in juries. There’s more attention, I think, given to extolling its virtues in the criminal context, and that’s why our project is specifically the *Civil Jury Project*. And I think early on we realized that we could maybe serve as a kind of clearing house for people who are interested in the civil jury and in learning about various innovations that were going around nationwide. And we’ve been up and running a little over a year; Steve Susman founded, I mean funded, this organization, and he’s been quite extraordinary in terms of going around the country and meeting with judges in various different states, getting them on board as judicial advisors. We have a huge number of academic advisors, and we have some jury consultants who are advisors to this project.

Now, as [an] academic, what I’m most excited about is that we have this academic arm of this project in which we can try to undertake some empirical research. Now, everything that you said, Stephen [Daniels], right up until the end about numbers not mattering, I think that there’s a little bit of a disconnect. There’s a large body, so, first of all, empirical studies aren’t going to resolve normative debates. But they can inform them, and there are certain myths that get purveyed where some of the empirical studies could be useful. Moreover—and Stephen you alluded to this—with respect to thinking particularly about empirical studies on the practical implications of caps, there are certain issues where there are empirical studies divided on both sides, and there’s convergence in certain areas.

So I would take, for example, the impact on the elderly as there being remarkable convergence—different researchers have studied different data sets. Actually you’ll notice there’s a theme: Texas gets exploited. Now if you’re from Texas, or if you know people from Texas, they say that’s because everything’s better and bigger in Texas, and the way it should be—but it’s because of this closed-claims data set that Stephen alluded to, which makes publically available insurance settlement data. That’s why that particular data, to

some extent in Illinois and Florida, gets mired. Because the problem is empirical researchers that are looking just at jury verdicts are only looking at the tip of the iceberg. But nonetheless, empirical scholars [are] coming at this issue from a variety of different directions, so looking at actual jury verdicts and trying to see what the impact of these have been as well as, well, I'm going to just quote a few statistics that come out of—Stephen alluded to this too—the massive research team that's bringing together scholars from Northwestern [and the] University of Texas.

They found, in looking at this Texas closed-claims data, that—they were looking there, Texas enacted the cap in 2003, and they were looking, doing a similar kind of natural experiment of sorts that Stephen was talking about what was happening before and after the cap—so just looking at the impact on the elderly, and the elderly are defined as sixty-four and older—uh every year I get closer to that I worry about that term “elderly.” We should say something like, “the wise” versus “the neophytes,” but in any event—it's the elderly versus the nonelderly, and they looked at the mean per-case payout. So they found declines after the cap in both groups, but for the decline in the elderly it was thirty-six to forty-one percent of a decline, compared to a twenty-six to twenty-seven percent decline in the nonelderly.

And there have been numerous other studies that have looked, not at this comprehensive dataset, but that have looked, for example, in California at published opinions before and after the cap, et cetera. One piece missing, and Stephen's work[] really—he should tout himself a little bit more. Because he didn't, I will—[what]'s really important is thinking about the plaintiffs' attorney as gatekeeper and what happens in terms of the cases not brought. Because obviously any kind of a study that's just looking at the impact in decided cases or settled cases is going to lose the cases that just drop out. And interestingly, when it comes to women, the empirical studies of what have happened in the verdicts and settlements are not as convergent as to the elderly, and I think a lot of the picture happens once you add Stephen's work here with respect to case selection and which types of cases are coming forward. So it's really piecing together empirical studies coming at the question from a variety of different perspectives.

I think it can be enormously powerful, and I think that there are ways in which, for example, empirical scholars could look at particular issues and start collecting data. There are enormous

opportunities or experiments going on: how different state courts are handling things differently, innovative practices, et cetera, and empirical scholars can study these in a rigorous way and then use them to, you know, overcome other peoples' fears or worries about enacting such things. So I believe that there's a place for good empirical study.

The second comment, though, that I wanted to make [is] about this ambivalence. So I agree that it's there. I think there's one piece of it, and it started to come out a little in our discussion about what's the common law and what's statutory intervention, and I, because I'm an academic, have to make things even more complicated. You know, we might think about, Guido Calabresi wrote a great book called *Common Law in the Age of Statutes*.<sup>3</sup> And he wrote this book about how the common law in the nineteenth century was the be-all, end-all of law. And then he likes provocative words, so he talked about the orgy of statute-making that our country had seen, and I would add to that the regulatory sphere—who makes law today more than legislatures? Agencies. So we have common law in the age of statutes and regulations, and how do we figure out what the fabric of the common law is and how we should respond to that? I don't have any quick, easy answers, but I think that that's at the root, normatively, of many of the debates that were bubbling to the surface earlier today.

The second—so those are the two comments that I have—the new issue, or it really was an issue that was on the table from the first panel, but it's something that I'm fascinated by—has to do with how juries perceive their role, and how we, as a society, how courts perceive what the jury is doing in the realm of damages. So this was alluded to earlier by one of the panelists about—the comment was that the Oregon State Supreme Court seems to draw a sharp line between economic damages and noneconomic damages. And again, I would go further. I would say that we're sort of obsessed with these doctrinal categories of economic, noneconomic, and punitive damages. And we have different kinds of restraints that are OK for some of those categories, and not others, and no really well-developed theories as to why and what we're doing. And it behooves us, I think, at this juncture, to start developing those theories. So I became interested, for example, in looking around the country and thinking about something that we could look at empirically, with when jurisdictions were enacting punitive damages caps, what was

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<sup>3</sup> GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1985).

happening to the noneconomic portion of damages? And there seemed to be some evidence that noneconomic damages were rising in jurisdictions where punitive damages were being depressed.

And I became interested in whether in medical malpractice—so people would say yes, and in fact the U.S. Supreme Court (this happened after I started thinking and writing about this), but the U.S. Supreme Court has actually said there could be a punitive element in noneconomic damages, right, so they kind of started to push noneconomic toward punitive damages and away from economic/compensatory damages, not directly, but in their reasoning. But I become interested in whether, in medical malpractice cases—because when I looked around at jurisdictions, some cases, some jurisdictions, a minority, capped total—economic and noneconomic—but most jurisdictions just capped noneconomic. And I started becoming curious as to whether the economic component could be malleable, right. Jurors—some of the best evidence we have from some of the social psychologists and others who have looked at this—tend to look at damages holistically. So it's not surprising that there might be a substitutability. It's not surprising that plaintiffs' attorneys and defense attorneys are strategic actors: we heard a little bit about how the defense might act strategically before a jury, knowing that after the fact, a category of damages would be capped. And this same should be true of plaintiffs' attorneys—knowing that you're in a jurisdiction with punitive damages caps, but noneconomic, why not try to fashion arguments to buttress that category?

And, in fact, there's a history—if you look at the history of wrongful death damages in our country, wrongful death damages statutorily were very restrictive with respect to allowing for noneconomic, so what happened? Arguments were made to transform noneconomic types of harms into economic. What would it cost to pay an individual to do the types of services that before we were just calling pain and suffering, loss of quality of life, et cetera, et cetera?

So I became interested in this kind of crossover effect—basically, whether it was happening—and then I think, for today's purposes, if so, what does this mean about not only strategic responses but an issue that's kind of just under the radar, and it's just under the radar in the *Horton* case as well, which is disclosure to the jury.<sup>4</sup> What kind of information do we want to give the jury about what it is that we're asking them to do? And that includes caps. Actually, there are some

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<sup>4</sup> *Horton v. Or. Health & Sci. Univ.*, 359 Or. 168, 376 P.3d 998 (2016).

jurisdictions where jurors can be told of caps. In Massachusetts, the defense counsel can specifically ask to have the cap given to the jury and then it goes into their determination.

In other states—I’ve looked—and one of the reasons that they’ve upheld caps is because it’s specifically not disclosed to the jury. As if, if it were, that would be meddling with their fact-finding process, but this is not. Well that’s kind of interesting, right? So, as I reread, and this is actually true—I had this wonderful day where I had this inexplicably free day out here in Portland, because I live in New York and I was coming from a previous symposium in Los Angeles, so I went hiking in Forest Park, which was magnificent, and I brought *Horton* with me. And this hiker actually remarked as I was holding it—you know, I was in hiking clothes, and I was holding—and it’s this big decision, rolled up in one hand. And he’s like, “Hey, I have to ask,” because I’d stopped. I got up to Pittock Mansion, and I’d stopped up there—and he’s seen me, and he said, “I have to ask, what is that that you’re bringing? I’ve seen people bring books, et cetera.” I said, “Oh, it’s a decision of the Oregon State Supreme Court.” And at that point, you know, he didn’t really have further questions.

So, these are two insights, though—so I looked at it more carefully, so I’m going to draw your attention to my learning. Footnote forty-four of the majority opinion, which I’d missed before, and I couldn’t believe this, is really interesting to me. It says: “[F]rom the perspective of article I, section 17, the degree of interference with the jury’s verdict is the same regardless of whether the jury is informed of the limit in advance of its deliberations or the limit is imposed after the jury returns its verdict.”<sup>5</sup> Wow, that’s interesting. And certainly many other jurisdictions that have upheld caps specifically because they weren’t disclosed to the jury seem to disagree with that. They seem to think that there’s something about giving that information that might intermeddle with what the jury’s doing, et cetera. So, I thought that was really interesting.

And then, the second insight. And I’m hoping some of the real lawyers can shed light on this because I’m perplexed, and I’ve all-day been listening to try to see if this question would be answered. This is in the dissent. And again, the first time reading this through I had missed it. But Justice Walters finally actually gives us the instruction to the jury. Because in a lot of these debates I’m always asking myself, well what do we say to the jury? And what do we ask the jury

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<sup>5</sup> *Id.* at 246 n.44, 376 P.3d at 1041–42 n.44.

to do when they're doing this fact finding? And how do we describe what economic damages are and what noneconomic damages are and what punitive [damages] are? And in this case, she starts, and she tells us the instruction to the jury was, "[Y]ou must decide the amount of plaintiff's damages . . . [the] plaintiff must prove economic and noneconomic damages by a preponderance of the evidence."<sup>6</sup> OK. And this part, this I'm really struggling—I'm just surprised by, "[T]he total amount of economic damages may not exceed the sum of \$17,678,681."<sup>7</sup> That's interesting—that's a different limit, obviously, than any kind of cap on noneconomic or totals—and then "the amount of non-economic damages may not exceed the sum of \$15 million."<sup>8</sup> And then she goes on to say, in this case, the jury returned a verdict for plaintiff in the sum of \$12 million.<sup>9</sup> \$12.071 million. So, this could be—and I mean, those can educate me—you know, we talked a little bit on the first panel about high-low agreements, et cetera. I've seen those. I understand those, but to disclose things like that to the jury and not worry about how that might affect their determination, and then have this cryptic footnote in the majority opinion about how, regardless of whether we tell them or not, the analysis is the same, I find bewildering.

[Kathryn Clarke raises her hand from the audience and explains that, in Oregon, the jury is informed of the amount of damages alleged in the prayer for relief.]

And do you always disclose that to the jury? So that's, I mean, it's interesting to me because in a lot of other jurisdictions they have all this fighting about whether or not those kinds of things will lead to anchoring, will interfere with what the jury's doing, et cetera. And so my only point is not that that is so it's great to learn why this is, but it should lead us to have questions about this issue of what we're asking the jury to do and what kind of information we do or don't want them to have.

**DAVE MILLER:** I'm Dave Miller and have the distinction of being the reason why each and every one of you are here today. I had the pleasure, along with Maureen Leonard, of representing Tyson Horton and his parents, and I too went for a walk with the *Horton* opinion. It was not into the Forest Park. It was into the bathroom on May 5 of

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<sup>6</sup> *Id.* at 298, 376 P.3d at 1070.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

last year. I got a phone call from a reporter, and it was early in the morning, and she said, “Dave, what do you think of the decision in *Horton*?” And I said, “Well, I didn’t even know it was out yet,” and she said, “Well, I’ll email you what I have because I don’t understand if you won or if you lost.” So it didn’t take me long to realize that we had lost, and so I telephoned my partner and I said, “Bob, I’ve got good news and bad news. The bad news is we lost *Horton*.” And he said, “Well, what good could possibly come from that,” and I said, “Well, we’re still open. We still have clients coming in the door.” And that’s remained the case.

But I was asked to come to offer, along with my friend Gordy Welborn, a former partner and long-time defense lawyer, practical effects that we see of caps, and you’ve all seen them. And, in my simple mind, I liken it to a sports analogy. That you simply pick your favorite team, be it the Oregon Ducks or a baseball team, the little league team you’re coaching, perhaps, and they’re all out there trying their best, and you’re coaching the team that doesn’t have the nicest, fanciest uniform, maybe not from the best part of town, and you look across the way at the other team, like the Hart Wagner guys. They’re all dressed in expensive suits, and they’ve all got their new uniforms, and you know, their fancy snacks, and you say, “Boys, we have just as much chance to win as they do”—we put their pants on, or we put our pants on one leg at a time, just like they do, I think—and you get ready, and you give a big cheer, and you go out there.

And then the umpire says, “Well, hold it—regardless of the number of runs your team scores, they’re not going to be charged more than five. So, go get ‘em!” And you have these kids looking at you like I have clients looking at me, saying what the hell is that?

How come we don’t have the same chance that they have? And that’s the story that I tell clients because that’s how I feel about it. Because for me, and I think for most plaintiffs’ lawyers, it comes down to the people. I told Justice Walters before we spoke today that—and I meant it from the heart, and I’ll share it all with you—that when I sat and I read through the *Horton* opinion, and you can imagine the thoughts that went through my mind, I could barely spell quid pro quo, let alone understand it, and the context of sovereign immunity, and other things that trial lawyers don’t get to talk much about—but what I didn’t see in that lengthy opinion was the name, Tyson Horton. Not one time did the majority opinion mention the plaintiff by name, which I found to be reflective of a total disconnect between the practical impact of the cap on this family in the context

of a record that was also woefully referenced in the majority opinion. And so, I thought I'd just quickly get it off my chest.

But one of the facts that was not mentioned, and it relates to Catherine [Sharkey]'s comment, and Kathryn [Clarke]'s correct pointing out that in Oregon we do allege a prayer of damages—we're required to do so, and the jury's informed about it—but one thing that most people don't know is that in closing argument in that case, the *Horton* case, the defense counsel, one of Gordy's partners, and they had their hands full because it was an admitted liability case, argued to the jury that OHSU believed Tyson Horton should be awarded eight million dollars. Now I've often thought, "Well, wait a minute, how can the institution tell a group of fact finders that they should award eight million dollars, when there is on the books a three-million-dollar statutory cap, and get away with it?" To me that doesn't seem fair to the people involved in the case. That was not mentioned in the majority opinion.

The other, I think, very relevant consideration, and of course this wouldn't ever be mentioned in front of the jury, but it was in the record, it became a part of the record during the middle of the trial when I stood up and moved to conform our economic damages claim up by four million dollars, and the trial judge, Jerry Hodson, appropriately said to defense counsel, well, outside the presence of the jury, before I grant that request, is that going to impact the defense, which lead to a recess, which led to a report back, that no, it does not affect the amount of liability insurance covering Tyson's claim, which was thirty million. Again, a very practical side of the case that you don't see reflected in the opinion, but there was in fact, despite the three-million-dollar cap, thirty million dollars of insurance coverage for Tyson's case.

The other things you don't see in the *Horton* case, which is a very practical reality, and I think it applies to all of us that handle plaintiffs' cases, be it a ten million case or a one million or whatever, you can't view caps from our clients perspective in a vacuum—they don't stand alone. In Tyson's case, we took an advance payment at the beginning of three million dollars, which was the aggregate cap, which was in effect pursuant to the 2009 statute that was enacted. Also, interestingly I was asked to be part of the—[interruption from Mr. Welborn]—I was asked to be part of the group that got together and negotiated with OHSU—what should the cap be post-*Clarke*?<sup>10</sup>

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<sup>10</sup> *Clarke v. Oregon Health & Scis. Univ.*, 343 Or. 581, 175 P.3d 418 (2007).

And the negotiation was with Mike King helping us as mediator, and we sat down, and we came to the conclusion that a good aggregate cap would be three million bucks. That would take care of the vast majority of claims against OHSU. And a \$1.5 million individual cap. And within days of that, Tyson Horton went into the operating room and effectively lost his liver. And so here we now had the first case really after that statute was then enacted that was going to challenge the sufficiency of that cap.

But in any event, as we considered the advance payment, [and] agreed to accept it, where did the money go? You and I know where it went, but most people don't know. Stanford, where Tyson incurred a bill of \$4.5 million, took \$1 million, to partially satisfy the remaining obligation. Health insurers took an additional \$500,000. Those same health insurers required another half a million dollars to be put in a set-aside trust, in case Tyson needed a liver replacement—a second liver replacement. So, we're now at—I'm losing track—2 million bucks. The remaining million dollars was set up in a fund to help Tyson with ongoing medical expenses into the future and to pay attorneys' fees and costs. So again, practical aspect—or practical impact—of a \$3 million cap has to be viewed in the context of health insurer liens, workers' compensation interests, and other very real things.

The other case I want to mention is a case that I filed before *Horton*, and that we settled not all that long ago, for a confidential sum, for Lowell Creasey. Lowell, being an eighty-two-year-old guy, retired accountant, who lived on the coast, and underwent, unfortunately, some spine surgery that did not go well. And Lowell now is in a walker and is incontinent of both urine and feces. Sadly, his medical expenses were about \$100,000. Did he have any other economic loss at age eighty-two? No. Why? Because his wife of fifty years—a forty-year nurse, Birdie is her name—took care of her husband. They did not want to have anybody in the home caring for him. So, and of course we were spinning numbers left and right, trying to enhance the claim—as Catherine correctly says in her law review article of 2005,<sup>11</sup> this whole notion of, I think you call it a crossover effect, you know I don't think lawyers like me think in those terms, but it's more how can we get the most we can get—but the practical effect of the *Horton* decision severely limited what we

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<sup>11</sup> Catharine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. REV. 391 (2005).

could recover for Lowell Creasey. And, I might add, that the defense argued that the \$500,000 *Horton* cap also limited Birdie's claim—in other words, both Birdie and Lowell combined were subject to a \$500,000 cap. Now what's the practical effect of that? I mean, as a trial lawyer you listen to that, and you say, "Well, forgive me, but you say bullshit—I'm not going to be hung by that." And you look at an eighty-two-year-old client, sitting in a wheelchair, and say, "Let's go to trial." Well, you know, you don't do that, because a guy that age probably would have shortened his life to go through all that, and we all know that. So, we settled the case for a confidential sum, and his son, Lowell's son Don, who is a former in-house defense lawyer for Mission Insurance in the Midwest, was none too pleased, and a Republican with capital "R" in front of his name, was none too pleased about the effect of this cap and has made his feelings known in Salem. And [I] hope it had some positive effect.

The third case I want to mention is really a collection of cases. My partner and I represented about eighteen to twenty people in a case involving one neurosurgeon. His name is James Makker. He's no longer practicing in Oregon, thank God. Our clients were disabled as a result of spine surgeries that he performed. There were an additional twelve plaintiffs in addition to our group, and Dr. Makker was operating at Providence Hospital in a surgery center here in town with \$3 million of liability coverage and a high-risk policy that took defense costs, attorneys' fees—again, my friend Gordon's firm—out of the \$3 million in coverage. So we had an effective cap of—by the time we got all the cases settled—of around \$2 million. Now, I'm representing some people who'd been operated [on] by Dr. Makker thirteen times. I represented two husband and wife couples who, all told, between those four people there, I think were sixteen different spinal operations. It was flagrant. It was written about finally in *The Wall Street Journal*, and I bring that up because these people were disabled—people going in—many of them disabled by on-the-job injuries, and when it came time to settle those cases, which we brought against Dr. Makker and Providence (we were able to establish a credentialing—negligent credentialing claim against the hospital), we spent most of our time dealing with the interests of the [workers'] comp carriers, the health insurers, and the others who were at the trough trying to get their money back. And this was in the setting, ladies and gentlemen, not of a surgeon who was in the mainstream—this was a surgeon who was on the edge and who has now fallen off the edge where he belongs. And so, at the end of the

day, some thirty people settled claims for sums that were not, frankly, enough money to compensate them. Not even close. Why? Well, again, because of the effective cap and the interests of the other third parties in the cases.

So, the final thing I'm gonna say, and, at this point, is that we've all thought a lot about caps, and you know, I get that. I sort of understand the conversation across the fence with the neighbor, and they don't understand it because you have to actually read a little bit to understand the effects of caps. But to me, caps do one thing in our business. And we are a business—we do work within a civil justice system that is based upon an adversarial component where one person wants something from somebody else. And if you take that business scenario—I don't care what example you want to use—and you eliminate the element of risk on one side, the system doesn't work. By eliminating risk, what's to prevent the insurance carrier—well, we can only get whacked in this case for \$750,000, let's go! Let's go try it. And that's what happens. Talk to defense lawyers who do a lot of public body defense, as my partner did for many, many years, when the cap was low—\$250,000 or whatever it was—and they will tell you, “Why offer the cap, when that's the most you can possibly ever lose?” Why do that? And that's the practical effect of these things.

**GORDON “GORDY” WELBORN:** You know, this reminds me of over forty years ago. I went to high school here in this town, and we were getting ready to play a football game against our rival, and somebody burned our initials in the football field before the game. So the athletic director contacts me and says, “Hey, you know what, we need you to go over and calm things down at the high school and show that it's not the football team that did this.” And so I talked to him, and I go in there, and they're having the pep assembly. And I walk in and my jersey is actually hanging from the basketball rim when I went in there, and this is kind of like the room I'm in today . . . [Audience laughter.]

It wasn't burning! But I do remember, and I felt that same twinge as I listened.

OK, the issues with caps, there's only good thing about caps, and that's for numbers crunchers, and insurance companies, and companies that are uninsured, to at least try to figure out, in some type of objective basis, what exposures are. When you take the cap out, then you've got this—you know, you've got a great lawyer like Dave [Miller], or the number of great lawyers in this room here—that can spin a great story, and get the emotions going, and you can get a

big number in there. And that's where it's difficult to actually evaluate what the damages are going to be worth.

Now, that may not mean anything. Because there isn't any, you know, you look at the constitution, [and] there's no regulation about that. It just says give 'em damages. But that's at least one explanation for caps. I can't give you a whole lot more other than that.

You know, from our standpoint—I've been doing this for over thirty years solely as a defense lawyer—caps actually I think hurt people that are experienced trying cases from the defense side. Because if you have a cap out there, there's no reason to hire good defense lawyers that have experience. And so when we have these cases out there that have caps, you know, they are risky cases or not very risky cases. It doesn't matter. They'll hire and have some in-house lawyer go try these cases. So it actually kind of hurts our business, from our standpoint.

There was something mentioned about gatekeepers. Gatekeepers are a big deal that I see from my side, where when we have caps out there, you have these cases come through, that the good lawyers, the people that, you know, I've got to hire three people, they're going to be very expensive, to try this case, it's going to be an expensive case, look at the exposure and what we can actually get out of the case—they don't take the cases. Well somebody does take the case. And that's the people that don't have any experience, don't really have the funds to actually put on a good case, they still come to us. And we're still trying those cases. Those are horrible to try. Because we still have to do everything [we] can, because we don't know that they're not going to have good experts, and with what we do in this state with trial by ambush—so we don't have gatekeepers like you would if you didn't have caps out there. People would be filing these lawsuits. So, you know, I deal with a lot of those cases, with the lawyers that don't have a lot of experience trying these cases.

So what I've seen from our standpoint, with cases with caps, is people really pushing the economic damages because you can start really working it to create your economic damage claim in the case to make it have some value. And that's the issue that I see, at least in keeping the cases going. The \$500,000 cap, you know, I can't even admit it to anybody that that's a reasonable number. It just doesn't make any sense.

But that's what we have right now. We've had it for quite a while, and I'm not sure anything's going to happen in Salem this time.

Maybe you guys know more than I do, but I don't know about that.<sup>12</sup> So, from our standpoint, how many people last year tried a jury trial? [Some members of audience raise hands.] That's not a lot of people in this room. You know, I look at it, [and] I tried four in 2015; last year I only tried one. I tried one this year, but you look around, and there are not a whole lot of cases getting tried. And so, as you know, if you're dealing with medical malpractice cases—what, maybe ten defense lawyers, maybe, maybe ten or fifteen defense lawyers—in the state that are handling all of the cases. And then you start dealing with the scheduling that you all deal with. Yeah, you've got this one particular lawyer so you know you're not going to have availability for twelve to eighteen months to get something going for these cases. There is one [positive] aspect [of] a cap—you might get some more people trying cases, and the docket may get a little bit better with respect to that.

But otherwise, I can't even support it.

**MILLER:** So I have to say, I have to tell you—I didn't have to strong-arm [Gordy Welborn] much to get him to come here. I mean, having done defense work for twenty years, I can tell you it's the insurance companies paying your bill, and the insurance companies want to have caps because they want to save money. They want to make more profits. It's that simple. So it takes somebody of the caliber of trial lawyer that this guy is [points to Gordy] to value the system's interest more than his own, frankly, to come and speak honestly about something as controversial as caps.

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<sup>12</sup> As of the date of this publication—and since the day of this symposium—the Oregon legislature has not passed any law impacting any existing statutory cap on damages.

