THE DAMAGES CAPS: "THE MOST IMPORTANT PART" OF HOUSE BILL 4

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In presenting initial drafts of what eventually became the Medical Malpractice and Tort Reform Act of 2003 (commonly referred to as H.B. 4) to the 78th Texas Legislature,[1] the chair of the Texas House Committee on Civil Practices proclaimed that "the most important part [of the bill] is a $250,000 cap on noneconomic damages."[2] That cap, along with the statutory cap on damages in wrongful death cases retained from the prior Medical Liability Act, continues to play a significant role in shaping medical malpractice litigation in Texas in the devastating wake of "tort reform" efforts.

I. THE NONECONOMIC DAMAGES CAP

Section 74.301 of the Texas Civil Practice and Remedies Code places a statutory cap on noneconomic damages.[3] The damages cap is calculated and

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1. Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, sec. 74.301, 2003 Tex. Gen. Laws 847, 873 (codified at TEX. CIV. PRAC. & REM. CODE § 74.301).

2. *Hearings on Tex. H.B. 3 and Tex. H.J.R. 3 Before the H. Comm. on Civil Practices*, 78th Leg., R.S. (Feb. 19, 2003) (statement of Rep. Joe Nixon, Chair, H. Comm. on Civil Practices) (available at tlchouse.granicus.com/MediaPlayer.php?view_id=22&clip_id=1400).

3. CIV. PRAC. & REM. § 74.301:

> (a) In an action on a health care liability claim where final judgment is rendered against a physician or health care provider other than a health care institution, the limit of civil liability for noneconomic damages of the physician or health care provider other than a health care institution, inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed $250,000 for each claimant, regardless of the number of defendant physicians or health care providers other than a health care institution against whom the claim is asserted or the number of separate causes of action on which the claim is based.
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> (b) In an action on a health care liability claim where final judgment is rendered against a single health care institution, the limit of civil liability for noneconomic damages inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed $250,000 for each claimant.
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> (c) In an action on a health care liability claim where final judgment is rendered against more

applied on a per-claimant basis, with "claimant" being defined to include any individual asserting derivative claims, meaning that all claimants share the applicable cap.[4]

There is a $250,000 limit on noneconomic damages for all claims against individual health care providers.[5] There is also a $250,000 limit on noneconomic damages for all claims against a single health care institution, with a maximum possible limit of $500,000 when two or more institutions are found to be negligent.[6]

The definition of noneconomic damages is found in § 41.001(12) of the Texas Civil Practice and Remedies Code:

> "Noneconomic damages" means damages awarded for the purpose of compensating a claimant for physical pain and suffering, mental or emotional pain or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, inconvenience, loss of enjoyment of life, injury to reputation, and all other nonpecuniary losses of any kind other than exemplary damages.[7]

Loss of household services[8] and pre-judgment interest[9] are considered to be economic damages and not subject to the cap. And while exemplary damages are excluded by name, the cap on noneconomic damages may impact the calculation of the statutory cap on exemplary damages.[10]

The $250,000 cap on noneconomic damages was modeled after California's Medical Injury Compensation Reform Act (MICRA), enacted in

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than one health care institution, the limit of civil liability for noneconomic damages for each health care institution, inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed $250,000 for each claimant and the limit of civil liability for noneconomic damages for all health care institutions, inclusive of all persons and entities for which vicarious liability theories may apply, shall be limited to an amount not to exceed $500,000 for each claimant.

4. *Id.* § 41.001(1):

"Claimant" means a party, including a plaintiff, counterclaimant, cross-claimant, or third-party plaintiff, seeking recovery of damages. In a cause of action in which a party seeks recovery of damages related to injury to another person, damage to the property of another person, death of another person, or other harm to another person, "claimant" includes both that other person and the party seeking recovery of damages.

5. *Id.* § 74.301(a).

6. *Id.* § 74.301(b)–(c). All totaled, a claimant can theoretically recover a maximum of three noneconomic damages caps, or $750,000. *See id.* § 74.301(c). The word "theoretical" was used because in the fifteen years since 2003, the authors have never heard of a single case in which a claimant recovered three noneconomic damages caps for a total of $750,000 in noneconomic damages.

7. *Id.* § 41.001(12).

8. Ellis v. United States, 673 F.3d 367, 380 (5th Cir. 2012).

9. Christus Health Gulf Coast v. Houston, No. 01-14-00399-CV, 2015 WL 9304373, at *9 (Tex. App.—Houston [1st Dist.] Dec. 22, 2015, no pet.); Chesser v. LifeCare Mgmt. Servs., L.L.C., 356 S.W.3d 613, 641 (Tex. App.—Fort Worth 2011, pet. denied).

10. CIV. PRAC. & REM. § 41.008(b) ("Exemplary damages awarded against a defendant may not exceed an amount equal to the greater of: (1)(A) two times the amount of economic damages; plus (B) an amount equal to any noneconomic damages found by the jury, not to exceed $750,000; or (2) $200,000.").

1975.[11] During the H.B. 4 legislative debate, there was much discussion of how the MICRA cap had affected medical malpractice litigation in California.[12] The 1975 MICRA cap of $250,000 was reused by the Texas Legislature with no adjustment for inflation between 1975 and 2003, and no provision in the statute adjusts the cap based on changes in the consumer price index (CPI).

Because the $250,000 noneconomic damage cap is not tied to the CPI to keep pace with inflation, the true value of the cap continues to erode over time. Based on the CPI, $250,000 in 2003 is worth the equivalent of only $180,153 as of August 2018.[13]

This was not the Texas Legislature's first attempt to use a limitation on damages in health care liability cases. In 1977, under the Medical Liability and Insurance Improvement Act, generally referred to by practitioners as Article 4590i, "the limit of civil liability for damages of the physician or health care provider shall be limited to an amount not to exceed $500,000," which included an adjustment for inflation.[14] This limit was applicable to all damages in all cases brought against physicians or health care providers, with the exception of damages awarded for past or future medical costs.[15]

In *Lucas v. United States*,[16] the Texas Supreme Court, responding to a certified question from the United States Court of Appeals for the Fifth Circuit, declared the limitation on recovery of nonmedical damages in Article 4590i to be in violation of the Open Courts Provision of the Texas Constitution when applied to persons asserting common law medical malpractice claims.[17] That provision states: "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."[18] In construing the Open Courts Provision, the Texas Supreme Court explained that:

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11. *See* 1975 Cal. Stat. 3949–78. For a general overview of MICRA and its provisions, *see* Larson v. UHS of Rancho Springs, Inc., 179 Cal. Rptr. 3d 161, 168–69 (Cal. Ct. App. 2014).

12. *See, e.g.*, *Hearings on Tex. H.B. 3 and Tex. H.J.R. 3 Before the House Comm. on Civil Practices*, *supra* note 2 (testimony of Dr. Richard Anderson, Chair, Doctors Company).

13. *CPI Inflation Calculator,* BUREAU LAB. STAT., https://www.bls.gov/data/inflation_calculator.htm (last visited Apr. 18, 2019).

14. Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 1, sec. 11.02(a), 1977 Tex. Gen. Laws 2039, 2052, *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 847, 884.

15. *Id.* § 11.02(a)–(b). While subsection (a) capped damages at $500,000, subsection (c) stated that this limit did not apply "to the amount of damages awarded on a health care liability claim for the expenses of necessary medical, hospital, and custodial care received before judgment or required in the future for treatment of the injury." *Id.* § 11.02(c). Section 11.03 of the Act was an alternative, partial limit on civil liability that the Texas Supreme Court also held to be unconstitutional in *Lucas v. United States*. *See* Lucas v. United States, 757 S.W.2d 687, 687 (Tex. 1988).

16. *Lucas*, 757 S.W.2d 687. As noted in the opinion, *Lucas* was the first time the Texas Supreme Court had ever answered a certified question from a federal court as authorized by Article V, § 3-c of the Texas Constitution, which was added in January 1986. *Id.*; *see* TEX. CONST. art. V, § 3-c.

17. *See Lucas*, 757 S.W.2d at 690. As will be discussed *infra*, this does not include persons asserting claims under the statutory Wrongful Death Act. *See infra* Part II (explaining same).

18. TEX. CONST. art. I, § 13.

> [T]he right to bring a well-established[,] common law cause of action cannot be effectively abrogated by the legislature absent a showing that the legislative basis for the statute outweighs the denial of the constitutionally-guaranteed right of redress. In applying this test, we consider both the general purpose of the statute and the extent to which the litigant's right to redress is affected.[19]

The *Lucas* Court specifically held that the damages limits were unconstitutional "as applied to catastrophically damaged malpractice victims seeking a 'remedy by due course of law.'"[20] In reaching this conclusion, the *Lucas* Court recognized that victims of medical malpractice did have a well-established, common law cause of action and held that the provisions limiting nonmedical damages were unreasonable and arbitrary when balanced against the purpose and basis of the statute.[21]

As for the noneconomic damages cap in the Medical Malpractice and Tort Reform Act of 2003, found in § 74.301 of the Texas Civil Practice and Remedies Code, courts have so far rejected the challenges that were successful in *Lucas*.[22] In large part, this is due to the inclusion of a proposed constitutional amendment in the 2003 legislative session. The September 13, 2003 Constitutional Amendment Election included proposed Proposition 12.[23] Approved by the voters by a slim 2.26% margin,[24] Proposition 12 amended Article III of the Texas Constitution to empower the Texas Legislature to limit noneconomic damage awards in all health care liability cases:

> Notwithstanding any other provision of this constitution, the legislature by statute may determine the limit of liability for all damages and losses, however characterized, other than economic damages, of a provider of medical or health care with respect to treatment, lack of treatment, or other claimed departure from an accepted standard of medical or health care or safety, however characterized, that is or is claimed to . . . contribute to[] disease, injury, or death of a person.[25]

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19. Sax *ex rel.* Sax v. Votteler, 648 S.W.2d 661, 665–66 (Tex. 1983).

20. *Lucas*, 757 S.W.2d at 690.

21. *Id.* at 690–92.

22. *See, e.g.*, Watson v. Hortman, 844 F. Supp. 2d 795, 801 (E.D. Tex. 2012); Tello v. United States, 608 F. Supp. 2d 805, 809 (W.D. Tex. 2009); *see* TEX. CIV. PRAC. & REM. CODE ANN. § 74.301 (West 2017).

23. *Ballot Language for the September 13, 2003 Constitutional Amendment Election*, TEX. SECRETARY STATE, https://www.sos.state.tx.us/elections/voter/2003sepconsamend.shtml (last visited Apr. 19, 2019).

24. *2003 Constitutional Amendment Election*, OFF. SECRETARY STATE (Sept. 13, 2003), https://elections.sos.state.tx.us/elchist103_state.htm.

25. TEX. CONST. art. III, § 66(b).

By its terms, this provision appears to foreclose invocation of the open courts doctrine or other provisions of the state constitution as a basis for attacking the cap on noneconomic damages.[26]

Nevertheless, a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause.[27] Therefore, statutory procedures that deprive someone of a statutory right must be held up to constitutional analysis, and due process requires that state procedures must provide proper procedural safeguards before a claimant's property interest may be destroyed.[28] When a legislature places restrictions on a litigant's use of established adjudicatory procedures, this becomes a denial of due process when such restrictions are "the equivalent of denying them an opportunity to be heard upon their claimed right[s]."[29]

So far, however, parties seeking to challenge the damages cap under the federal Constitution have had no success. In *Watson v. Hortman*, the Eastern District of Texas rejected federal constitutional challenges to the § 74.301 damages caps.[30] The *Watson* court ruled that the damages cap did not violate a constitutional right of access to the courts because it did not deny any victims of medical malpractice an "adequate, effective, and meaningful" legal remedy.[31] As for the argument that the cap renders the pursuit of medical malpractice claims uneconomical in many cases, the court first concluded that because bringing a medical malpractice claim did not fall within any of the fundamental interests recognized by the Supreme Court,[32] the rational basis test applied, and then stated that "[t]he cap on noneconomic damages is reasonably related to the State of Texas's goals of reducing malpractice insurance premiums and improving access to care."[33]

II. THE DEATH CAP

Aside from the cap on noneconomic damages, there is a separate "death cap" that applies when the suit alleges survival or wrongful death claims against health care providers.[34] This cap sets an overall cap on liability for all

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26. *See id.*

27. *See, e.g.*, Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982).

28. *See id.*

29. Boddie v. Connecticut, 401 U.S. 371, 380 (1971).

30. Watson v. Hortman, 844 F. Supp. 2d 795 (E.D. Tex. 2012).

31. *Id.* at 799–800 (quoting Bounds v. Smith, 430 U.S. 817, 822 (1977)).

32. The *Watson* court cited the Fifth Circuit's decision in *Clifford v. Louisiana* for the proposition that the "right to recover for medical malpractice does not fall within the fundamental interests recognized by the Supreme Court." *Id.* at 801 (quoting Clifford v. Louisiana, 347 F. App'x 21, 23 (5th Cir. 2009)).

33. *Id.* For a thorough discussion of *Watson*, *see* Robert S. Peck & Hartley Hampton, *A Challenge Too Early: The Lawsuit to Invalidate Texas Damage Caps Ten Years Ago and Its Likely Future Vindication*, 51 TEX. TECH L. REV. 667 (2019).

34. TEX. CIV. PRAC. & REM. CODE ANN. § 74.303 (West 2017):

> (a) In a wrongful death or survival action on a health care liability claim where final judgment is rendered against a physician or health care provider, the limit of civil liability for all

damages of $500,000, adjusted for inflation, regardless of the number of claimants or defendants.[35] This provision also prescribes jury instructions to be given, including a directive prohibiting jurors from considering whether the liability of any party may be subject to legal limits, such as a damages caps.[36]

Unlike the cap on noneconomic damages found in § 74.301, the death cap provides for an adjustment of the cap based on changes in the CPI[37] as compared to the CPI in August 1977.[38] The most recent CPI figure is divided by the August 1977 figure to calculate the ratio by which the $500,000 cap is multiplied.[39] For example, to calculate the death cap at the time of this Article's writing, we located the latest CPI-W figure, which was the value in August 2018, 246.336. We divided 246.336 by the CPI-W from August 1977,

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> damages, including exemplary damages, shall be limited to an amount not to exceed $500,000 for each claimant, regardless of the number of defendant physicians or health care providers against whom the claim is asserted or the number of separate causes of action on which the claim is based.
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> (b) When there is an increase or decrease in the consumer price index with respect to the amount of that index on August 29, 1977, the liability limit prescribed in Subsection (a) shall be increased or decreased, as applicable, by a sum equal to the amount of such limit multiplied by the percentage increase or decrease in the consumer price index, as published by the Bureau of Labor Statistics of the United States Department of Labor, that measures the average changes in prices of goods and services purchased by urban wage earners and clerical workers' families and single workers living alone (CPI-W: Seasonally Adjusted U.S. City Average—All Items), between August 29, 1977, and the time at which damages subject to such limits are awarded by final judgment or settlement.
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> (c) Subsection (a) does not apply to the amount of damages awarded on a health care liability claim for the expenses of necessary medical, hospital, and custodial care received before judgment or required in the future for treatment of the injury.
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> (d) The liability of any insurer under the common law theory of recovery commonly known in Texas as the "Stowers Doctrine" shall not exceed the liability of the insured.
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> (e) In any action on a health care liability claim that is tried by a jury in any court in this state, the following shall be included in the court's written instructions to the jurors:
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> > (1) "Do not consider, discuss, nor speculate whether or not liability, if any, on the part of any party is or is not subject to any limit under applicable law."
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> > (2) "A finding of negligence may not be based solely on evidence of a bad result to the claimant in question, but a bad result may be considered by you, along with other evidence, in determining the issue of negligence. You are the sole judges of the weight, if any, to be given to this kind of evidence."

35. *Id.* § 74.303(a). Unlike the cap found in § 74.301, which does not apply to economic or punitive damages, the death cap applies to all damages, with the exception of "necessary medical, hospital, and custodial care." *Id.*

36. *Id.* § 74.301(e)(1).

37. The statute prescribes:

> [Use of] the consumer price index, as published by the Bureau of Labor Statistics of the United States Department of Labor, that measures the average changes in prices of goods and services purchased by urban wage earners and clerical workers' families and single workers living alone (CPI-W: Seasonally Adjusted U.S. City Average—All Items).

Id. § 74.303(b).

38. *Id.* § 74.301. August 1977 was the effective date of the prior damages cap found in Article 4590i. Act of May 30, 1977, 65th Leg., R.S., ch. 817, § 1, sec. 11.02(a), 1977 Tex. Gen. Laws 2039, 2052 (repealed 2003).

39. CIV. PRAC. & REM. § 74.303(b).

61.2. This yielded a ratio of 4.0251. When this multiplier is applied to the original value of the cap, $500,000, the result is the adjusted value of the cap in August 2018: 4.0251 x $500,000 = $2,012,550.00.

The $500,000 death cap number in § 74.303 was a holdover from the previous $500,000 general damages caps found in Article 4590i, the same one the *Lucas* Court ruled was a violation of the Open Courts Provision as applied to common law medical malpractice actions.[40] The Texas Supreme Court, however, refused to extend that holding to wrongful death claimants. In *Rose v. Doctors Hospital*, the Court identified a clear distinction in how the Open Courts Provision applies to claims based on common law versus claims created by statute.[41] According to the Texas Supreme Court, because wrongful death claims are creations of statute, the legislature can change and limit the remedies available, including limiting damages, without running afoul of the Open Courts Provision.[42] The Court also rejected an equal protection challenge to the limits under both federal and state Constitutions.[43]

Texas courts have struggled with construing and applying the two separate caps. Two appellate courts have concluded that both the noneconomic damages caps found in § 74.301 and the wrongful death cap are to be applied to damage awards, with the noneconomic damages provision applied first and the wrongful death cap applied second, to cap the overall recovery in the case.[44]

III. WHERE TO NOW?

Fifteen years after its enactment, the "most important" part of H.B. 4 is showing its age.[45] The $250,000 cap was a relic of the 1970s when the Texas Legislature borrowed it from California's MICRA and kept the same number California used in 1975.[46] Inflation has eaten away at the cap, making it already worth $70,000 less than when it became part of Texas law.[47]

Without an amendment to adjust the cap for inflation, the value placed by the legislature on every Texan's pain and suffering, mental anguish, impairment, and disfigurement will only get smaller. And as the value of the

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40. *See generally* Lucas v. United States, 757 S.W.2d 687 (Tex. 1988).

41. Rose v. Doctors Hosp., 801 S.W.2d 841, 846–47 (Tex. 1990).

42. *Id.* at 842, 845; *see also* Moreno v. Sterling Drug, Inc., 787 S.W.2d 348, 366 (Tex. 1990) (explaining that there is no common law cause of action for wrongful death in existence). The Texas Wrongful Death Act is codified at CIV. PRAC. & REM. § 71.001–.051.

43. *Rose*, 801 S.W.2d at 845–46.

44. *See* Rio Grande Reg'l Hosp., Inc. v. Villarreal, 329 S.W.3d 594, 626–27 (Tex. App.—Corpus Christi 2010, pet. granted, judgm't vacated w.r.m.); THI of Tex. at Lubbock I, LLC v. Perea, 329 S.W.3d 548, 586–87 (Tex. App.—Amarillo 2010, pet. denied).

45. Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, sec. 74.301, 2003 Tex. Gen. Laws 847, 873 (codified at CIV. PRAC. & REM. § 74.301).

46. *See supra* note 11 and accompanying text (giving a general overview of MICRA).

47. *See supra* note 13 and accompanying text (discussing the effect of time and the CPI on damages caps).

cap shrinks, the arbitrariness of placing the same limit on the noneconomic damages of every individual, regardless of their age or the severity of their affliction, only becomes even more unjust.

The death cap, while it does account for inflation, otherwise suffers from the same infirmity as the noneconomic damage caps, arbitrarily capping the value of a life with no regard for age, condition, or any other individual element. Also, the death cap may be subject to further challenges due to its breadth. The death cap limits economic damages as well as noneconomic damages and, therefore, is not saved by the Proposition 12 amendment to Article III of the Texas Constitution. That provision does not allow the legislature to limit economic damages without regard to any constitutional provision.[48]

In assessing the effects and continuing usefulness of any damages cap, it should also be remembered that under Texas precedent, but for the enactment of Proposition 12, the noneconomic damages caps would violate the Open Courts Provision of the Texas Constitution.[49] All the reasons the Texas Supreme Court identified in *Lucas* are applicable to the $250,000 cap, and in striking down a cap, Texas courts would follow courts in over twenty states that have done the same thing.[50]

At base, the continuing existence of the noneconomic cap and the death cap are an affront to our common understanding of what the tort system is meant to do. The caps, by law, prevent the tort system from providing full and fair compensation to victims of medical negligence.[51] Instead of allowing juries to determine appropriate remedies, the caps protect tortfeasors at the expense of victims. After fifteen years, it is time to retire the caps and let the tort system do its job: hold wrongdoers accountable, provide full and fair compensation for victims, and deter future unacceptable behavior.

48. TEX. CONST. art. III, § 66(b).

49. *See supra* notes 16–17 and accompanying text (discussing the previous violation of the Open Courts Provision of the Texas Constitution by the noneconomic damages caps).

50. For an in-depth discussion of decisions striking down damages caps, *see* Peck & Hampton, *supra* note 33.

51. *See supra* notes 1–4 and accompanying text (discussing such prevention under current law).