

# KANSAS TRIAL LAWYERS ASSOCIATION



To: Special Committee Financial Institutions & Insurance  
Senator Rob Olsen, Chairman  
Representative Jim Kelly, Vice Chairman

From: David R. Morantz, Shamberg Johnson and Bergman, Chartered, Kansas City  
On behalf of Kansas Trial Lawyers Association

Date: October 29, 2019

Re: *Hilburn v Enerpipe Ltd.* (112,765) (2019)

My name is David R. Morantz and I am with Shamberg Johnson and Bergman Chartered, Kansas City. I am President of the Kansas Trial Lawyers Association and I am testifying on behalf of KTLA.

It has been KTLA's long-held position and experience that non-economic damage caps interfere with a citizen's fundamental, constitutional and inviolate right to trial by jury. KTLA believes in the jury system and we trust Kansas jurors.

Juries are composed of ordinary Kansans from all walks of life who have no personal interest in the outcome of a case. Juries are in the best position to resolve disputes fairly because they represent the local community. Our fellow Kansans are more than qualified to sit on a jury and assess fair and reasonable damages based on evidence presented to them by the plaintiff and defendant. Indeed, Kansas juries have been empowered to render a verdict when a criminal defendant is accused of capital murder and may face a death sentence.

**Non-economic damage caps violate the constitutional right to trial by jury, an "inviolable" and fundamental right under the Kansas Constitution.** In *Hilburn v Enerpipe Ltd.* the Kansas Supreme Court clearly and unambiguously ruled that noneconomic damage caps are unconstitutional in all personal injury actions, and that KSA 60-19a02 is null and void. The *Hilburn* decision is a victory for all citizens of Kansas because it restores the inviolate constitutional right to trial by jury.

Thankfully, most of us will never experience the misfortune of circumstances in which we, or loved ones, sustain non-economic injuries due to the dangerous and unsafe actions of another. But for Kansans who experience such life-changing injuries, *Hilburn* is much more personal.

*Hilburn* represents the end of an arbitrary and oppressive government intervention where lawmakers more than 30 years ago sought to substitute their judgment for that of Kansas citizen jurors. It is the end of bearing the financial burden (along with the physical and emotional costs) of injuries and loss caused by some else, despite a jury's verdict. It restores accountability and a measure of justice, even though some losses are so great they can never be fully restored.

**Non-economic damage caps favor those whom the jury finds are in the wrong.** Caps protect wrongdoers and their insurance companies from full financial accountability for acts a jury determines were the cause of serious, permanent, and disfiguring injuries. As in the *Hilburn* case, damage caps may protect *out-of-state* companies and individuals but *damage caps always harm a Kansas citizen*.

***Hilburn* applies only to non-economic damages.** Medical care is an economic cost. Economic damages include medical bills for the injuries caused by the wrongdoer; economic damages have never been capped. Under the *Hilburn* decision a jury will still determine liability and the amount of economic loss based on the evidence, including medical bills.

**There are many factors that influence health care costs that are unrelated to the *Hilburn* decision.** The problem of health care costs is complex. It is premature to draw conclusions about *Hilburn*'s influence on health care costs, if any, because there are many other well-documented factors that are more relevant than non-economic damage caps.

First, health care costs are a national concern and are driven by trends from outside of Kansas. Second, multiple studies over a span of years have shown there are many contributors to rising health care costs, including: patients receiving more care, and more intense and expensive treatments that are not offset by expected savings;<sup>1</sup> and population growth and aging.<sup>2 3</sup> A just-published study<sup>4</sup> by the Journal of the American Medical Association from researchers at Humana, Inc. and the University of Pittsburgh School of Medicine finds that 25% of U.S. health care spending is “waste”.<sup>5</sup>

**Kansas is now in the majority of states that do not cap non-economic damages.** Forty-one (41) states plus the District of Columbia do not have general non-economic damage caps in personal injury or general tort cases.<sup>6</sup> Only 9 states have a general liability cap like the one struck down in *Hilburn*.

And the evidence does not support claims that non-economic damage caps are the only or best way to control medical malpractice premium cost.

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<sup>1</sup> Kincaid, Ellie. What's Driving Health Care Costs Up in the U.S. Forbes. Published online November 7, 2017.

<sup>2</sup> *Ibid.*

<sup>3</sup> Ginsberg, Dr. Paul, et. al. What is Driving U.S. Health Care Spending? America's Unsustainable Health Care Cost Growth. Bipartisan Policy Center, 2012. The authors list 21 factors driving health care utilization and price.

<sup>4</sup> Shrank WH, Rogstad TL, Parekh N. Waste in the U.S. Health Care System: Estimated Costs and Potential for Savings. JAMA. Published online Oct. 07, 2019.

<sup>5</sup> The authors identified six categories of waste: failure of care delivery, failure of care coordination; over treatment or low-value care; pricing failure; fraud and abuse; and administrative complexity.

<sup>6</sup> Center for Justice & Democracy, June 20, 2019. <https://centerjd.org/content/fact-sheet-caps-compensatory-damages-state-law-summary> States without non-economic damage caps in personal injury or general tort cases are AL, AZ, AR, CA, CT, DC, DE, FL, GA, IL, IN, IA, KS, KY, LA, ME, MA, MI, MN, MO, MT, NE, NV, NH, NJ, NM, NY, NC, ND, OK, PA, RI, SC, SD, TX, UT, VT, VA, WA, WV, WI, WY. States without non-economic damage caps in medical malpractice cases are AL, AZ, AR, CT, DC, DE, FL, GA, IL, KS, KY, ME, MN, NH, NJ, NY, OK, PA, RI, VT, WA, WY (21 total, plus the District of Columbia.)

Americans for Insurance Reform (AIR)<sup>7</sup> examined the impact of caps on damages and limitations on tort law protections enacted from 2002-06 on medical malpractice premiums<sup>8</sup>. AIR concluded:

- States that enacted new limits on patients’ legal rights in medical malpractice cases saw an average 22.7 percent decrease in pure premiums from 2002 to 2016 – but states that did nothing saw a larger average drop of 29.5 percent.
- States that enacted only caps on damages saw an average 21.8 percent decrease in pure premiums from 2002 to 2016– but the states that did nothing saw an even greater average drop of 28.9 percent.
- Severe rates hikes experienced by doctors during the three past insurance crises were not the result of exploding claims or tort system costs but rather the industry’s own boom and bust economic cycle, dictated by the state of the economy and insurance industry profitability, including bond and stock market gains or losses.

**Conclusion.** KTLA believes the Legislature does not need to take action following *Hilburn* and should not. Any legislative action that affects the right to trial by jury is ill-advised and likely unconstitutional based on the Court’s ruling in *Hilburn*.

Policymakers’ most important consideration is to support the individual rights of Kansas citizens guaranteed in the Kansas Bill of Rights and the Bill of Rights of the US Constitution, KSA 54-106. Whether it is the individual right to bear arms, freedom of religion, freedom of speech, the inviolate right to trial by jury, or other constitutional right, each must be protected for the benefit of individual Kansans.

On behalf of the members of the Kansas Trial Lawyers Association, I respectfully request that the Committee support and protect the inviolate right to trial by jury.

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<sup>7</sup> Americans for Insurance Reform is a coalition of nearly 100 consumer and public interest groups representing more than 50 million people.

<sup>8</sup> Hunter, J. Robert and Doroshaw, Joanne. Premium Deceit 2016: the Failure of “Tort Reform” to Cut Insurance Prices, November 26, 2016. <http://centerjd.org/content/premium-deceit-2016-failure-tort-reform-cut-insurance-prices> .