

Federal Tort Reform and the Seventh Amendment

SUJA A. THOMAS¹

Today I will discuss the constitutionality of proposed tort reform, particularly focused upon the constitutionality of caps under proposed federal laws as applied to suits in federal court. The approach that I advocate goes against the current trend of the Supreme Court jurisprudence on the civil jury. The current trend I think does not adequately take into account the text of the Constitution and our common law history.

My main argument is the Framers established the jury as an independent actor in the Constitution. The jury is similar to other constitutional actors, with power competing with those actors, for example the judiciary itself, and the legislature. The Framers established a constitutional structure whereby the jury in federal courts decided certain cases and damages were a fundamental component of such jury decision-making. If we permit the legislature to alter jury verdicts in any case that goes before the jury, then we are effectively rendering at least part of the constitutional right to a jury trial a nullity. While juries can still decide liability in cases, juries may not be able to decide the damages, dependent upon whether the legislature enacts a cap. I will argue that the text of the Constitution, our constitutional history and the role of the jury under the English common law support my arguments against this role for the jury and for the unconstitutionality of federal caps. Also, using an empirical study, I will argue that caps infringe the jury trial right.

¹ Presented by Suja A. Thomas, Professor, University of Cincinnati College of Law, at the American Association of Law Schools Section on Civil Procedure Program: The Civil Jury in the Shadow of Tort Reform, Washington, D.C., January 5, 2006. Thanks to Kelly Rezny for her research assistance in the preparation of this talk.

Recent federal tort reform efforts include the proposed Help Efficient Accessible, Low Cost, Timely Health Care Act of 2005,² the Healthy Mothers and Healthy Babies Access to Care Act³ and the Pregnancy and Trauma Care Access Protection Act of 2005.⁴ Each applies to medical malpractice cases and limits non-economic damages, including pain and suffering, and also punitive damages.⁵ None of these Acts has been passed although it is expected that these and like bills will continue to be proposed by Congress.⁶ The legislature has modeled its bills on state statutes, including California's,⁷ many of which include caps.⁸

These efforts have been defended as an appropriate response to documented rising malpractice awards.⁹ Opponents of medical malpractice tort reform argue otherwise, citing government reports showing no proven relationship between caps and lower insurance premiums.¹⁰

While the effectiveness of tort reform will continue to be discussed, I think that our focus on the reform needs to be re-directed back to the Constitution. The Seventh

² H.R. 5, 109th Cong. (2005). (Formerly H.R. 534).

³ S. 366, 109th Cong. (2005).

⁴ S. 367, 109th Cong. (2005).

⁵ See H.R. 5, 109th Cong. (2005); S. 366, 109th Cong. (2005), S.367, 109th Cong. (2005).

⁶ See Collin Sult, *Questionable Medicine—Why Medical Malpractice Reform May be Unconstitutional*, 47 ARIZ. L. REV. 195, 195 (2005). Every Congress since 1987 has proposed federal malpractice reform legislation.

⁷ See Cal Civ Code §§ 3333.1 & 3333.2 (LEXIS 2006).

⁸ See, e.g., Carly N. Kelly & Michelle M. Mello, *Are Medical Malpractice Damages Caps Constitutional? An Overview of State Litigation*. 33 J.L. MED & ETHICS 515, 515 (2005).

⁹ See, e.g., Kevin J. Gfell, *The Constitutional and Economic Implications of a National Cap on Non-economic Damages in Medical Malpractice Actions*, 37 IND. L. REV. 773, 778-789 (2004); see also Kimberly J. Frazier, *Arkansas's Civil Justice Reform Act of 2003: Who's Cheating Who?*, 57 ARK. L. REV. 651, 656 (2004), (citing U.S. Dep't of Health and Human Servs., *Confronting the New Health Care Crisis: Improving Health Care Quality and Lowering Costs by Fixing our Medical Liability System* (July 24, 2002), available at <http://aspe.hhs.gov/daltcp/reports/litrefm.htm>).

¹⁰ See General Accounting Office, Report to Congressional Requesters, *Medical Malpractice Insurance: Multiple Factors have Contributed to Increased Premium Rates*, 4, GAO 03-702 (2003), available at <http://www.gao.gov/new.items/d03702.pdf>; General Accounting Office, Report to Congressional Requesters, *Medical Malpractice: Implications of Rising Premiums on Access to Health Care*, 1, GAO-03-836 (August, 2003), available at www.gao.gov/new.items/d03836.pdf.

Amendment is one of the relevant constitutional provisions that would govern the issue of the constitutionality of caps under federal law in suits in federal court. The Amendment has been interpreted to apply only to suits in federal court, although many states have a constitutional requirement similar to the Seventh Amendment and as a result the analysis that I will describe here may also apply in certain state courts.¹¹

In addition to the Seventh Amendment, other arguments could be made regarding the issue of the constitutionality of caps, including claims based on equal protection and due process.¹² In this talk, I focus only on the Seventh Amendment in the context of the Constitution.

You have the text of the Seventh Amendment before you. I'd point out that the Seventh Amendment is the only place in the Constitution that specifically refers to the common law.¹³ This is an interesting fact especially given the Supreme Court's frequent reliance on examining the English common law in the interpretation of other parts of the Constitution that do not include this specific command to follow the common law. The Supreme Court has interpreted the common law in the Seventh Amendment to be the English common law in 1791 when the Amendment was adopted.¹⁴

Under the Seventh Amendment, there is a right to a jury trial in suits in federal court where “the right . . . existed under the English common law [in 1791] when the Amendment was adopted,”¹⁵ or where there are “statutory causes of action ‘analogous to

¹¹ See Kelly & Mello, *supra* note 8, at 520-21. The constitutions of 48 states contain a provision that has some similarity to the Seventh Amendment.

¹² See *id.* at 515.

¹³ See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 164-165 and n. 59 (1996) (Souter, J., dissenting) (differentiating between the Seventh Amendment and the Eleventh Amendment, while both having common law influence, the former by its specific language “intended to adopt the common law”).

¹⁴ See *Dimick v. Schiedt*, 293 U.S. 474, 496-497 (1935).

¹⁵ *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996) (quoting *Balt. & Carolina, Inc. v. Redman*, 295 U.S. 654 (1935)).

common-law causes of action ordinarily decided in English courts in the late 18th century.”¹⁶ Such suits include “suits in which legal rights [are] to be ascertained and determined [as opposed to suits in equity or admiralty].”¹⁷ As two examples, there is a right to a jury trial in tort actions which existed under the English common law, and there is a right to a jury trial in Title VII cases in which emotional distress damages are alleged.

Now, relating this to damages in malpractice cases, I will simplify matters by examining caps on only non-economic damages, like pain and suffering, excluding economic damages and punitive damages. I exclude economic damages, in other words actual damages, because they are generally not subject to caps in tort reform laws. I exclude punitive damages for a couple of reasons. First, there is some evidence that punitive damages are only a small part of medical malpractice claims. A recent article regarding tort reform in the *Journal of Law, Medicine and Ethics* cited a study in the *New England Journal of Medicine* which found that only 1.5% of damages in med mal cases are punitive damages.¹⁸ Second, it’s arguable that under the Supreme Court’s 2001 decision in *Cooper Inds. Inc. v. Leatherman Tool Group* that punitive damages are not facts and thus are not subject to a Seventh Amendment analysis.¹⁹

Now, looking at the arguments for the constitutionality of caps for non-economic damages, the Third, Fourth and Sixth Circuits have considered this issue in the context of state caps and have held state caps constitutional under the Seventh Amendment.²⁰

Again, in this talk I am considering only the issue of the constitutionality of federal caps

¹⁶ *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 709-09 (1999) (citing *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 348 (1998) (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989))).

¹⁷ *Id.* at 708 (quoting *Parsons v. Bedford* 3 Pet. 443, 447, 7 L.Ed. 732 1830).

¹⁸ See *Kelly & Mello*, *supra* note 8, at 516.

¹⁹ See 532 U.S. 424 (2001).

²⁰ See *Boyd v. Balula*, 877 F.2d 1191 (4th Cir. 1989); *Davis v. Omitowaju*, 883 F.2d 1155 (3rd Cir. 1989); *Smith v. Botsford General*, 419 F.3d 513, 519 (6th Cir. 2005).

in federal court. The imposition of state caps in federal courts pose certain additional interesting questions involving Erie that I won't address today.

The Circuit decisions are instructive regarding the reasons that have been given by courts thus far for the constitutionality of caps under the Seventh Amendment and it's noteworthy that – although in dicta – the Supreme Court in *Gasperini* cited the 3rd and 4th Circuits' decisions on this point of the constitutionality of state caps under the Seventh Amendment.²¹ The Circuit decisions are based on one or more of the following: caps are constitutional because legislatures, not courts, are reviewing the facts found by a jury; caps are constitutional because the legislature can eliminate causes of action and thus also can limit damages; caps are simply the law that is being applied to a jury's finding of the facts; caps are constitutional because there actually may not be a right to a jury trial in the remedy phase of a civil jury trial.²² Let me add that the 8th and 9th Circuits have held Title VII caps constitutional under reasoning similar to the reasoning in these med mal cases in federal court.²³ Some state courts have expressed the opinion that caps are simply a legislative remittitur, analogous to remittiturs by courts.²⁴ I would summarize all of these arguments as being regarding the power of the legislative branch versus the power of the jury. Separate from these arguments, there is the policy argument for caps: we need a way to curb high verdicts by juries and caps are the best way to do this.

²¹ See *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 429 n.9 (1996).

²² See *Boyd v. Balula*, 877 F.2d 1191 (4th Cir. 1989); *Davis v. Omitowoju*, 883 F.2d 1155 (3rd Cir. 1989); *Smith v. Botsford General*, 419 F.3d 513, 519 (6th Cir. 2005).

²³ See *Hemmings v. Tidyman's Inc.*, 285 F.2d 1174, 1200-1201 (9th Cir. 2002); *Madison v. IBP, Inc.*, 257 F.3d 780, 804 (8th Cir. 2000) (overruled on other grounds).

²⁴ See *Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d 251, 260 (Kan. 1988).

In an article entitled *Judicial Modesty and the Jury*, published last year, I argued that the jury, like the executive branch, the legislature, the courts and states, is a separate constitutional actor, and that similar to the concepts of separation of powers and federalism, there is a distinct division of power between the jury and judiciary established by the Constitution.²⁵ This concept is confirmed by what the Framers stated regarding the jury as a check on the power of the judiciary.²⁶ I would add to what I stated in that paper that nothing in the Constitution, nor in what the Framers stated, supports that the legislature itself was to function as a check on the jury. In fact, the separation of power between the judiciary and the legislature and the subsequent power that the judiciary alone is given over the jury in the Seventh Amendment appears to confirm that the legislature was not intended as a check on the jury. So part of my answer to the arguments for the constitutionality of legislative caps is the Constitution's text itself does not support such a role for the legislature nor does the discussion surrounding the adoption of the Constitution and the Seventh Amendment support such a role.

The next part of my answer to the arguments for the constitutionality of legislative caps looks to English legal history and an empirical study in the federal courts. In two recent articles, I have discussed procedures that English courts used in the late 18th century that affected the jury trial.²⁷ Under the English common law, a judge could re-examine a verdict only by considering whether to order of a new trial.²⁸ No procedure similar to remittitur or judgment as a matter of law existed under the English common

²⁵ See Suja A. Thomas, *Judicial Modesty and the Jury*, 76 U. COLO. L. REV. 767 (2005).

²⁶ See *id.* at 773-75.

²⁷ See Suja A. Thomas, *Re-examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731 (2003); Suja A. Thomas, *The Seventh Amendment, Modern Procedure, and the English Common Law*, 82 WASH. U. L. Q. 687 (2004).

²⁸ See Thomas, *Remittitur*, *supra* note 27, at 775.

law.²⁹ The jury alone determined the damages and the jury's findings would almost invariably stand.³⁰ If damages were excessive, a new trial could be ordered.³¹ One English judge at the time had stated "we cannot say what the damages ought to be but can only send it for the investigation of another jury."³²

Let me also say that the attempted comparison between remittitur and caps to defend the constitutionality of caps lacks force. In deciding that additur was unconstitutional under the Seventh Amendment, in *Dimick*, the Court had called remittitur "doubtful precedent" and stated that "it . . . may be that if the question of [the constitutionality of] remittitur were now before us for the first time, it would be decided otherwise."³³ Moreover, as I have already stated, the practice of the English courts was different in significant ways from the practice of the federal courts today. Under the English common law, once a jury rendered a verdict, the judge did not examine the verdict, except as to the possible order of a new trial. There was no remittitur. I would suggest then that remittitur is not a good basis to argue in favor of the constitutionality of caps.

As a final point, let me mention an empirical study regarding remittitur that supports the argument against the constitutionality of caps. I studied remittitur in the federal courts from 1991 through 2000 using published and unpublished decisions on Westlaw.³⁴ I found that remittitur effectively eliminates the plaintiff's right to jury trial.³⁵

²⁹ See *id.* at 767; Thomas, *Modern Procedure*, *supra* note 27.

³⁰ See Thomas, *Remittitur*, *supra* note 27, at 770.

³¹ *Id.*

³² *Id.* at 781 (quoting *Goldsmith v. Sefton*, 145 Eng. Rep. 1046, 1046 (1796)).

³³ 293 U.S. at 484-85.

³⁴ See Thomas, *Remittitur*, *supra* note 27, at 735.

³⁵ See *id.*

In a case in which remittitur has been ordered, the judge states that the remitted amount is the maximum amount that a reasonable jury could find.³⁶ As a result, when a plaintiff is given the option of taking a new trial or the remittitur, the plaintiff is unlikely to take a new trial because the judge has already pronounced the maximum amount a reasonable jury could find under the facts of the case.³⁷

My study found this to be true. I used the information on Westlaw to determine in which cases a judge had remitted a case. I then examined information on docket sheets, information provided by lawyers on the case and information from appellate decisions to determine whether the plaintiff had accepted the remittitur, settled the case or took the new trial. When given the option of a new trial or a remittitur, in 98% of the cases, the plaintiff took the remittitur or settled the case, taking the remittitur in 71% of the cases, and settling in 27% of the cases.³⁸

With respect to caps, I propose that caps in medical malpractice cases would have a similar effect on the plaintiff's right to a jury trial. Where there is a cap, a plaintiff with a significant claim has little reason to take the case to trial. The legislature has already decided what the case is worth. Only if the plaintiff believes that his case is worth less than the cap or, the defendant will not settle, would the plaintiff take the case to trial. Moreover, the cap forces the plaintiff to possibly take less than the case is worth because the defendant arguably should offer less than the cap because the cap is the most the plaintiff can obtain by going to trial.

³⁶ See *id.* at 732.

³⁷ See *id.* at 734.

³⁸ See *id.* at 744.

I still need to answer the question how do we solve any demonstrated problem with high jury verdicts without caps. I think that part of the solution is judges should use their power to order new trials and part of the solution lies in settling these cases before the jury hears them.

What I'm arguing – that is for the unconstitutionality of federal caps – is against the tide of the Supreme Court jurisprudence on the Seventh Amendment. Even though it may seem unlikely that the Court will change its course if it were to decide this issue, the Court has changed its course in the past on other issues, and here, where there is indisputable history to support the role of the jury as the decision-maker on damages and where there is constitutional text to support this role, there is good reason for us as scholars to continue to argue for this change in course.