

# NEWS ALERT

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## HILBURN V. ENERPIPE AND ITS IMPACT ON STATUTORY NON-ECONOMIC DAMAGES CAPS IN KANSAS TORT ACTIONS

On June 14, 2019, the Kansas Supreme Court in *Hilburn v. Enerpipe Ltd* (No. 112,765) struck down K.S.A. 60-19a02, which capped non-economic damages in personal injury actions.

Hilburn was an automobile negligence case. The jury awarded the injured plaintiff \$335,000, comprising \$33,490.86 in economic damages for medical expenses and \$301,509.14 in non-economic “pain and suffering” damages. The trial court, applying the K.S.A. 60-19a02 cap reduced the non-economic damages award to \$250,000. [Note: In 2014, the Legislature increased the cap to \$325,000 and allowed for an increase to \$350,000 after July 1, 2022.]

A divided Court held that the statutory cap violates the “right to trial by jury” in Section 5 of the Kansas Bill of Rights by intruding “upon the jury’s determination of the compensation owed to redress her injury.” The Court rejected its own *quid pro quo* test in *Miller v. Johnson* 295 Kan. 636 (2012) for deciding the constitutionality of a statutory non-economic damages cap.

The Hilburn decision creates uncertainty about the future of other statutory damage caps. *Miller* was a medical negligence case. Although the Hilburn Court rejected the *Miller* Court’s rationale, the Hilburn Court did not decide the constitutionality of the cap in a medical negligence case. Historically, Kansas has considered statutory caps for medical negligence separately from those for other personal injury actions. However, the plaintiff’s bar argues that since 1988, Kansas has not statutorily differentiated between the caps.

Given this uncertainty, health care providers may experience increasing medical liability insurance premiums. Cases are now working their way through courts that will decide whether the Hilburn holding is applied in medical negligence cases.

On February 13, 2020, the Kansas House Committee on Judiciary introduced House Bill No. 2673 that would fast track cases. If passed, the Kansas Supreme Court would have original jurisdiction to decide “the construction and validity of K.S.A. 60-19a02, and amendments thereto, or any other law that creates a limitation in a medical malpractice liability action on a claim for noneconomic loss, following the decision in the case of *Hilburn v. Enerpipe Ltd.*, No. 112,765, June 14, 2019.” The bill is assigned to the House Appropriations Committee.

Also, the Legislature has studied the possibility of amending the Kansas Constitution to reject the Hilburn holding. To date no resolution has been introduced for such an amendment.

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