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JUDICIAL TRIAGE: CHALLENGING TENNESSEE’S DAMAGES CAPS ON LAW AND POLICY GROUNDS

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INTRODUCTION

In 2011, the Tennessee legislature enacted a variety of reforms to its civil litigation regime, including a cap of $750,000 on noneconomic damages.\(^1\) The legislation, signed into law by Republican Governor Bill Haslam, was designed to make Tennessee “more competitive for new jobs with surrounding states by bringing predictability and certainty to businesses calculating potential litigation risk and cost.”\(^2\) This policy goal of affording certainty to businesses would be guaranteed, in effect if not in purpose, by limiting the compensation available to innocent victims of negligent conduct.

This note argues that Tennessee’s recent reforms are unconstitutional abrogations of various rights guaranteed by the State’s Constitution. Specifically, a cap on noneconomic damages violates the rights of trial by jury guaranteed in Art. I. § 6 of the Tennessee Constitution, and the right to a remedy in an open court.\(^3\) Beyond constitutional arguments, this note further posits that the law ultimately results in a fundamental unfairness endemic to damage caps: it simply is not possible for a judge fairly to apportion capped awards among deserving

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\(^1\) See T.C.A. § 29-39-102(a)(2) (West 2014) (“Compensation for any noneconomic damages suffered by each injured plaintiff not to exceed seven hundred fifty thousand dollars ($750,000) for all injuries and occurrences that were or could have been asserted, regardless of whether the action is based on a single act or omission or a series of acts or omissions that allegedly caused the injuries or death”).


\(^3\) Tenn. Const. art. I, § 6 (“That the right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors”).
victims, and judges must therefore preside over a system of “judicial triage” whereby truly arbitrary decision-making replaces judicial reasoning.

In making these arguments, this note proceeds in three parts. The history and purpose of damage caps as a mechanism to combat perceived crises in the American health care system is explored in Part I. This part provides the necessary context for understanding the nature of Tennessee’s recent reforms. Recent developments in other states with respect to constitutional attacks on similar statutory caps are analyzed in Part II. This part underscores the state constitutional infirmities in the Tennessee law. Finally, in Part III, this note argues that the imposition of damage caps works substantive unfairness into the justice system by forcing judges to make unconscionable decisions when dividing capped funds among successful plaintiffs.4

Part I: Caps in Context

A. The National Reform Effort

The imposition of caps on damages recoverable in personal injury cases emerged in the 1970’s as a legislative tool through which to address rising medical malpractice premiums.5 These reforms were founded on the assumption of a causal link between damage awards in personal injury cases and increasing malpractice insurance premiums. California, for example, enacted a cap of $250,000 on non-economic damages in 1975 to address its malpractice insurance “crisis.”6 Despite the enactment of this cap, malpractice insurance premiums in

6 Cal. Civ. Code § 3333.2(b) (West 2014) (“In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars ($250,000”). This dollar amount was not corrected for inflation, and in today’s terms would be approximately $58,000. It’s time
California continued to rise, and in 1988 “had reached an all-time high – 450% higher than 1975,” when California’s Medical Injury Compensation Reform Act was enacted.\(^7\) The efficacy of such caps notwithstanding, reforms similar to those adopted by California continued throughout the 1980’s, during what some scholars have termed a “second wave” of malpractice liability problems.\(^8\) These reforms were substantively similar to the earlier reforms of states like California.\(^9\) Most recently, a “third wave” of malpractice liability reforms was proposed at the federal level during the administration of President George W. Bush.\(^10\) The federal proposal capped non-economic damages at California’s 1975 level of $250,000, and was couched in terms of improving patient access to health care.\(^11\) At the time of the proposal, which was not adopted, the Congressional Budget Office (C.B.O.) observed that caps on damage awards were not likely to reduce health care costs, because “even a reduction of 25 percent to 30 percent in malpractice

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\(^7\) How Insurance Reform Lowered Doctors’ Medical Malpractice Rates in California And How Malpractice Caps Failed, p. 3, CONSUMERWATCHDOG.ORG, http://www.consumerwatchdog.org/resources/1008.pdf, (last visited January 12, 2014). See also Preamble to the Medical Injury Compensation Reform Act, ch. 2, § 12.5, 1975 Cal. Stat. 4007 (“The Legislature finds and declares that there is a major health care crisis in the State of California attributable to skyrocketing malpractice premium costs and resulting in a potential breakdown of the health delivery system, severe hardship for the medically indigent, a denial of access for the economically marginal, and depletion of physicians such as to substantially worsen the quality of health care available to citizens of this state”).

\(^8\) See Chandler Gregg, The Medical Malpractice Crisis: A Problem With No Answer?, 70 Mo. L. Rev. 307, 314 (2005); Thomas P. Hagen, “This May Sting A Little”—A Solution to the Medical Malpractice Crisis Requires Insurers, Doctors, Patients, And Lawyers to Take Their Medicine, 26 Suffolk U. L. Rev. 147, 150 (1992).

\(^9\) See Gregg, supra, note 7. (“One commentator describes this crisis as one not of “availability” like the 1970s but rather one of ‘affordability.’ During this second wave of problems, there was a renewal of reform efforts much like the efforts of the 1970s.”)


costs would lower health care costs by only about 0.4 percent to 0.5 percent, and the likely effect on health insurance premiums would be comparably small.” The C.B.O. report further stated that:

Evidence from the states indicates that premiums for malpractice insurance are lower when tort liability is restricted than they would be otherwise. But even large savings in premiums can have only a small direct impact on health care spending—private or governmental—because malpractice costs account for less than 2 percent of that spending.

Capping damage awards, in other words, was not likely to “improve patient access to health care,” the name of the House’s proposal notwithstanding. Additionally, the reduction in malpractice premiums has been shown to depend on external economic factors, causing some commentators to question the causal link between damage caps and malpractice insurance rates.

The efforts to enact national tort reform at the federal level, while slowed, persist today. An unlikely coalition of Republicans and Democrats has formed in opposition to the federal reform effort, albeit for very different reasons in each party. Some Republicans fear a federal

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13 Id. at 1.
14 See supra, note 11.
15 See Medical Malpractice Caps Fail to Prevent Premium Increases, According to Weiss Ratings Study, WEISSRATINGS.COM, http://www.weissratings.com/News/Ins_General/20030602pc.htm, (last visited January 12, 2014) (“In 19 states that implemented caps during the 12-year period, physicians suffered a 48.2 percent jump in median premiums, from $20,414 in 1991 to $30,246 in 2002. However, surprisingly, in 32 states without caps, the pace of increase was actually somewhat slower, as premiums rose by only 35.9 percent, from $22,118 to $30,056.”)
17 Id.
damage cap would be an impermissible violation of the 10th Amendment as an overreach of the federal government, while Democrats have argued that damage caps are essentially a financial gift to the health care industry.\(^\text{18}\) While such a coalition has been successful in preventing the enactment of a national damage cap, this coalition does not extend to the state level. Proponents of damage caps have thus re-focused their efforts to individual states, and in 2011, this debate came to Tennessee.

### B. Tort Reform in Tennessee

Many states (including Tennessee and its neighbors Georgia, Missouri, and North Carolina) have passed caps on noneconomic damages since 2000.\(^\text{19}\) Since their enactment, many of these statutory caps have been invalidated by the high courts in these states, including Georgia (2010) and Missouri (2012).\(^\text{20}\) In addition, malpractice premium rates have decreased nationally since 2007, in part due to market factors outside the arena of tort reform, such as more competition within the insurance industry.\(^\text{21}\) When Tennessee enacted its “Tennessee Civil Justice Act of 2011,” the tort reform package containing the $750,000 cap on non-economic

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\(^{18}\) Id.


\(^{20}\) Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218 (Ga. 2010); Watts v. Lester E. Cox Medical Centers, 376 S.W.3d 633 (Mo. 2012); See also: States That Have Declared Their Medical Malpractice Damage Cap Unconstitutional, JUSTICE.ORG, [http://www.justice.org/cps/rde/xbr/justice/8._States_that_Have_Declared_a_Medical_Malpractice_Damage_Cap_Unconstitutional.pdf](http://www.justice.org/cps/rde/xbr/justice/8._States_that_Have_Declared_a_Medical_Malpractice_Damage_Cap_Unconstitutional.pdf) (last visited January 12, 2014).

\(^{21}\) Jeffrey Bendix, *Competition driving malpractice premiums down*, MEDICAL ECONOMICS (Nov. 25, 2013), [http://medicaleconomics.modernmedicine.com/medical-economics/news/competition-driving-malpractice-premiums-down-0](http://medicaleconomics.modernmedicine.com/medical-economics/news/competition-driving-malpractice-premiums-down-0) (“Medical malpractice premiums continue to hold steady or decline for primary care physicians (PCPs), helped by more insurance carriers entering the field and the ongoing consolidation of primary care practices”) (emphasis added).
damages, malpractice insurance premiums nationwide had been steadily declining for the fourth consecutive year.\textsuperscript{22} Interestingly, the legislative reforms proposed in Tennessee were not couched in terms of reducing liability insurance premiums. Instead, the publicly stated rationale for imposing a cap on non-economic damages in Tennessee centered upon attracting businesses and creating jobs for Tennesseans.\textsuperscript{23} Opponents of the proposed civil reform package challenged this “job-creation” rationale by pointing to Tennessee’s already favorable status as a business-friendly climate.\textsuperscript{24} A 2007 study by the U.S. Chamber Institute for Legal Reform, the advocacy group affiliated with the lobbying group the U.S. Chamber of Commerce, ranked Tennessee 7\textsuperscript{th} among the 50 states in terms of favorable perception by U.S. businesses.\textsuperscript{25} A similar 2010 study ranked Tennessee 19\textsuperscript{th}.\textsuperscript{26} The most recent study, conducted after Tennessee’s litigation reform package was enacted, ranked Tennessee 26\textsuperscript{th}, its worst ranking since 2002,\textsuperscript{27} and behind states in which damage caps have been declared unconstitutional.\textsuperscript{28}

\textsuperscript{22} Id.
\textsuperscript{23} Jeff Woods, Haslam touts tort reform as a business-friendly jobs-creation bill, NASHVILLE CITY PAPER, (April 3, 2011), http://nashvillecitypaper.com/content/city-news/haslam-touts-tort-reform-business-friendly-jobs-creation-bill (“‘We want to have the best business climate, and to do that, we want to make sure we’re competitive with our neighboring states,’ Haslam said. ‘It’s one of the reasons we’re addressing tort reform. We want to make certain that there aren’t states around us that have a more welcoming climate for businesses than we have.’”)
\textsuperscript{24} Id.
\textsuperscript{26} Id.
\textsuperscript{27} Id.
\textsuperscript{28} Id. Notably, Wisconsin ranked 15\textsuperscript{th} overall in the 2012 study, despite a 2005 ruling invalidating damage caps. See Ferndon v. Wisconsin Patients Compensation Fund, 701 N.W.2d 440 (Wis. 2005).
The debate in the Tennessee legislature on the damage cap measure was particularly lively and unusually long.\(^\text{29}\) Senator Roy Herron, arguing against the bill, emphasized that “caps on noneconomic damages on someone who has been harmed for life could be calculated to be less than what lawmakers get in their per diem serving in the Legislature.”\(^\text{30}\) This calculation was based on the “catastrophic” injury provision of the bill, which allows for a $1 million recovery. Senator Herron deducted one third for litigation costs and attorney fees, and divided the remainder over an average life expectancy of 62 years.\(^\text{31}\) The resulting figure was $29 per day, significantly less than the $175 per diem given to members of the Tennessee General Assembly at the time.\(^\text{32}\) Supporters of the bill characterized damage caps as necessary “to create a more predictable structure in which businesses can quantify what the risk is going to be.”\(^\text{33}\) Senator Mark Norris, the majority leader and a key supporter of the bill, emphasized the job-creation rationale, if vaguely: “How many jobs? Nobody can say. There’s no crystal ball for that.”\(^\text{34}\) After more than four hours of debate, the bill passed by a vote of 21-12.\(^\text{35}\)

The statute at the focus of this note, Tennessee Code Annotated § 29-39-102, reads:

(a) In a civil action, each injured plaintiff may be awarded:

(1) Compensation for economic damages suffered by each injured plaintiff; and
(2) Compensation for any noneconomic damages suffered by each injured plaintiff not to exceed seven hundred fifty thousand dollars ($750,000) for all injuries and occurrences that were or could have been asserted, regardless of whether the action is based on a single.

\(^\text{29}\) Mike Morrow, *Tort Reform Bill Passes Senate*, TNREPORT.COM (last visited March 1, 2014).
\(^\text{30}\) *Id.*
\(^\text{31}\) *Id.*
\(^\text{32}\) *Id.*
\(^\text{33}\) *Id.*
\(^\text{34}\) *Id.*
\(^\text{35}\) *Id.*
act or omission or a series of acts or omissions that allegedly caused the injuries or death.

(b) If multiple defendants are found liable under the principle of comparative fault, the amount of all noneconomic damages, not to exceed seven hundred fifty thousand dollars ($750,000) for each injured plaintiff, shall be apportioned among the defendants based upon the percentage of fault for each defendant, so long as the plaintiff's comparative fault (or in a wrongful death action, the fault of the decedent) is not equal to or greater than fifty percent (50%), in which case recovery for any damages is barred.

(c) If an injury or loss is catastrophic in nature, as defined in subsection (d), the seven-hundred-fifty-thousand-dollar amount limiting noneconomic damages, as set forth in subdivision (a)(2) and subsection (b) is increased to, but the amount of damages awarded as noneconomic damages shall not exceed, one million dollars ($1,000,000).

(d) “Catastrophic loss or injury” means one (1) or more of the following:
   (1) Spinal cord injury resulting in paraplegia or quadriplegia;
   (2) Amputation of two (2) hands, two (2) feet or one (1) of each;
   (3) Third degree burns over forty percent (40%) or more of the body as a whole or third degree burns up to forty percent (40%) percent or more of the face; or
   (4) Wrongful death of a parent leaving a surviving minor child or children for whom the deceased parent had lawful rights of custody or visitation.

(e) All noneconomic damages awarded to each injured plaintiff, including damages for pain and suffering, as well as any claims of a spouse or children for loss of consortium or any derivative claim for noneconomic damages, shall not exceed in the aggregate a total of seven hundred fifty thousand dollars ($750,000), unless subsection (c) applies, in which case the aggregate amount shall not exceed one million dollars ($1,000,000).\(^{36}\)

Several features of this law require immediate comment. The first, though perhaps not the most immediately apparent, relates to what is not mentioned, namely, any adjustment for inflation. The second noteworthy aspect of the law is the higher pay scale ($1,000,000) for injuries deemed by the legislature to be “catastrophic.” Injuries meeting the definitions provided

\(^{36}\) See supra, note 1.
in this exhaustive list are compensated, by legislative order, at a higher rate than all other
injuries. Finally, it is worth noting that the cap attaches “to each injured plaintiff,” such that the
derivative claims of a spouse or children of an injured plaintiff “shall not exceed in the
aggregate” $750,000 or, in the enumerated “catastrophic” cases, $1,000,000.37 These features of
the law will figure prominently in the next section, which analyzes the law in the context of
constitutional defects contained in the law.

Part II: Caps and the State Constitution

A. The Right of Trial by Jury

The Tennessee Constitution provides that “right of trial by jury shall remain inviolate.”38
The Tennessee Supreme Court addressed the contours of this “inviolate” right in Garner v. State:

The preservation of the trial by jury in all its purity, is of the first
importance; a strict adherence to its form, in all its parts, is not to be
dispensed with, or to be considered as captious or trifling. It is to be
watched with a jealous assiduity, and the slightest deviation from the
established mode of proceeding regarded as affecting our dearest interests,
and as such to be instantly put down: bearing constantly in our minds, that
it is one of the best guards of our rights, of our property, of our liberty, and
our lives.39

More recently, in State v. Hester, 324 S.W.3d 1, 50-51 (Tenn. 2010) the Court described
the central importance of the right to trial by jury:

The citizen jury provides the foundation of this Nation's legal system. Encroachment on the right to trial by jury was among the chief complaints registered by the American colonists in the Declaration of Independence. Alexander Hamilton considered the right to trial by jury to be “the very palladium of free government.” Thomas Jefferson believed it to be “the only anchor, ever yet imagined by man, by which government can be held to the principles of [the] Constitution.”40

38 See supra, note 3.
39 Garner v. State, 13 Tenn. 159, 176-179 (Tenn. 1833)
40 State v. Hester, 324 S.W.3d 1, 50-51 (Tenn. 2010)
The Court in *Hester* went on to cite *Tipton v. Harris*, a case decided by the Tennessee Supreme Court just thirty years after Tennessee’s founding:

The right to a trial by jury . . . is too sacred to be intermeddled with by any power upon earth; too inseparable from human happiness to be submitted to the discretion of any human Legislature.  

Emphasizing the liberty interests historically at stake in the trial by jury, the Court has written:

The right of trial by jury is as old as the common law in England, and is supposed by Worthington, in his Treatise on Juries, 27 Law Lib., 5, 6, to have been derived there from Roman jurisprudence. However greatly it may have been abused, it has been, and is, regarded as an essential element of public liberty.

The Tennessee Court of Appeals has held that the substantive right to a trial by jury requires the jury to determine the amount of damages:

No issue was submitted to the jury as to whether the Town should recover and if so for how much. The amount of recovery was submitted to a special master, and judgment was based upon his report . . . It is therefore clear that the defendant was deprived of his constitutional right to trial by jury.

A current legal challenge to Tennessee Code Annotated §29-39-102, relying on the above-quoted excerpts, has argued:

Tennessee citizens have an ‘inviolate’ right to have a jury determine the amount of compensatory damages, including noneconomic damages, under our Constitution. The right to have a jury make that decision cannot be eliminated or restricted by the Tennessee legislature and the Tennessee

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41 *Id.* citing Tipton v. Harris, 7 Tenn. 414 (Tenn. 1824).
42 Riley v. Bussell 48 Tenn. 294, 296 (Tenn. 1870).
43 Town of Smyrna ex rel. Odom v. Ridley, 1984 Tenn. App. LEXIS 3423, at * 2, 14-15 (Tenn. Ct. App. Sept. 5, 1984) (The Tennessee Supreme Court overruled this decision on the basis that the plaintiff was not entitled to a jury trial because “there is no right under this provision to a jury trial in an action that is equitable in nature unless it was triable by jury when the Constitution was adopted.” Town of Smyrna ex rel. Odom v. Ridley, 730 S.W.2d 318, 321 (Tenn. 1987). This finding obviated the need to address the issue of whether the right of trial by jury required jury determination of the amount of damages, as the Court of Appeals had held.
Constitution also precludes any violation of the right to trial by jury “on any pretence [pretense in the 1870 & current Constitution] whatever” and “guard[s] against transgression of the high powers” by excepting the rights enumerated in the Declaration of Rights (including the right to trial by jury) “out of the general powers of government” and declaring that these rights shall “forever remain inviolate.”

Similar arguments have recently prevailed in the high courts of Georgia and Missouri, two states with constitutional guarantees of the right of trial by jury. The Georgia Supreme Court invalidated a $350,000 cap on noneconomic damages by first finding that: “As with all torts, the determination of damages rests ‘peculiarly within the province of the jury.’” The Court then examined “whether the noneconomic damages caps . . . unconstitutionally infringe on this right,” holding:

By requiring the court to reduce a noneconomic damages award determined by a jury that exceeds the statutory limit, [the statutory cap] clearly nullifies the jury’s findings of fact regarding damages and thereby undermines the jury’s basic function.

The Court adopted verbatim the reasoning of the majority in *Smith v. Department of Insurance*, in which the Supreme Court of Florida invalidated a $450,000 cap on noneconomic damages: “if the legislature may constitutionally cap recovery at $450,000, there is no discernible reason why it could not cap the recovery at some other figure, perhaps $50,000, or

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45 See Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218, 222 (Ga. 2010); Watts v. Lester E. Cox Medical Centers, 376 S.W.3d (Mo. 2012).
46 Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218, 222 (citing Dimick v. Scheidt, 293 U.S. 474, 480 (1935) (“assessment [of damages] was a matter so peculiarly within the province of the jury that the Court should not alter it.”)
47 Id. at 223.
The very existence of the caps, in any amount,” said the Court, “is violative of the right to trial by jury.”

Two objections to this line of reasoning may include the assertions that (1) the legislature may alter or amend the common law, and that (2) other statutory limits on jury trials, such as the workers’ compensation regime, suggest the legislature’s authority to enact a cap on damages. Without question, the legislature may alter the common law, but such alterations are subject to constitutional limitations. As Justice Koch of the Tennessee Supreme Court has written, “not requiring legislative acts altering the common law to be constitutional would render the constitution itself completely ineffective.” The legislature’s authority to alter common-law remedies must therefore be distinguished from its authority, or lack thereof, to reconceive of remedies for constitutional rights. As the Tennessee Supreme Court has reasoned:

The remedy is sometimes so incorporated with the right, that it would be extremely difficult, if not impossible, to maintain, in any proper sense, that the former can be impaired without affecting the latter. But this is a point we need not stop to discuss, as it is clear beyond all doubt, that the prohibitions of the Constitution, in letter and spirit, apply as much to remedies as to rights. It was thought proper and necessary that the rules regulating the remedy should be equal and uniform in their operation, as well as those regulating the rights of the citizens. And surely this is correct; for if the remedy may be frittered away, what is the right worth?

The second objection—that the worker’s compensation regime and similar statutory restrictions on jury trials evidence the necessary legislative authority to enact a cap on damages—misunderstands the nature of the worker’s compensation regime, which confers a

48 507 So.2d 1080, 1088 (Fla. 1987).
49 691 S.E.2d, 223.
52 Id. at 425 (citing Morgan v. Reed, 39 Tenn. (2 Head) 275, 283-84 (1858)).
statutory, as opposed to constitutional, right, and which functions on a theory of waiver of the right to trial by jury.\textsuperscript{53} As the Tennessee Supreme Court has explained:

\begin{quote}
The act in question confers rights and remedies that were unknown to the common law. The act is elective. If the employé accepts the provisions of the act, it thereby becomes a part of his contract of employment, and \textit{he waives his right to trial by jury} and accepts the compensation and remedies provided by the act.\textsuperscript{54}
\end{quote}

The employee’s contractual waiver of rights has no corollary in Tennessee Code Annotated § 29-39-102, which curtails the remedy embodied in the right to a jury trial by reducing, in all cases, jury awards exceeding the statutory cap limit. By thus impairing the remedy, the legislature has abrogated the right.

\textbf{1. Jury Damages at Common Law}

There is an historical aspect to this argument that must be admitted and clarified. The highest courts of both Georgia\textsuperscript{55} and Missouri\textsuperscript{56} analyzed the right to a trial by jury in terms of what that right encompassed at the time of the adoption of the state Constitution. The same mode of historical analysis governs in Tennessee, as the Supreme Court has held:

\begin{quote}
Under Article I, § 6 of our constitution, the right of trial by jury must be preserved inviolate. This means that it \textit{must be preserved as it existed at common law} at the time of formation of the constitution.\textsuperscript{57}
\end{quote}

The question remains: did the right to a trial by jury encompass the right to have a jury determine the damage award at the time of the formation of Tennessee’s Constitution? The answer provided by reference to both the common law and the United States Supreme Court is in the affirmative. As the Georgia Supreme Court analyzed the common law:

\begin{quote}
See supra, note 40. (emphasis added).
\end{quote}

\begin{quote}
\textit{Id.} (emphasis added).
\end{quote}

\begin{quote}
691 S.E.2d at 223.
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376 S.W.3d at 640.
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As with all torts, the determination of damages rests “peculiarly within the province of the jury.’” (Citation omitted.) Dimick v. Schiedt, 293 U.S. 474, 480(3), 55 S.Ct. 296, 79 L.Ed. 603 (1935). See also OCGA § 51–12–12(a) (“[t]he question of damages is ordinarily one for the jury”). Because the amount of damages sustained by a plaintiff is ordinarily an issue of fact, this has been the rule from the beginning of trial by jury. See Charles T. McCormick, Handbook on the Law of Damages § 6, p. 24 (1935). See also 3 Blackstone, Commentaries, supra, Ch. 24, p. 397 (“the quantum of damages sustained by [a plaintiff] cannot be [ascertained] without the intervention of a jury”).  

Other commentators have concurred in this historical understanding of the common law:

The great weight of commentators, early case law, federal precedent, and state court decisions reflect that common law juries regularly assessed damages. According to Sir William Blackstone, the quintessential authority on English common law, a determination of the quantum of damages a party suffers “cannot be done without the intervention of a jury.” Even when a defendant admits liability, the court must call a jury to assess damages. A nineteenth century commentator, Theodore Sedgwick, wrote that the amount of damages “being in most cases intimately blended with the questions of fact, must have been from the outset generally left with the jury.” Modern commentators agree.  

This conclusion that juries determined the amount of damages at common law has found support in the United States Supreme Court, which reasoned in Feltner v. Columbia Pictures:

There is clear and direct historical evidence that juries, both as a general matter and in copyright cases, set the amount of damages awarded to a successful plaintiff.  

The historical record, then, lends support for the idea that, at the time of Tennessee’s Constitution, the common law right of a trial by jury included the right to have the jury award damages. By contrast, as the Missouri Supreme Court noted:

[S]tatutory caps on damage awards simply did not exist and were not contemplated by the common law when the people of Missouri adopted their constitution in 1820 guaranteeing that the right to trial

58 691 S.E.2d at 223.
by jury as heretofore enjoyed shall remain inviolate. The right to trial by jury “heretofore enjoyed” was not subject to legislative limits on damages.61

2. Tennessee Code Annotated § 29-39-102 Violates the Right to a Trial by Jury

Having thus established that the right to a trial by jury protects that right as it existed at the time of the formation of Tennessee, and having established that at common law juries determined the amount of damages, we must now turn to the question of whether the cap on noneconomic damages violates this right. Employing the analysis of the Missouri Supreme Court leads inevitably to the conclusion that a legislative cap on jury awards is constitutionally impermissible, as such a law:

[I]mposes a cap on the jury's award of non-economic damages that operates wholly independent of the facts of the case. As such, [the law capping damages] directly curtails the jury's determination of damages and, as a result, necessarily infringes on the right to trial by jury when applied to a cause of action to which the right to jury trial attaches at common law.62

The rationale of the Georgia Supreme Court is quite similar:

By requiring the court to reduce a noneconomic damages award determined by a jury that exceeds the statutory limit, [the damage cap] clearly nullifies the jury's findings of fact regarding damages and thereby undermines the jury's basic function.63

Importantly, the Missouri Supreme Court rejected the idea that the jury could fulfill its constitutional function (by awarding damages as part of its fact-finding mission) in harmony with the legislative cap (by contrast, a question of law). The Court rejected this “splitting” rationale, popular among proponents of damage caps64, reasoning:

The argument that [the cap on damages] does not interfere with the right to trial by jury because the jury had a practically meaningless opportunity

61 376 S.W.3d at 639.
62 376 S.W.3d at 640.
63 691 S.E.2d at 223.
64 See supra, note 59.
to assess damages simply “pays lip service to the form of the jury but robs it of its function” . . . The unavoidable result of this rationale is that [the] right to trial by jury is directly subject to legislative limitation. This holding is untenable for the simple reason that a statutory limit on the state constitutional right to trial by jury amounts to an impermissible legislative alteration of the Constitution.65

A natural counterpoint to this line of reasoning is that the power of judicial remittitur suggests that judges can modify jury awards as a matter of law, and that therefore the power to modify the jury award extends to the legislature. This objection, however, is unavailing for at least two reasons. The first is that, unlike legislative caps on damages, judicial remittitur existed in the common law at the time of the adoption of the Tennessee Constitution.66 As the Court in Watts reasoned, adopting the reasoning of the United States Supreme Court in Dimick v. Schiedt (1935),

[T]he United States Supreme Court . . . found that there were few common law precedents authorizing judicial remittitur but that the procedure was a part of the common law and, consequently, a part of the federal constitutional jury trial right.67

Since the power of judicial remittitur existed in the common law at the time of the adoption of Tennessee’s Constitution, this power is subsumed into the right to a trial by jury. There is no such historical record supporting the proposition that legislative damage caps were part of the common law. This fact alone rebuts the assertion that remittitur supports the notion of legislative power to remit, in effect, all future cases at once, regardless of the facts of the case or the evidence presented.

The second reason the practice of judicial remittitur does not lend support to legislative caps is that remittitur is an intensive, fact-based inquiry, which requires judicial scrutiny of a

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65 376 S.W.3d at 642.
67 376 S.W.3d at 639.
particular case and the award given by the jury.\textsuperscript{68} For example, the Tennessee Supreme Court has held that remittitur is proper in cases where jury awards are excessive to the point of unreasonable, and has described the inquiry into reasonableness:

To determine whether a verdict is within the range of reasonableness, the trial judge must consider the credible proof at trial regarding the nature and extent of the injuries, pain and suffering, economic losses including past and future medical bills, lost wages and loss of earning capacity, age, and life expectancy.\textsuperscript{69}

In \textit{Meals ex rel. Meals v. Ford Motor Company}, the case from which the above language is excerpted, the Tennessee Supreme Court overturned the Court of Appeals’ decision to reduce the jury award because the Court of Appeals failed to account for the actual evidence of the case:

In this case, the Court of Appeals reduced the jury's award of damages by 70.55\% based on its conclusion that the award of non-economic damages of $39.5 million demonstrated sympathy and was excessive. The Court of Appeals reached this conclusion \textit{without discussing the evidence regarding Plaintiff's damages} and by relying on the amount of the verdict in \textit{Potter v. Ford Motor Co.}, 213 S.W.3d 264 (Tenn.Ct.App.2006). We respectfully disagree with the conclusion reached by the Court of Appeals.\textsuperscript{70}

A legislative cap on noneconomic damages in all cases, regardless of the evidence, thus cannot be supported by an analogy to judicial remittitur, which requires scrutiny of each case based on the material evidence presented.

The foregoing argument has sought to establish that Tennessee’s legislative cap on non-economic damages violates the constitutional right to a trial by jury. In the following section, it is argued that a related provision, which guarantees that “every man, for an injury done him in

\textsuperscript{68} See \textit{Meals ex rel. Meals v. Ford Motor Co.}, 417 S.W.3d 414 (Tenn. 2013).
\textsuperscript{69} \textit{Id.} at 423.
\textsuperscript{70} \textit{Id.} (emphasis added).
his . . . person . . . shall have remedy by due course of law,” prevents the legislature from enacting damage caps such as those contained in Tennessee Code Annotated § 29-39-102.71

B. Tennessee’s Open Courts and Remedy by Due Course of Law Provision

The right of trial by jury protected by the Tennessee Constitution, as mentioned above, contains certain procedural safeguards. A similar constitutional provision enumerating substantive rights in terms of judicial procedure is the right of open access to the courts of the state. Article 1, section 17 of The Tennessee Constitution provides:

That all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay. Suits may be brought against the state in such manner and in such courts as the Legislature may by law direct.72

While this constitutional provision once provided a vital means of checking legislative actions, it “has not figured prominently in Tennessee’s constitutional jurisprudence during recent times.”73 The metaphorical “closing” of the open courts provision stems from what Justice Koch describes as “an erroneous decision by the Tennessee Supreme Court in 1920 confining the application of Tenn. Const. art. I, S 17 to the judicial branch of government,”74 a clear reference to Scott v. Nashville Bridge Co., in which the Supreme Court stated, in dicta, “[t]he provision of section 17 of article 1 of our state Constitution is a mandate to the judiciary, and was not intended as a limitation of the legislative branch of the government.”75 This conclusion made no reference to several of the court’s earlier decisions, in which the Court had interpreted the open courts provision as conferring rights against the state that the legislature could not abridge.

71 Tenn. Const. art. I, S 17
72 Id.
73 See supra, note 41, at 415.
74 Id. at 406 (referencing Scott v. Nashville Bridge Co., supra, note 50).
75 See supra, note 40.
courts provision to apply to the legislature. In direct opposition to this conclusion, for example, stands the earlier case of *Townsend v. Townsend*, in which the Supreme Court stated of article 1, section 17:

In Magna Charta this restriction is upon royal power; *in our country it is upon legislative and all other power*. We must understand the meaning to be that, *notwithstanding any act of the Legislature to the contrary*, every man shall have “right and justice” in all cases, “without sale, denial, or delay.”

At issue in *Townsend* was an act that provided:

[U]pon any judgment thereafter to be obtained, execution shall not issue until two years after the rendition of such judgment, unless the plaintiff shall indorse upon the execution that the sheriff or other officer shall and may receive, in satisfaction of said execution, notes on the State bank of Tennessee and its branches, and the Nashville bank and its branches, or any of them, and such other notes as pass at par with them, &c.  

Relying on the article 1, section 17 protections contained in the words “right and justice without sale, denial or delay,” the Court held:

[These words] clearly comprehend the case of executions suspended by *act of the Legislature* in every instance where justice requires that it should immediately issue; as it manifestly does where the law, operating upon the contract when first made, held out to the creditor the promise of immediate execution after judgment.

The holding of *Townsend* (in 1821), that the act of the legislature violated article 1, section 17 of the Tennessee Constitution, is irreconcilable with the Court’s decision in *Scott* (in 1920) that the provision applied only the judiciary and does not apply to the legislative branch of

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76 See Harrison, Pepper & Co. v. Willis, 54 Tenn. 35, 46 (1871) (“Original process must issue without price, except what the law fixes, and without denial, though the defendant be a favorite of the King who interferes in his behalf, and must be proceeded on by judges, after suit instituted upon it, without delay, either of themselves or by order of the King, or as we say, *act of the Legislature.*”)(emphasis added). See also Fisher’s Negroes v. Dabbs, 14 Tenn. (6 Yer.); Townsend v. Townsend, 7 Tenn. (1 Peck) 1, (1821).
77 *Townsend v. Townsend*, 7 Tenn. 1, 14 (1821) (emphasis added).
78 *Id.* at 2
79 *Id.* at 15. (emphasis added).
the government. This discrepancy is all the more notable because the Townsend case is not mentioned once in the Scott case. Instead, the Scott decision refers to cases that do not actually support the assertion that article 1, section 17 applies only to the judiciary. Bledsoe v. Wright, on which the Scott Court relies, simply holds that a particular statute does not violate article 1, section 17. The other authority offered in support of this “judiciary-only” construction is similarly defective:

In Pawley v. McGimpsey, 15 Tenn. (7 Yer.) 502, 504-05 (1835), the court invalidated a local court rule requiring that motions for a new trial be filed no later than the Saturday following the trial. In Dodd v. Weaver, 34 Tenn. (2 Sneed) 669, 672-73 (1855), the court recognized the right to appeal from a county court’s decision in an election contest case either through a common-law writ of certiorari or a general statute authorizing appeals from county court decisions.

The inconsistent judicial interpretation of article 1, section 17 has not gone unnoticed by Tennessee jurists. In a concurring opinion in the 1960 Tennessee Supreme Court case of Catlett v. State, Justice Sweptson called attention to the confusion created by Scott:

If that opinion means that that part of said provision is a restriction on the legislature also, then I agree with the majority opinion that [the statute at issue] violates same; otherwise, if it applies only to the judiciary, it would not be a warrant for holding the Act unconstitutional.

Justice Swepston’s concurring opinion emphasizes the determinative significance of constructing the open courts provision as a check on the legislature, as well as the unfortunate

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80 See supra note 50.
81 Id.
82 223 S.W. 844, 852 (Tenn. 1920).
83 61 Tenn. 471, 472 (1873) (“It is not the action of the Court, but that of the party complaining, that is limited to twelve months. The party having done all required of him, delays and continuances by Courts, their incompetency, as in this case, or their failure to meet, can not divest him of the right invested by his application, showing good cause.”). Thus the Court exercised judicial review, albeit finding in favor of the challenged law.
84 See supra, note 51, at note 492.
state of confusion in Tennessee’s jurisprudence in failing to construe this provision with uniformity or regularity. This ambiguity has resulted in a chilling effect: “[n]either the bench nor the bar has been eager to fashion constitutional arguments or decisions based on provisions that the court itself finds difficult to construe or to apply.” Any successful legal challenge to Tennessee Code Annotated § 29-39-102 couched in terms of open access to courts would necessarily have to engage this ambiguity, and to seek resolution in favor of the court’s earlier decisions construing the provision as applying to the legislature in addition to the judiciary. If Tennessee courts find such reasoning persuasive, the result could potentially invalidate the statutory damages cap as an impermissible restriction of the open access to courts and of the “remedy by due course of law.” This reasoning has been persuasive in a number of jurisdictions, most notably in Florida, where a similar argument defeated a $450,000 cap on noneconomic damages. There the court reasoned:

Access to courts is granted for the purpose of redressing injuries. A plaintiff who receives a jury verdict for, e.g., $1,000,000, has not received a constitutional redress of injuries if the legislature statutorily, and arbitrarily, caps the recovery at $450,000. Nor, we add, because the jury verdict is being arbitrarily capped, is the plaintiff receiving the constitutional benefit of a jury trial as we have heretofore understood that right.

The Supreme Court of Florida notably viewed the statutory cap as violating both the right of access to courts for redress of injuries and the right of trial by jury. Because a statutory cap curtails the available remedy in all cases, it necessarily implicates both provisions, which both

86 See supra, note 41, at 415.
87 See supra, note 46.
88 See supra, note 38, at 1088-1089.
89 Id.
integrate substantive rights with procedural mechanisms for protecting those rights.\textsuperscript{90} A crucial factor in the Court’s holding was the legislature’s failure to provide “a reasonable alternative remedy or commensurate benefit” or to make a “legislative showing of overpowering public necessity for the abolishment of the right and no alternative method of meeting such public necessity.”\textsuperscript{91} While it is certainly true that other courts in different states have held that noneconomic damage caps do not violate similar constitutional provisions guaranteeing a remedy by due course of law, these courts have tended to find that the legislature did make a showing of public necessity, (usually in the context of fighting rising malpractice insurance premiums)\textsuperscript{92} or that the plaintiffs had failed to argue that the damage cap was unreasonable or inadequate.\textsuperscript{93} Tennessee’s cap on noneconomic damages does not provide an adequate or reasonable alternative remedy, because, as noted above, the cap amount does not adjust for inflation, and even the maximum recovery of $1 million could amount to as little as $29 per day.\textsuperscript{94} Of course, the purchasing power of that $29, adjusted for future inflation, will likely be much less than it is today.\textsuperscript{95} Further, the argument that victims of negligence must be prevented from recovering money damages above the statutory cap in the name of an “overpowering public

\textsuperscript{90} See supra, note 41, at 405 (“Tenn. Const. art. I, S 17 actually embodies five discrete rights. The “open courts” clause guarantees that “all courts shall be open.” The “right to remedy” clause states that all persons “shall have remedy by due course of law” for injuries to their lands, goods, person, or reputation. In addition, Tenn. Const. art. I, S 17 guarantees that right and justice will be administered without sale, that right and justice will be administered without denial, and that right and justice will be administered without delay.”)

\textsuperscript{91} See supra, note 38.

\textsuperscript{92} University of Miami v. Echarte, 618 So.2d 189, 196 (Fla. 1993).

\textsuperscript{93} State By and Through Colorado State Claims Bd. of Div. of Risk Management v. DeFoor, 824 P.2d 783, 791 (Colo. 1992) (“Claimants do not contend that the General Assembly has eliminated a right to an adequate remedy that existed at common law, nor do they now dispute their ability to file suit against the State”).

\textsuperscript{94} See supra, note 29.

\textsuperscript{95} See supra, note 6 (California’s 1975 cap of $250,000 is equivalent to $58,000 in 2014).
necessity” in creating jobs or providing economic certainty to businesses has yet to be made in earnest, even by proponents of the cap enacted in Tennessee.96

The ultimate resolution of the question of whether damage caps are justified on the grounds of necessity implicates certain policy judgments, beyond the more judicial interpretative exercise of construing article 1, section 17 to prohibit such a cap. These policy questions are addressed in the following section.

III. Judicial Triage: The Fundamental Unfairness of Damage Caps

The constitutional arguments advanced above pertain to the procedural safeguards and substantive rights guaranteed by Tennessee’s Constitution. This section considers non-economic damage caps in a different context, and poses the question: can caps ever be instituted fairly? For purposes of answering this question, constitutional provisions may be of assistance, but they are not dispositive. Put another way, even assuming that a legislature may enact a cap on damages without running afoul of the right to a trial by jury; or the right to a remedy by due course of law; or the doctrine of separation of powers; or the equal protection of the laws; might there still be a fatal defect in such a cap that would militate against imposing it?97 The answer suggested here is that “judicial triage,” whereby a judge must choose, more or less at whim, how to allocate damages among injured victims, is an inevitable result of damage caps where multiple

96 See supra, note 34, and accompanying text. (“How many jobs? Nobody can say. There’s no crystal ball for that.”96).
97 This sort of inquiry is akin to the analysis often employed in cases invoking the doctrine of substantive due process. See BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) (holding that excessive damage awards violate substantive due process, but that no bright-line ceiling could be placed on punitive damages). See also Fein v. Permanente Medical Group, 474 U.S. 892 (1985) (White, J. dissenting)(“Whether due process requires a legislatively enacted compensation scheme to be a quid pro quo for the common-law or state-law remedy it replaces, and if so, how adequate it must be, thus appears to be an issue unresolved by this Court.”). While a substantive due process challenge to damage caps is certainly plausible, such a legal argument is not contemplated by this section.
successful plaintiffs claim injuries related to the same accident.\textsuperscript{98} The term, as employed throughout this section, is taken from a judgment written by Judge Peter D. Lichtman, in which Judge Lichtman explained how he was forced to carry out the truly impossible work of fairly dividing settlement money to victims of the 2008 Chatsworth train collision in the Chatsworth district of Los Angeles California.\textsuperscript{99} The amount of money available to victims of the crash had been capped by law at $200,000,000, and, based on the record and evidence in the case, Judge Lichtman determined this amount to be inadequate by, at the very least, $64,000,000.\textsuperscript{100} To understand why it was simply not possible to compensate each victim fairly under the cap, and why the exercise of “allocating interpled funds” necessarily collapsed into an arbitrary exercise of “judicial triage,” some further explanation of the facts of the train collision and the legal landscape is required.

A. The Chatsworth Train Collision

On September 12, 2008, a commuter train collided with a Union Pacific freight train, causing twenty-four passenger deaths and various severe, long-term injuries.\textsuperscript{101} The Union Pacific freight train weighed four times that of the passenger train, such that:

[T]he sheer weight of the freight train crushed the lighter and more flexible passenger train. The fate of every passenger riding on Metrolink

\textsuperscript{98} See Chatsworth Metrolink Collision Cases, Final Judgment Re: Allocation of Interpled Funds No. PC043703, p. 24, Cal. Super. Ct. (2011) (available online at \url{http://ww2.lasuperiorcourt.org/hp/dbf4wnmpnfvzelnieu4hw45/1461782185.pdf} (“Triage is a medical term and not a legal doctrine. The origin is French and means to sort or select. In today's parlance it means to ration medical care when resources are limited.”). Here the term “accident” is used interchangeably with “act” or “occurrence”.


\textsuperscript{100} See supra, note 98, at 24.

\textsuperscript{101} See supra, note 98, at 2.
that day, be it death, serious injury or the ability to walk away, hinged on a passenger's choice of seat and that seat's direction of travel.102

The two trains collided with each other while each was traveling at roughly 40 miles per hour.103 As Judge Lichtman recounted the collision:

The force of the impact due to the weight differential and speed caused the Metrolink locomotive to telescope into the passenger compartment of the first car thereby killing all passengers seated in approximately the first 3/4 rows of both the upper and lower levels. All three locomotives, the leading Metrolink passenger car and seven freight cars, were derailed and both lead locomotives and the passenger car fell over. All but two of the deaths occurred in the first passenger car.104

A brief catalogue of the horrific injuries sustained by the surviving passengers of the collision will clarify the extent of the devastation wrought in the crash. These injuries were not simply physical in nature; Post Traumatic Stress Disorder (PTSD), for example, “still remains the single greatest harm to each surviving passenger and their families” to this day.105 This is not to suggest that the physical injuries sustained were anything other than severe. The Court singled out those passengers seated at tables for the particularly grievous injuries they sustained:

[Their] experience was like being on the receiving end of a blunt edged guillotine. The impact would force a passenger's body to fold over the edge of the table with the edge being driven deep within the abdominal cavity. The result of which was to have every internal organ crushed, lacerated, or severed.106

Those passengers seated in benches fared little better:

All of the bench passengers were launched head/face first into a bulkhead. The effect was to remove the skin from one's scalp and inflict gruesome injuries to the face and eyes. Eyes and eye sockets were damaged and

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102 Id. at 5.
103 Id. at 6.
104 Id.
105 Id.
106 Id. at 14.
scalp wounds were commonplace. Many passengers described holding the skin of their face in place while waiting to be triaged.\textsuperscript{107}

While the Court found these injuries exceptionally gruesome, the full range of injuries was overwhelming:

In this collision, the passengers were catapulted into seats, bulkheads, dividing walls, as well as other passengers at over 40 miles per hour. The bones in the body were crushed and compressed to the point of fragmentation. Many of the victims testified to helplessly watching their bodies fly through the air knowing that they were going to hit either someone or something.\textsuperscript{108}

As already mentioned above, lingering psychological trauma affected each passenger “with complete uniformity.”\textsuperscript{109} These psychological\textsuperscript{110} injuries were, in the words of the Court, “tragic.”\textsuperscript{111} The Court set forth the mental devastation of the survivors, as well as the deterioration of the most important relationships in the lives of the survivors, in vivid detail:

Each passenger now walks around with an aura or shroud of anxiety, frustration, fear, hyper vigilance, isolation and hyper agitation. The spouse or domestic partner who was riding the train is simply non-communicative, seeks isolation and has a complete lack of patience for everyone, but especially for the non-riding spouse or domestic partner and co-workers. There exists an overwhelming feeling of anger and bitterness that this has happened to them.\textsuperscript{112}

The collapse of spousal relationships has not spared the children of survivors:

Children of these passengers have noticed the difference perhaps in a more stark fashion. Either dad or mom is just different. The "go to" person can

\textsuperscript{107} Id.
\textsuperscript{108} Id. at 12.
\textsuperscript{109} Id. at 19.
\textsuperscript{110} While some measure of psychological injury can be made in purely economic terms, the kinds of injuries set forth here would typically be classified as “noneconomic damages” for the “mental anguish” and “pain and suffering” imposed upon the victim. See Andrew J. McLurg, \textit{It’s a Wonderful Life: The Case for Hedonic Damages in Wrongful Death Cases}, NOTRE DAME LAW REVIEW, 66 Notre Dame L. Rev. 57 (1990). Thus these injuries would fall under the cap imposed by laws such as Tennessee Code Annotated § 29-39-102.
\textsuperscript{111} See supra, note 98, at 19.
\textsuperscript{112} Id. at 20.
either not be found and if found, they are not to be disturbed. The sheer weight of seeking advice puts too much of an emotional stressor on the victim. Mom or dad is a hollowed out individual. Essentially, the children are now missing a parent.\textsuperscript{113}

The pervasiveness of PTSD among the survivors complicated the Court’s task of allocating scarce settlement funds immensely. Since every survivor suffered acute mental injuries, the Court struggled to find a valid way to discriminate among these injuries. The Court, emphasizing the futility and arbitrariness of its task, offered this analogy:

\begin{quote}
Any attempt to assess this disorder is like turning over a carton of eggs and letting them fall on the floor. Trying to determine which egg is cracked more is futile. It is impossible to quantify. Yet the disorder does exist with each survivor and is quite pervasive. The challenge to this Court is how to assess the weight it is to be given when juxtaposed with the future medical challenges that many of the passengers face along with the monetary cap that this Court has to work within.\textsuperscript{114}
\end{quote}

To understand how the Court came to face this challenge, and how the Court ultimately reached its results, a brief review of the relevant law and procedural posture of the case is necessary.

**B. Applying an Arbitrary Law**

In 1997, Amtrack successfully lobbied for congressional limitations on its liability in connection with its business operation.\textsuperscript{115} While Amtrack had asked Congress to cap its liability

\textsuperscript{113} \textit{Id.}

\textsuperscript{114} \textit{Id.} at 22. The Court included the testimony of a UCLA psychologist specializing in PTSD in the opinion, in which the expert stated: 'This tragic accident had an enormous impact on survivor perceptions. Visually, survivors could see death around them, and they were very much aware of their precarious physical state. Their auditory senses were overwhelmed by the initial crash noise, and then thereafter, the sounds of pain and dying, and the frantic calls for help. The fire and smoke was obvious; the diesel smell too. These sensations, and the resultant cues are notorious for eliciting flashbacks in PTSD.”  \textit{Id.} at 21.

\textsuperscript{115} S. REP. NO. 105-085 (1997) (“Amtrak has testified four times before the Senate Commerce Committee during the 104th and 105th Congress to report on its plans to improve its financial performance and achieve long-term viability. Amtrak's testimony has consistently

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at $250,000,000.\textsuperscript{116} “to achieve operating self-sufficiency,” the ironically styled “Amtrack Reform and Accountability Act of 1997” ultimately capped liability at $200,000,000, or $50,000,000 less than Amtrack itself had requested.\textsuperscript{117} The language of the law that would ultimately come to govern the Chatsworth collision case reads simply:

The aggregate allowable awards to all rail passengers, against all defendants, for all claims, including claims for punitive damages, arising from a single accident or incident, shall not exceed $200,000,000.\textsuperscript{118}

In the Chatsworth collision case, the defendants, Metrolink and Connex, did not contest their liability; rather, they simply paid the maximum allowable $200,000,000 into a special fund.\textsuperscript{119} Once the defendants had made this payment, the federal judge presiding over the case dismissed the defendants from the case altogether on January 3, 2011, and “precluded the prosecution of any further action against the originally named defendants in both the State and Federal actions.”\textsuperscript{120} All that remained for the justice system to do at that point was to dispense the settlement funds:

On January 20, 2011 in the Los Angeles Superior Court, Judge Highberger ordered the cases transferred to the Honorable Peter D. Lichtman, Judge presiding for all purposes. Judge Lichtman was given full authority to allocate the interpled funds among the claimants and to adjudicate all equitable issues to final judgment. Three weeks later in the United States

discussed the need for statutorily imposed liability limits in order for Amtrak to achieve operating self-sufficiency. S. 738 would permit Amtrak to enter into `contracts' with its passengers through ticket purchases to limit claims related to rail passenger transportation to no less than the limits established by the Committee-passed product liability reform legislation (i.e., punitive damages, where permitted, equal to 2 times compensatory damages or $250,000 whichever is greater).”.

\textsuperscript{116} Id.
\textsuperscript{118} Id.
\textsuperscript{120} See supra, note 98, at 2.
District Court, Judge Wu entered final judgment in the Interpleader Action on February 10, 2011, declaring that "[t]he allocation of the interpleader fund as to each claimant is transferred to and assumed by the Superior Court of the State of California for the County of Los Angeles."\(^{121}\)

Thus to Judge Lichtman fell the difficult, if not impossible, task of fairly dividing the settlement funds among the survivors of the Chatsworth crash; of sifting through broken eggshells to determine which was more cracked than the other. In attempting to approach this task methodically, the Court used “three different protocols” to allocate the funds among all the claimants.\(^{122}\) The first step was to ask the plaintiffs’ attorneys what amount each attorney was seeking on behalf of his or her client.\(^{123}\) The Court was aware from the outset that this first-protocol number would likely exceed the monetary limit, “nonetheless, the information was essential in attempting to establish the overall value of the collision itself.”\(^{124}\) The amounts requested by the attorneys for the survivors of the crash totaled between $320,000,000 and $350,000,000, or nearly double the cap limit.\(^{125}\) The second protocol was to issue “tentative awards” to each plaintiff:

> Each plaintiff would not know the tentative award, but the amount would be used by the Court to establish a record of whether the Court’s award matched the request by counsel as well as being consistent with the damages presented.\(^{126}\)

The totality of “tentative awards” made by the Court exceeded the cap by $64,000,000.\(^{127}\)

The amount of the tentative (i.e., reduced) awards was, as one commentator has observed, “less what the families had asked for. Less than what the facts established. More than what Congress

\(^{121}\) Id. at 3.
\(^{122}\) Id. at 23.
\(^{123}\) Id.
\(^{124}\) Id.
\(^{125}\) Id. Most attorneys provided ranges of damages.
\(^{126}\) Id.
\(^{127}\) Id.
would allow.” Nonetheless, the Court had to allocate the funds while not exceeding the cap limit. The “third protocol” the Court used involved difficult, and ultimately arbitrary decisions about where the money would go:

This final stage boiled down to judicial triage. Triage is a medical term and not a legal doctrine. The origin is French and means to sort or select. In today's parlance it means to ration medical care when resources are limited. This Court was forced to do precisely what the first responders did on the day of the accident. It had to categorize the injuries and victims and make the awards on the basis of what the future would hold for many of the families and victims.\textsuperscript{129}

Explaining to the victims and family members of those who died in the crash the enormous constraints placed upon the Court, Judge Lichtman provided the following scenario:

At each of the hearings, the Court explained to the victims what the judicial triage aspect would encompass. The example provided would be to imagine the two of us returning to the scene of the accident and you were handed a bag containing only 10 bandages. You were then instructed to care for the victims as you saw fit and use your discretion as to which victim you thought should receive a bandage. You then returned to the Court and asked for more bandages and were told there were none to give. You were then instructed to cut the bandages in halves, quarters, eights, or even sixteenths, but that \textit{under no circumstances would you receive more bandages.}\textsuperscript{130}

Recognizing the fundamental unfairness involved in this methodology, but recognizing, too, that the Court was powerless\textsuperscript{131} to do anything else, the Court offered this observation:

[\textit{I}]\textnormal{m}possible decisions had to be made. What was given to one victim had to be taken from another. Essentially a Sophie's Choice had to be made on a daily basis. One Sophie's Choice is enough for a lifetime, but over 120 of them defies description. This Court is no stranger to difficult cases or

\begin{flushleft}
\textsuperscript{129} \textit{See supra}, note 98, at 24-25.
\textsuperscript{130} \textit{Id.} at 25. (emphasis added).
\textsuperscript{131} \textit{Id.} “[T]he fact remains that this Court must follow the law and in light of the federal court interpleader action and the orders issued therein, there was no discretion to do otherwise.”
\end{flushleft}
difficult decisions but that does not make the situation any less challenging.\textsuperscript{132}

In a footnote, the Court clarified that the phrase “Sophie’s Choice” was “[u]sed as an idiom in this context to mean a tragic choice between two unbearable options.”\textsuperscript{133} However, it is worth exploring the origin of that particular idiom. “Sophie’s Choice” is the title of William Styron’s acclaimed 1979 novel, in which the main character, Sophie, is sent with her two children to the Auschwitz concentration camp.\textsuperscript{134} Upon entering the camp, Sophie encounters a Nazi soldier, who tells her: “You may keep one of your children. The other one will have to go. Which one will you keep?”\textsuperscript{135} With this allusion, the Court went on to make the required allocations, setting forth alphabetically the list of names and the corresponding recoveries.\textsuperscript{136}

\textbf{C. No Allocation Within an Allocation.}

An important detail concerning the method of allocating the settlement funds to victims of the Chatsworth crash bears mentioning for its significance to the Tennessee damages cap.\textsuperscript{137} When attempting to determine the proper (discounted) amount to give each victim of the crash, the Court simply could not address the problem of claims related to each passenger, such as claims of spouses or children.\textsuperscript{138} As the Court said:

As to those first car passengers that survived, this Court was left with the dilemma of simply trying to find the money necessary to care for future medical necessities. This means that awards for PTSD in many cases simply did not exist. Loss of consortium awards, while valid and real, had to be lumped in with the award to the passenger/spouse. In that regard,

\footnotesize{
\begin{itemize}
  \item \textsuperscript{132} \textit{Id.}
  \item \textsuperscript{133} \textit{Id.} at n. 5.
  \item \textsuperscript{134} Stephanie Beranek, \textit{William Styron: Sophie’s Choice}, L.\textsc{s}i.O\textsc{rg} (L\textsc{o}ndon School of J\textsc{ournalism}), \url{http://www.lsj.org/web/literature/styron.php} (last visited March 4, 2014).
  \item \textsuperscript{135} \textit{Id.}
  \item \textsuperscript{136} \textit{See supra}, note 98, at 30-32.
  \item \textsuperscript{137} \textit{See supra}, note 39, and accompanying text.
  \item \textsuperscript{138} \textit{Id.} at 25.
\end{itemize}
}
this Court specifically mentioned at each and every hearing that there would be no separate allocation for loss of consortium. In other words, there would not be an allocation within an allocation. This would be left up to the plaintiffs themselves and their counsel of record to determine how the monies would be divided. Since there was a shortage of funds to begin with, this Court felt it appropriate for the family to make that decision on their own. To do otherwise would create the appearance, if not a reality, of the spouses competing for the limited funds.\footnote{Id.}

Read closely, this passage is a particularly stark admission of palpable injustice. The Court openly acknowledged that valid claims for loss of consortium existed, but that, because of a “shortage of funds to begin with,” these claims could be compensated, if at all, only by reducing the award given to the survivors of the crash so as to compensate spouses and children with derivative claims. The Court refused to make this reduction, declaring “there would not be an allocation within an allocation,” all the while recognizing that in “reality,” there would be such a double allocation\footnote{This sort of “claim within a claim,” is endemic to damage caps, and has formed the basis for successful challenges to caps in some states on the basis of equal protection. \textit{See} Ferdon ex rel. Petrucelli v. Wisconsin Patients Compensation Fund, 701 N.W.2d 440 (Wis. 2005) (“Because the total noneconomic damages recoverable for bodily injury or death may not exceed the $350,000 limit for each occurrence . . . An injured patient who is single may recover the entire $350,000, while a married injured patient shares the cap with his or her spouse; a non-married injured patient with children shares the $350,000 with the children; a married injured patient with children shares the cap with the spouse and children”) (emphasis added).} (or, to use the Court’s analogy, a splitting of bandages), but that, standing on appearances, the Court would not be the one to make it. The task of making allocations for the survivors’ noneconomic damages, as well as the derivative noneconomic damage claims of spouses and children of survivors, in other words, was “transferred” to the families in much the same way that the task of making all other allocations had been transferred from the District Court to Judge Lichtman in the Superior Court.\footnote{\textit{See supra}, note 121 and accompanying text.} Appearances aside, in both scenarios, the substantive unfairness involved in making these allocations—in taking from one to give to the other—could not be remedied merely by tapping the right person to do the job.
D. Ethics and Policy after Chatsworth.

The Chatsworth case has been worth exploring in detail because it offers a point of view rarely considered in larger cultural and political debates about “tort reform” and caps on liability: the perspective of a judge, trying in earnest to apply the law fairly, yet fully aware that the law is unfair. These debates, as has been mentioned above, have been contextualized in terms of addressing a malpractice insurance crisis (California), helping a struggling business (Amtrack), or stimulating economic growth (Tennessee). The rationale for enacting damage caps in each case may change, but the impossibility of fairly dividing inadequate damage awards among deserving victims of negligence remains the same. The ultimate consequence of these caps, irrespective of whether they achieve the legislative purpose of the day, is to supplant judicial judgment with judicial triage. If nothing else, the Chatsworth case and Judge Lichtman’s judgment illuminate the kinds of policy choices involved in so-called “liability reform:” which is to say a choice to “heavily favo[r] corporate interests and heavily burde[n] the innocent victims of negligent conduct.”

The essential premise of this section has been to suggest that, whatever the rationale, the mechanism of capping damages in the legislature leads inevitably to substantively unfair, decision-making; to judicial triage and “Sophie’s Choices.” Implied throughout this argument is the related premise that, for the very fact of being so palpably unfair, damage caps are a poor policy mechanism to achieve any legislative goal. It is here acknowledged, however, that some advocates of damage caps may wish to challenge that premise, and to argue that, even though caps are fundamentally unfair, they are necessary in today’s economic climate to accomplish certain objectives. If this is where the conversation moves, that will at least be a victory for

142 See supra, note 128.
intellectual honesty.

Yet, even then, legislative caps remain a poor tool for reasons less ethical and more practical. An important recent study suggests that the efficacy of noneconomic damage caps in reducing liability may be limited by an underappreciated “crossover effect.”\textsuperscript{143} This study posits that plaintiffs and juries often award higher, unbounded economic damage awards and relatively smaller noneconomic damage awards, which are capped.\textsuperscript{144} An example of this crossover effect is a recent $70.9 million verdict in California for medical negligence.\textsuperscript{145} The most salient aspect of this award is that jury awarded only $500,000 in noneconomic damages; the remaining $70.4 million was awarded as purely economic damages, which are not capped.\textsuperscript{146} While it is certainly true that caps can be effective at reducing the size of a plaintiff’s damages award,\textsuperscript{147} this crossover effect and its ripple effects throughout the justice system have not been thoroughly appreciated by both proponents and opponents of damage caps.

One important “ripple effect” of damage caps and the resulting restyling of cases by plaintiffs in terms of economic damages rather than noneconomic damages is that certain valid claims will not be litigated at all where those claims involve relatively small economic damages, as the following illustration explains:

Imagine, for example, two potential malpractice clients approaching a plaintiffs’ attorney who handles such cases on a contingency basis. One client is a young lawyer disabled by medical malpractice who has the potential for large foregone future earnings. The other is a housewife who

\textsuperscript{144} \textit{Id.} at 391.
\textsuperscript{146} \textit{Id.}
\textsuperscript{147} \textit{Id.} at 419.
suffered horribly as a result of malpractice, but has no lost market earnings. In the non-cap state, both cases are brought and the jury on average gives high judgments, but relatively high noneconomic loss to both and economic loss only to the lawyer . . . Now imagine the same scenario in a cap state. One possibility is that the plaintiffs’ attorney takes the housewife’s case and attempts, through the crossover mechanisms discussed above, to transform noneconomic damages into economic damages—for example, by retaining an expert to testify as to the market value of the services that she provides. What happens, however, if the attorney decides not to take the housewife’s case because of the difficulty of classifying her losses as economic?\textsuperscript{148}

The answer to this question is that the attorney’s not taking the housewife’s case means her valid noneconomic damage claim is not awarded, and this set of affairs is a victory for the ultimate objective of “tort reform,” which is to reduce liability, albeit by effectively “pricing out” certain classes of plaintiffs whose hard economic damages are relatively small. It is worth pointing out that the entire rationale of noneconomic damage awards in the first place is that awarding damages only on the basis of economic loss results in an obvious unfairness.\textsuperscript{149} Under a pure “pecuniary loss” test for calculating the value of a lost life, children often have a negative net worth.\textsuperscript{150} The elderly and poorer minority groups, too, tend to have much smaller claims for pecuniary loss.\textsuperscript{151} One potential response in curing this unfairness could be simply to cap all damages, without distinction between noneconomic and economic damages. This sort of approach would have the effect of at least seeming to treat every potential plaintiff equally.

\textsuperscript{148} Id. at 489.
\textsuperscript{149} See supra, note 110, at 60.
\textsuperscript{150} Id. (“Since child-raising costs usually far outdistance pecuniary benefits bestowed by a child, the result is that children usually have a negative net worth”).
\textsuperscript{151} See supra, note 143, at 490. (“[Noneconomic damage caps] affect certain disadvantaged groups, including minorities, women, and the young, who are more likely to have lower economic”).
However, such a total damages cap leads even more surely to substantive unfairness to everyone, as the Chatsworth case illustrates.\textsuperscript{152}

\textbf{CONCLUSION}

The recent imposition of a cap on noneconomic damages in Tennessee will inevitably work a fundamental injustice upon deserving plaintiffs. This injustice can take many possible forms: the injured plaintiff who cannot secure access to the justice system because her claim simply lacks hard economic damages; the married plaintiff who ultimately recovers less than a similarly situated single plaintiff because his wife’s claim is combined with his under the cap; all plaintiffs whom a jury awards damages in excess of the cap, and who see their awards reduced automatically by the legislature; each of these, to name only a few, suffers an unfairness under this law.\textsuperscript{153} The constitutional defects in this law, as argued above, are substantial: the fundamental right to a trial by jury cannot be abrogated by the legislature, nor can the legislature curtail the right to a remedy in an open court by declaring, from the outset of litigation, what the maximum recovery will be.\textsuperscript{154} These arguments have carried the day in nearby states such as Georgia, Missouri, and Florida. Yet, regardless of the constitutional defects in the law, caps on noneconomic damages are ultimately misguided as an effective policy tool: by constraining the decision-making of judges and jurors, they introduce an element of arbitrariness into the justice

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\textsuperscript{152} The cap at issue in the Chatsworth collision case was a cap on all damages, without distinction for economic and noneconomic loss.
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\textsuperscript{153} The effect of damage caps on settlement awards is yet another example of a “ripple effect;” settlements tend to be lower when negotiations occur in the context of a cap. See Linda Babcock & Greg Pogarsky, \textit{Damage Caps and Settlement: A Behavioral Approach}, 28 J. LEGAL STUD. 341 (1999).
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\textsuperscript{154} This argument pertains to damage caps in the case of private defendants, which is the nature of the cap imposed by Tennessee Code Annotated § 29-39-102; the constitutional authority of the legislature to impose damage caps in cases against the State of Tennessee is not contemplated by this note. Further, this note has not explored the compelling arguments that Tennessee Code Annotated § 29-39-102 violates the equal protection of the laws and the doctrine of separation of powers.
\end{flushleft}
system that undermines the basic foundations of fairness and a meaningful day in court. The ultimate aim of providing certainty to businesses is hardly controversial; yet other, less devastating methods of accomplishing this goal must surely be feasible. The first duty of society is not to protect the interests of the few at the expense of the many. Rather, as Alexander Hamilton supposedly said, “the first duty of society is justice.” This phrase is prominently etched into stone on the Justice A.A. Birch Building in downtown Nashville.\textsuperscript{155} It is the hope of this note that the idea of justice as a primary social obligation amounts to more than mere shibboleth, and instead remains a vital principle today.