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Judicial Activism - The Wisconsin Supreme Court 2005
Supreme Court Overturns Medical Malpractice Caps:
Redefines Punitive Damages Standard and Expands Risk Contribution Theory

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Supreme Court Overturns Medical Malpractice Awards in Noneconomic Damages

The [Wisconsin Supreme Court on Thursday, July 14, held \(4-3\)](#) that the statutory limitation for an award of noneconomic damages in malpractice cases is unconstitutional, violating the equal protection clause of the Wisconsin Constitution. The Majority reiterates the theory of “judicial deference to the legislature and the presumption of constitutionality of statutes,” but states that a statute will be held unconstitutional if the statute is shown to be “patently arbitrary” with “no rational relationship to a legitimate government interest.” (*Ferdon v. Wisconsin Patients Compensation Fund*, 2005 WI 125, July 14, 2005)

“Noneconomic damages” include pain and suffering, mental distress and loss of enjoyment of normal activity. The caps in question apply only to these damages and no limit is placed on “compensatory damages” such as medical and other care-related expenses and lost wages.

The Majority relies upon the rational basis “with teeth” test to arrive at its conclusion that the cap on noneconomic damages is arbitrary; creates an undue hardship on a small unfortunate group of plaintiffs; and, is not rationally related to the legislative objectives of lowering medical malpractice premiums and controlling health care costs. On the last point, the Court cites certain portions of various studies (some state, some national, some old, some new) to support its conclusion that there was no rational basis (“with teeth”) to support the adoption of statutory caps.

The Majority does point out that statutory limitations are not per se unconstitutional and noted that the Court recently ([July 2004](#)) upheld the cap on noneconomic damages for wrongful death medical malpractice actions. In his concurring opinion, Justice Crooks “emphasizes” that statutory caps in medical malpractice cases can be constitutional.

The Majority also does not address other constitutional issues raised by the petitioner since it reached its decision on equal protection grounds. Justice Crooks, however, joined by Justice Butler, states rather clearly that an unreasonably low cap (presumably including one at \$350,000) can also violate the constitutional right to a trial by jury and legal remedies for wrongs inflicted.

Justice Prosser (joined by Justices Wilcox and Roggensack) and Justice Roggensack (joined by Justices Wilcox and Prosser) wrote strong dissents challenging the Majority’s conclusion that the legislatively adopted cap is not rationally related to the Legislature’s objective.



Both Justices challenge the selective use of studies, many outside of Wisconsin, and selected portions of those studies and the conduct of a “mini trial” to justify its conclusions under the rational basis theory. Justice Prosser also states that “This court is not meant to function as a ‘super legislature,’ constantly second-guessing the policy choices made by the legislature and governor.” Prosser points out the deliberative nature of the legislative process; the input that may be provided from parties on both or all sides of an issue; and, the voters remedy to retire those who supported laws that the voters disfavor.

Supreme Court Decision in Lead Paint Case

The [Wisconsin Supreme Court held](#) that Article I, Section 9 of the Wisconsin Constitution does not insulate wrongdoers from liability simply because recovery has been obtained from an altogether different wrongdoer for an altogether different wrong. The Court, most significantly, concluded that the lead paint claims at issue warrant extension of the “risk contribution” theory. (*Thomas v. Mallett*, 2005 WI 129, July 15, 2005)

Justice Butler wrote, "...we again conclude 'that as between the plaintiff, who probably is not at fault, and the defendants, who may have provided the product which caused the injury, the interest of justice and fundamental fairness demand that the latter should bear the cost of injury.'"

The manufacturers are in a better position to absorb the cost of the injury, said Butler. “They can insure themselves against liability, absorb the damage award, or pass the cost along to the consuming public as a cost of doing business.” The Court concluded that it is better to have the manufacturers or consumer share in the cost of the injury rather than place the burden on the innocent plaintiff.

In his dissent, Justice Wilcox said the end result of the majority decision was "manufacturers can be held liable for a product they may or may not have produced, which may or may not have caused the plaintiff's injuries, based on conduct that may have occurred over 100 years ago when some of the defendants were not even part of the relevant market." He added, "Simply put, the majority opinion amounts to little more than this court dictating social policy to achieve a desired result."

Justice Prosser warned of the potential consequences of the decision. “Wisconsin will be the mecca for lead paint suits. There is no statute of repose on products liability here, and this court has now created a remedy for lead paint poisoning so sweeping and draconian that it will be nearly impossible for paint companies to defend themselves or, frankly, for plaintiffs to lose.”

Supreme Court on Punitive Damages

The Supreme Court on March 18 handed down two opinions relating to Wisconsin law on punitive damages. The Court issued its interpretation of the Wisconsin statute [s. 895.85 (3)] adopted in the 1995 legislative session.

The rulings were in a drunken driving case and the high profile Mitsubishi case. While the Court recognized that the Legislature created a “heightened standard” in its adoption of s. 895.85 (3), it rejected the stricter interpretation of the Appeals Court in the Mitsubishi case; reversed that decision; and, held that the punitive question was appropriate to be presented to the jury.

Despite its recognition of legislative intent to adopt a heightened standard, the majority on the Supreme Court actually used the opportunity to craft a standard, based on the Court’s interpretation, that is weaker than that which existed prior to the Legislature’s action in the ‘95 session. In fact, the punitive damage legislation had the result intended by the Legislature, that is to limit punitive damages to the most egregious cases where punishment (outside of the criminal justice system) and deterrence are appropriate under common law—until the Court issued its opinion in these two cases. Also, in both cases, the Court failed or refused to address the constitutional issue as to the question of whether or not the amount of the award was excessive.

[\(LeRoy M. Strenke v. Levi Hogner and Nau Country Insurance Company & Patricia Wischer, et. al v. Mitsubishi Heavy Industries America, Inc., et.al](#)