TORT REFORM—HOW THE PHRASE "AS HERETOFORE ENJOYED" SUBJECTED WRONGFUL DEATH PLAINTIFFS TO NONECONOMIC DAMAGES CAPS IN MISSOURI, *DODSON V. FERRARA*, 491 S.W.3D 542 (MO. 2016) (EN BANC).

Francisco F. Guzman Andrade[*]

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* J.D., Rutgers Law School, 2018. The Author would like to thank his family and friends for their support throughout law school that made the writing of this Comment possible, and for trying to pretend they were remotely interested in hearing about caps on noneconomic damages awards. Special thanks to the members of the *Rutgers University Law Review*, whose efforts made this piece worthy of publication, and in particular to Jase Brown, for his thoughts and feedback on various drafts. Lastly, thanks for the class of 2018 for being the best damn class to walk the streets and halls of Rutgers-Camden.

I. INTRODUCTION

In *Dodson v. Ferrara*,[1] the Missouri Supreme Court became the latest to weigh in on the constitutionality of a legislatively imposed cap on noneconomic damages awards. The case represented yet another chapter in the ongoing battle between tort reform advocates that allege a need to reel in a tort system spiraling out of control and opponents who claim their fears are unfounded.[2] This time, the cap at issue was part of Missouri Revised Statutes section 538.210,[3] which capped noneconomic damages[4] awards in wrongful death actions arising out of medical malpractice at $350,000.[5] The Missouri Supreme Court upheld the cap, holding that it did not violate the right to jury trial, separation of powers, or equal protection provisions of the Missouri Constitution.[6]

This Comment will provide a brief history and overview of the issues surrounding legislatively imposed caps on damages awards in medical malpractice claims. This Comment will then focus on Missouri and its constitution—specifically the grounds on which legislatively imposed damages caps have been attacked—before finally delving into the *Dodson* court's reasoning and analysis in upholding the noneconomic damages

1. 491 S.W.3d 542 (Mo. 2016) (en banc).

2. *See, e.g.*, DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 159–66 (Vicki Been et al. eds., 4th ed. 2010) (discussing tort reform law and the issues surrounding the arguments posed by advocates and opponents of tort reform in plaintiff remedies). *See generally* Philip Shuchman, *It Isn't That the Tort Lawyers Are So Right, It's Just That the Tort Reformers Are So Wrong*, 49 RUTGERS L. REV. 485 (1997) (highlighting the arguments for and against tort reform and their implications in the tort reform debate).

3. MO. ANN. STAT. § 538.210(1) (West 2008 & Supp. 2013) (amended 2015, 2017) reads in relevant part: "In any action against a health care provider for damages for personal injury or death arising out of the rendering of or the failure to render health care services, no plaintiff shall recover more than three hundred fifty thousand dollars for noneconomic damages irrespective of the number of defendants."

4. Noneconomic damages are defined as "damages arising from nonpecuniary harm including, without limitation, pain, suffering, mental anguish, inconvenience, physical impairment, disfigurement, loss of capacity to enjoy life, and loss of consortium but shall not include punitive damages." *Id.* § 538.205(7).

5. *Id.* § 538.210(1). This statute was amended in 2015, placing a $400,000 cap on personal injury claims arising out of medical malpractice and a $700,000 cap on claims of catastrophic personal injury or death arising out of medical malpractice. It was again amended in 2017, but with no changes made to this subsection. *See id.* § 538.210 (West, Westlaw through 2017 Sess. of the 99th Gen. Assemb.). Because the injury and death of Shannon Dodson occurred before the 2015 amendment, the pre-2015 statute applied to his case and all references are to this statute unless otherwise indicated.

6. *Dodson*, 491 S.W.3d at 550.

caps in medical malpractice wrongful death suits imposed by the Missouri General Assembly through Missouri Revised Statutes section 538.210. Lastly, this Comment will argue that the *Dodson* majority employed valid reasoning in line with a majority of the country to uphold the cap, but in doing so failed to properly consider the practical implications of its decision.

II. STATEMENT OF THE CASE

This case arose out of the death of Shannon Dodson. Ms. Dodson was treated at Mercy Hospital St. Louis, seeking care after experiencing shortness of breath.[7] She complained of chest pains after being diagnosed with bronchitis and underwent an electrocardiogram ("EKG").[8] The EKG suggested there might be some abnormalities and doctors recommended Ms. Dodson undergo a cardiac catheterization for further evaluation.[9]

Dr. Robert Ferrara performed the heart catheterization.[10] During the surgery, Ms. Dodson suffered a dissection of the left main coronary artery causing difficulty in blood flow to the heart.[11] Dr. Ferrara called for assistance, "but no attempt was made to open the artery until approximately 30 minutes after the dissection occurred."[12] After Dr. Ferrara and another doctor were unsuccessful in their attempts to place a stent in the artery, Ms. Dodson was finally transported to surgery "more than 45 minutes after Dr. Ferrara first noticed the dissection."[13] The doctors were unable to restore Ms. Dodson's cardiac function and she was pronounced dead shortly thereafter.[14]

Ms. Dodson's family ("Plaintiffs") brought a wrongful death action against Dr. Ferrara and his employer, Mercy Clinic Heart and Vascular, LLC ("Defendants").[15] Plaintiffs claimed "Dr. Ferrara's negligent care and treatment of Ms. Dodson caused or contributed to cause her death."[16] The case was tried by a jury, who returned a verdict in favor of Plaintiffs on their negligence claims.[17] The jury awarded Plaintiffs $1,831,155 for economic damages and $9,000,000 for noneconomic damages, but the

7. *Id.* at 550–51.
8. *Id.* at 550, 563.
9. *Id.* at 551.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* The suit was brought by Ms. Dodson's spouse and three children. *Id.*
16. *Id.*
17. *Id.*

total award was reduced to $2,181,155 after the trial court granted Defendants' motion to cap the noneconomic damages of a medical malpractice claim at $350,000.[18]

Both parties appealed. Plaintiffs argued that the damages caps were in violation of the separation of powers,[19] right to a jury trial,[20] and equal protection[21] clauses of Missouri's constitution.[22] In response, the Missouri Court of Appeals noted the first two claims were "merely colorable," but that the equal protection claim was a "real and substantial" constitutional attack that raised an issue of first impression, making transfer to the Missouri Supreme Court appropriate. [23] The supreme court agreed it had exclusive jurisdiction over Plaintiffs' constitutional claims.[24]

III. BRIEF OVERVIEW OF LEGISLATIVELY IMPOSED DAMAGES CAPS

Capped—or attempts to cap—jury damages awards are nothing new; they are part of the ongoing tort reform movement that originated in the latter half of the twentieth century.[25] Some have seen the movement as a separation of powers issue, pitting legislatures against increasingly active judiciaries.[26] Others have looked past the branches of government and characterize the tort reform movement as a struggle between frequent defendants—mainly insurance companies—and the personal injury plaintiffs' bar, consumer advocate groups, and labor unions.[27]

18. *Id.*

19. MO. CONST. art. II, § 1.

20. MO. CONST. art. I, § 22(a). Specifically, and important for our discussion, article I, section 22(a) reads: "the right of trial by jury as heretofore enjoyed shall remain inviolate."

21. MO. CONST. art. I, § 2.

22. *Dodson*, 491 S.W.3d at 550.

23. Dodson v. Ferrara, No. ED 100952 and ED 101143, 2015 WL 4456188, at *6–7 (Mo. Ct. App. July 21, 2015). By "merely colorable," the Missouri Court of Appeals meant these issues had already been addressed and disposed of by the Missouri Supreme Court in *Sanders v. Ahmed*, 364 S.W.3d 195 (Mo. 2012) (en banc). *Id.* at *6. See *infra* Section IV.B, for a more detailed discussion of *Sanders*.

24. *Dodson*, 491 S.W.3d at 551 (citing MO. CONST. art. V, § 3).

25. *See* Joseph Sanders & Craig Joyce, *"Off to the Races": The 1980s Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207, 212 n.21 (1990) (explaining how tort reform has been an ongoing process in which legislatures began to become involved beginning in the 1970s).

26. *See, e.g.*, VICTOR E. SCHWARTZ ET AL., WHO SHOULD MAKE AMERICA'S TORT LAW: COURTS OR LEGISLATURES? 3–7 (1997).

27. LAYCOCK, *supra* note 2, at 159.

A. Arguments for and Against Tort Reform

Not surprisingly, advocates of tort reform are largely insurance companies and their lobbyists. They argue that the constant, often meritless claims and gradually increasing size of plaintiff damages awards are devastating the medical insurance industry and, in turn, access to health care by limiting the ability for companies to insure medical practitioners.[28] Opponents of the caps are skeptical of such crises in the insurance industry and argue these assertions by the insurance companies are exaggerated and often the fault of the insurance companies themselves, not plaintiffs seeking redress for medical wrongs.[29]

Both sides frequently use statistics to support their positions, but the reliability of these numbers is questionable at best.[30] Nevertheless, these numbers have shown to be influential both in legislative chambers and courtrooms, with legislatures referencing them in support of legislation

28. Douglas A. Kysar, Thomas O. McGarity & Karen Sokol, *Medical Malpractice Myths and Realities: Why an Insurance Crisis Is Not a Lawsuit Crisis*, 39 LOY. L.A. L. REV. 785, 786–87 (2006).

29. *See, e.g.*, Eliot Martin Blake, Comment, *Rumors of Crisis: Considering the Insurance Crisis and Tort Reform in an Information Vacuum*, 37 EMORY L.J. 401, 408–14 (1988). Indeed, these crises seem to appear periodically. *See* Rachel Zimmerman & Christopher Oster, *Insurers' Price Wars Contributed to Doctors Facing Soaring Costs*, WALL ST. J., June 24, 2002, at A1 (analyzing a new "crisis" in medical malpractice insurance, this time in regard to obstetrics, with insurers withdrawing from the market and doctors refusing to deliver babies, the article highlighting arguments from both sides); Chad Terhune, *Top Republicans Say There's a Medical Malpractice Crisis. Experts Say There Isn't*, WASH. POST (Dec. 30, 2016), https://www.washingtonpost.com/news/to-your-health/wp/2016/12/30/top-republicans-say-theres-a-medical-malpractice-crisis-experts-say-there-isnt/?utm_term=.97482369befa (discussing yet another medical practice crisis as recent as December of 2016). At least one scholar asserts insurance companies are aware of these episodes and their cause. For a more detailed explanation of how these periodic cycles may be the result of insurance companies and their underwriting schemes, see Tom Baker, *Medical Malpractice and the Insurance Underwriting Cycle*, 54 DEPAUL L. REV. 393, 436–37 (2005).

30. Commentators have written about how both sides play with the numbers. *See* LAYCOCK, *supra* note 2, at 160–61. Advocates of tort reform will often use the mean of jury rewards, often influenced by a particularly large outlier award that skews the mean number. *See, e.g.*, W. Kip Viscusi, *The Blockbuster Punitive Damage Awards*, 53 EMORY L.J. 1405, 1426–27 (2004) (discussing outlier verdicts influence by punitive damage awards that can manipulate data when calculating mean award sizes). Opponents prefer to use the median number, which they claim more accurately reflect the actual size of most jury awards. This distinction is important because the difference can be substantial. For a comparison using statistics from the department of justice, see Thomas H. Cohen & Steven K. Smith, *Civil Trial Cases and Verdicts in Large Counties*, *2001*, BUREAU OF JUSTICE STATISTICS, tbl.6 (2004), https://www.bjs.gov/content/pub/pdf/ctcvlc01.pdf. The table provides medians, but not means, however the information and numbers necessary to calculate the means are included.

capping damages awards and courts citing them when evaluating the validity of such caps.[31]

B. State Legislatures Respond to Tort-Reform Arguments

Legislatures across the nation responded to these alleged crises in the insurance field, with forty-nine states enacting some form of tort-reform legislation between 1974–1976.[32] The majority of tort reform legislation appears concerned with alleviating tort defendants at the remedies stage of litigation, as opposed to the liability stage.[33] Some commentators speculate that legislators take this approach because it is easier to implement legislation at the remedy stage than it is to redefine common law liability and things such as duty, negligence, or causation, for example.[34]

Indeed, noneconomic damages[35] are a particularly easy target for tort reform advocates to attack, emphasizing the difficulty in calculating

31. Some courts have used the numbers and other evidence in support of legislatively imposed damages caps and found them too unreliable or unconvincing to uphold them on rational basis grounds when subject to equal protection attack. *See, e.g.*, Ferdon *ex rel.* Petrucelli v. Wis. Patients Comp. Fund, 2005 WI 125, ¶¶ 104–05, 284 Wis. 2d 573, 701 N.W.2d 440, 466–67 (Wis. 2005) (collecting cases and striking down a cap on noneconomic damages in personal injury claims under a rational basis analysis); *cf.* Verba v. Ghaphery, 552 S.E.2d 406, 410–11 (W. Va. 2001) ("[T]he parties as well as *amici* presented copious statistics to this Court to either defend or refute the legislature's findings in support of the medical malpractice cap, [but our] inquiry is whether the legislature reasonably could conceive to be true the facts on which the challenged statute was based."). Interestingly, both cases involved statutes that had been in place for at least ten years, which was an additional factor considered by the court in *Ferdon*, which essentially said that even if an insurance crisis had in fact taken place it did not mean that there is an insurance crisis in perpetuity to necessitate the statute and limit the recovery of plaintiffs. *Ferdon*, 2005 WI 125, ¶¶ 111, 116, 701 N.W.2d at 468.

32. Allen Redlich, *Ending the Never-Ending Medical Malpractice Crisis*, 38 ME. L. REV. 283, 316 (1986).

33. State legislatures have passed several types of statutes in response to the tort reform debate, including those addressing: ad damnum clauses, alternative dispute resolution, limiting or abolishing the collateral source rule, comparative negligence, contingent fees, caps on damages, limiting recovery for noneconomic damages, limiting or abolishing punitive damages, providing judgments be paid over the life of the victim, limiting or abolishing joint and several liability, allowing for defendants to recover attorneys' fees from plaintiffs who file frivolous claims or even unsuccessful claims, limiting governmental liability, and allowing for periodic payments by defendants. *See* Sanders & Joyce, *supra* note 25, at 220–22; LAYCOCK, *supra* note 2, at 159.

34. LAYCOCK, *supra* note 2, at 159.

35. Douglas Laycock makes the claim that the use of the term "noneconomic" is itself a ploy by defendants, crediting them with coining the phrase. *See id.* at 159. Laycock points out that "noneconomic" is not an economic term because economists attach economic significance to anything that is valued by humans. *Id.*; *see also* Christine Piette Durrance,

things like "pain and suffering" and arguing that such emotions tend to erode over time.[36] Moreover, capping noneconomic damages also serves the purpose of limiting the amount of potential recovery a plaintiff may receive, which in turn serves the tort reform movement by deterring claims—practitioners will be more hesitant to take cases that will incur significant litigation costs if the potential recovery is limited.[37]

C. Plaintiffs' Attacks on Tort-Reform Legislation

As of 2016, thirty-three states deploy some sort of cap on damages recoverable in medical malpractice lawsuits, with twenty-four explicitly capping noneconomic damages.[38] Of these, at least ten states have upheld their statutes against constitutional attack.[39] Conversely, noneconomic

Noneconomic Damage Caps and Medical Malpractice Claim Frequency: A Policy Endogeneity Approach, 26 J.L. ECON. & ORG. 569, 570 n.3 (2009).

36. For further discussion regarding the difficulty in calculating noneconomic damages to provide adequate compensation to a plaintiff that also does not overly punish a defendant, see John Bronsten, Christopher Buccafuso & Jonathan S. Masur, *Hedonic Adaptation and the Settlement of Civil Lawsuits*, 108 COLUM. L. REV. 1516, 1516 (2008) (examining the "burgeoning psychological literature on happiness and hedonic adaptation ([i.e.,] a person's capacity to preserve or recapture her level of happiness by adjusting to changed circumstances)."); *cf.* Rick Swedloff & Peter H. Huang, *Tort Damages and the New Science of Happiness*, 85 IND. L.J. 553, 556, 558 (2010) (responding to arguments by "legal hedonists" and concluding that their research is not reliable enough for policies to be based upon).

37. Durrance, *supra* note 35, at 570.

38. *Medical Malpractice Damages Caps*, MEDICAL MALPRACTICE CENTER, http://www.malpracticecenter.com/legal/damage-caps (last visited May 25, 2018).

39. *See* Franklin v. Mazda Motor Corp., 704 F. Supp. 1325, 1326, 1335–36 (D. Md. 1989) (upholding an answer to certified question Maryland statute limiting recovery of noneconomic damages in personal injury actions to $350,000 because it neither violated plaintiffs right to jury trial under state and federal constitutions, nor the doctrine of separation of powers); L.D.G., Inc. v. Brown, 211 P.3d 1110, 1131 (Alaska 2009) (holding noneconomic damages was not unconstitutional on its face as a denial of the right to trial by jury in wrongful death case); Evangelatos v. Sjuperior Court, 753 P.2d 585, 587 (Cal. 1988) (upholding cap on noneconomic pain and suffering damages in tort cases under California and federal equal protection); Garhart *ex rel.* Tinsman v. Columbia/Healthone L.L.C., 95 P.3d 571, 575–76 (Colo. 2004) (en banc) (upholding statutory caps in medical malpractice actions against various state constitutional challenges, including the right to a trial by jury, separation of powers, and equal protection); Kirkland v. Blaine Cty. Med. Ctr., 4 P.3d 1115, 1117, 1122 (Idaho 2000) (holding that statutory cap on noneconomic damages in all actions for personal injury, including death did not violate the right to jury trial guaranteed by Idaho Constitution and did not constitute impermissible special legislation nor violate the separation of powers doctrine); Miller v. Johnson, 289 P.3d 1098, 1105 (Kan. 2012) (upholding statutory noneconomic damages cap as constitutional under equal protection guarantees and separation of powers doctrine of state constitution); Butler v. Flint Goodrich Hosp. of Dillard Univ., 607 So. 2d 517, 518, 521 (La. 1992) (upholding constitutionality of state $500,000 cap on general damages in a medical malpractice suit against multiple defendants against equal protection and open courts challenges); Arbino

damages caps have been overturned or struck down on constitutional grounds in six states.[40] Interestingly, five states—Arizona, Arkansas, Kentucky, Pennsylvania, and Wyoming—do not have to worry about the constitutionality of noneconomic damages caps, as the limiting of jury awards is expressly prohibited in their state constitutions.[41]

Opponents of damages caps tend to attack them on six constitutional grounds: (1) equal rights and opportunities,[42] (2) access to courts, (3) right to a jury trial, (4) due process, (5) single subject or ban on special legislation rule, and (6) separation of powers.[43] Plaintiffs have had mixed results attacking damages caps on these grounds, but it appears

v. Johnson & Johnson, 116 Ohio St. 3d 468, 2007-Ohio-6948, 880 N.E.2d 420, 432, at ¶¶ 42, 72, 114 (upholding noneconomic damages cap against state constitution right to jury trial and equal protection attacks); Judd v. Drezga, 2004 UT 91, ¶¶ 10, 19, 31, 32, 36, 103 P.3d 135, 139, 141, 144–45 (upholding statute limiting damages recoverable in medical malpractice actions as constitutional under state constitution's open courts/remedy clause, uniform operation of laws provision, due process clause, right to a jury trial, and separation of powers doctrine); Etheridge v. Med. Ctr. Hosps., 376 S.E.2d 525, 531 (Va. 1989) (upholding noneconomic damages cap against right to jury trial state constitutional provision attack).

40. *See* Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 170–71 (Ala. 1991) (jury trial and equal protection); Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218, 220 (Ga. 2010) (jury trial); Lebron v. Gottlieb Mem'l Hosp., 930 N.E.2d 895, 908, 914 (Ill. 2010) (striking down cap on noneconomic damages as violation of separation of powers because cap interfered with judiciary's responsibility for remitting excessive jury verdicts); Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633, 636 (Mo. 2012) (en banc) (jury trial); Brannigan v. Usitalo, 587 A.2d 1232, 1233 (N.H. 1991) (equal protection); Sofie v. Fibreboard Corp., 771 P.2d 711, 712–13, 728 (Wash. 1989) (en banc) (jury trial).

41. ARIZ. CONST. art. II, § 31 ("No law shall be enacted in this state limiting the amount of damages to be recovered for causing the death or injury of any person."); ARK. CONST. art. V, § 32 ("[N]o law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons . . . ."); KY. CONST. § 54 ("The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property."); PA. CONST. art. III, § 18 ("[I]n no other cases shall the General Assembly limit the amount to be recovered for injuries resulting in death, or for injuries to persons . . . ."); WYO. CONST. art. X, § 4 ("No law shall be enacted limiting the amount of damages to be recovered for causing the injury or death of any person."); *see also* Robert F. Williams, *Foreword*: *Tort Reform and State Constitutional Law*, 32 RUTGERS L.J. 897, 898–99 (2001).

42. While many states do not have express "equal protection" provisions, such protection is nonetheless extended to citizens through other or similarly-worded provisions. For example, the Missouri Constitution's "equal protection" provision states that "that all persons are created equal and are entitled to equal rights and opportunity under the law . . . ." MO. CONST. art. I, § 2. According to one state constitutional law expert, only fifteen states have equal protection clauses in their constitutions. JEFFREY M. SHAMAN, EQUALITY AND LIBERTY IN THE GOLDEN AGE OF STATE CONSTITUTIONAL LAW 41 (2008).

43. 1 JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES § 6.03[4][a], at 6-17 to 6-20 (4th ed. 2006).

plaintiffs tend to have the most success challenging damages cap statutes under the access to courts and right to a jury trial provisions.[44]

D. How Wrongful Death Plaintiffs Differ in Their Challenges

Wrongful death plaintiffs challenging statutes face an additional hurdle that their personal injury counterparts do not. It is widely recognized that wrongful death was not a cause of action at common law, providing an avenue for courts to uphold the constitutionality of noneconomic damages caps on awards in wrongful death actions.[45] At common law, the death of a person did not create a right to bring a civil action for damages on behalf of anyone.[46] Thus, it was "cheaper for the defendant to kill the plaintiff than to injure him."[47] The common law rule left the greatest injury one person could inflict on another—death—without civil redress. This anachronism is one states and legislatures would begin to remedy in the nineteenth century, including Missouri.[48]

As a result of this distinction, wrongful death claims—as with any claims based on causes of action that were not available at common law—are generally subject to more limitations. Among such limitations are caps on damages. The reasoning behind this is that statutorily-created causes of action are creatures of the legislature; as the legislature has the authority to create a cause of action, it follows that they also possess the authority to limit it.[49]

However, the widespread belief that there was no civil redress for wrongful death at common law rests on shaky ground. Commentators have pointed out that courts and jurists claiming that the common law denied recovery for the death of an individual killed by negligence rely on dicta in an English decision, which itself offers no support for its proposition that "[i]n a civil Court, the death of a human being could not be complained of as an injury."[50] Thus, the distinction upon which courts

44. *See id.* (surveying case law regarding attacks on statutorily imposed damages caps).

45. 12 AM. JUR. TRIALS 317, § 2 (1966).

46. *Id.*

47. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 127, at 945 (5th ed. 1984). Keeton goes on to add, quite accurately, that such a rule resulted in "the most grievous of all injuries [leaving] the bereaved family of the victim, who frequently were destitute, without a remedy." *Id.*

48. *See* 12 AM. JUR. TRIALS, *supra* note 45. For a detailed discussion of the wrongful death cause of action and its origins, see Wex S. Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043 (1965).

49. Sanders v. Ahmed, 364 S.W.3d 195, 205 (Mo. 2012) (en banc).

50. Baker v. Bolton [1808] 170 Eng. Rep. 1033 (EWHC KB), http://www.bailii.org/ew/cases/EWHC/KB/1808/J92.html. In Baker, a husband sued when a stagecoach overturned

have perennially relied and regurgitated to differentiate wrongful death claims from other actions available at common law may be unfounded.

Moreover, while the question of whether a wrongful death claimant is entitled to civil redress may no longer be an issue after its codification, the question remains as to whether such redress can be limited by statute. This distinction has been highlighted in Missouri when caps are attacked under right to jury trial provisions.[51] This is because the jury trial right is ordinarily treated as "historically tied," and therefore states like Missouri with right to jury trial provisions in their constitutions have typically applied this right to causes of action available at common law or in existence at the time of the constitution's ratification.[52] In lieu of the widespread—and perhaps erroneous—belief that wrongful death causes of action were unavailable at common law, constitutional guarantees and protections such as the right to a jury trial do not extend to these claims and can therefore be limited by the legislature that "created" the cause of action in the first place. It is on these grounds that we now turn to the Missouri Supreme Court's interpretation of this question.

IV. EVOLUTION OF MISSOURI'S NONECONOMIC DAMAGES CAP JURISPRUDENCE

Missouri joined the medical malpractice damages cap party in 1986, when the Missouri legislature enacted Senate Bill 663, creating Missouri's medical malpractice statute.[53] Senate Bill 663 was the Missouri legislature's response to the "insurance 'crises'" that swept the

and caused the death of his wife. Lord Ellenborough, who issued the decision, allowed recovery for loss of society and grief suffered by the plaintiff, but only from the time of the accident to the time of death. This was before issuing his statement that became the basis for the American rule that there was no recovery for wrongful death in the absence of a statute. STUART M. SPEISER & JAMES E. ROOKS, JR., RECOVERY FOR WRONGFUL DEATH § 1:2 (4th ed. 2008).

51. *See, e.g.*, Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633, 637–46 (Mo. 2012) (en banc) (delving into historical analysis and interpretation of Missouri's right to jury trial constitutional provision to determine if a cap on noneconomic damages in medical malpractice personal injury case was constitutional).

52. *Id.* at 638; FRIESEN, *supra* note 43, at 6-26 to 6-27. *Compare* Greist v. Phillips, 906 P.2d 789, 797–800 (Or. 1995) (en banc) (statutory caps of $500,000 in noneconomic damages did not implicate right to jury trial because wrongful death action did not exist at common law), *with* Lakin v. Senco Prods., Inc., 987 P.2d 463, 475 (Or. 1999) (civil cases in which the right to jury trial was established in 1857, and like actions, cannot be made subject to such caps).

53. S.B. 663, 83d Gen. Assemb., 2d Reg. Sess. (Mo. 1986). Chapter 538 of Missouri's Revised Code, titled "Tort Actions Based on Improper Health Care," codified the medical malpractice law passed by the Missouri General Assembly in 1986.

nation during the 1970s and 1980s.[54] Chapter 538 included several provisions to regulate "tort actions based on improper health care," including section 538.210. The noneconomic damages cap first came under attack in 1992, in *Adams v. Children's Mercy Hospital*, where the parents of a child who had suffered severe brain injuries due to medical negligence had their $13 million noneconomic damages jury award reduced to $430,000, per the section 538.210 cap.[55]

The plaintiffs in *Adams* attacked section 538.210 on various constitutional grounds, but the court upheld the statute against all, including, relative to this discussion, equal protection and right to a jury trial attacks.[56] The *Adams* court reasoned that a jury's main task is fact-finding, and once the jury has determined liability and damages, its task is complete.[57] The court then applied the law to the facts at hand and found the permissible remedy was a matter of law, not fact, and therefore outside the purview of the jury.[58] The court reasoned that because the application of the cap occurred only after the jury had completed its fact-finding task, the cap did not infringe on the right to a jury trial.[59]

As the right to a jury trial was not infringed, the court found that no fundamental right was affected, and thus rational basis was the appropriate test to determine if the cap violated the equal protection clause.[60] Applying a rational basis test, the court found that the state had a legitimate interest in preventing any sort of insurance or health care crisis that may be detrimental to the state or its citizens, and that the legislature could rationally believe the section 538.210 cap would alleviate this concern.[61] As the cap was rationally related to the legislature's goal, the court held the cap did not violate equal protection.[62]

Adams would be the law in Missouri for over two decades before being overturned in *Watts v. Lester E. Cox Medical Centers*.[63] However, to fully

54. *See supra* Part III; Daniel James Sheffner, *Fatal Medical Negligence and Missouri's Perverse Incentive*, 7 ST. LOUIS U. J. HEALTH L. & POL'Y 147, 152–53 (2013) [hereinafter *Medical Negligence*] (quoting Klotz v. St. Anthony's Med. Ctr., 311 S.W.3d 752, 773 (Mo. 2010) (en banc) (Wolff J., concurring) (per curiam)).

55. 832 S.W.2d 898, 900–02, 904 (Mo. 1992) (en banc). The 1986 cap had a clause adjusting for inflation and at the time of the *Adams* trials the cap had risen to $430,000. *Id.* at 900 n.1, 902 n.4.

56. *Id.* at 901, 908.

57. *Id.* at 907.

58. *Id.*

59. *Id.*

60. *Id.* at 903.

61. *Id.* at 904–05.

62. *Id.* at 905.

63. 376 S.W.3d 633, 636 (Mo. 2012) (en banc).

understand the reasoning used by the *Watts* court to overrule *Adams* and declare noneconomic damages caps in personal injury cases unconstitutional—and how it factored into the analysis in *Dodson*—we must first look at two other cases: *State ex rel. Diehl v. O'Malley*[64] and *Sanders v. Ahmed*.[65]

A. State ex rel. Diehl v. O'Malley

Diehl involved the question of whether a plaintiff in an employment discrimination claim was entitled to the right to a trial by jury.[66] There, a former employee sued her employer for damages under the Missouri Human Rights Act ("MHRA"). Importantly, the plaintiff filed a lawsuit for damages—not equity—along with a motion for a jury trial.[67] The trial judge who overruled the motion argued that Missouri's right to a jury trial applied only to specific claims that were recognized by law in 1820, not actions that came into existence thereafter, such as plaintiff's employment discrimination claim.[68]

The Missouri Supreme Court delved into a historical analysis of the issue in reversing the trial court and finding the plaintiff was entitled to a jury trial in her employment discrimination cause of action.[69] The court made a distinction between suits in equity and administrative proceedings, which were not entitled to a jury trial, and "civil action[s]" for damages, in which the right to a jury trial should "remain inviolate."[70] The court made the distinction based on the fact that Missouri had guaranteed a jury trial for any civil action of "the value of one hundred dollars" more than ten years before the adoption of the common law in 1816.[71] The proper question in determining if the jury trial guarantee applied then, according to the court, was whether the action brought was an action at law, to which the jury trial guarantee typically applied, or an action in equity, to which it did not.[72] In other words, the right to a jury trial was one "generally applicable . . . where the relief sought is the traditional common-law remedy of damages," with equitable cases being the exception to the rule.[73]

64. 95 S.W.3d 82 (Mo. 2003) (en banc).
65. 364 S.W.3d 195 (Mo. 2012) (en banc).
66. *Diehl*, 95 S.W.3d at 84.
67. *Id.* The plaintiff sued her employer for damages under the MHRA prohibiting discrimination on the basis of age and sex. *Id.*
68. *Id.* at 85.
69. *Id.* at 85–89, 92.
70. *Id.*
71. *Id.* (quoting Mo. Terr. Laws 58, § 13 (1804)).
72. *Id.* at 86.
73. *Id.*

The court went further in its analysis, finding that actions brought pursuant to a statute, even those enacted after the adoption of the constitution in 1820, were not per se excluded from a jury trial.[74] The proper determination, according to Missouri Supreme Court precedent, was whether a cause of action "is analogous to an action at common law, or whether it [is] in the nature of a suit in equity."[75] The court applied this reasoning to the actions for damages based on the employment discrimination at issue, finding the cause of action "analogous to those kinds of actions triable by juries at the time of the Constitution of 1820."[76] Thus, the plaintiff's statutorily-based claims were "conceptually indistinguishable" from other actions for damages that traditionally carried the right to a jury trial, because they sought "redress for wrongs to a person."[77]

B. Sanders v. Ahmed

Sanders involved a plaintiff who succeeded in a wrongful death action arising from the death of his wife as a result of negligent medical care.[78] The ensuing noneconomic damages award was reduced pursuant to section 538.210, leading the plaintiff to challenge the constitutionality of the cap on right to jury trial grounds.[79] The court did not reach the plaintiff's argument that *Adams* had incorrectly stated the law in regard to the right to a jury trial as it pertained to common law causes of action, referencing the well-established precedent in Missouri that a claim for wrongful death was statutory and had no common-law antecedent.[80]

The plaintiff in *Sanders* argued the wrongful death claim was a continuation of the predicate tort of medical negligence that existed at common law.[81] The court rejected the argument, citing cases that

74. *Id.*
75. *Id.* (quoting Bates v. Comstock Realty, 267 S.W. 641, 644 (Mo. 1924)).
76. *Id.* at 87.
77. *Id.* at 88.
78. Sanders v. Ahmed, 364 S.W.3d 195, 201 (Mo. 2012) (en banc).
79. *Id.* at 202–03.
80. *Id.* at 203.
81. *Id.* at 204. *Sanders* also made the argument that the exclusion of the wrongful death claim as a common law cause of action was dicta. *Id.* The court rejected this argument in one sentence by citing to previous Missouri Supreme Court precedent that validated Lord Ellenborough's dictum in Baker v. Bolton [1808] 170 Eng. Rep. 1033 (EWHC KB). *Id*. That case, *Glick v. Ballentine Produce, Inc.*, cited Lord Campbell's Act which included a preamble "which recited that there was then no cause of action at law for death by wrongful act." 396 S.W.2d 609, 614 (Mo. 1965), *overruled on other grounds*, Bennett v. Owens-Corning Fiberglas Corp., 896 S.W.2d 464 (Mo. 1995) (en banc). That Act had been generally accepted and the *Glick* court would not get "into the fruitless task of attempting to upset all the law on this subject, English and American, since 1808." *Id.*

distinguished wrongful death as a "new statutory cause of action independent of the predicate tort."[82] Thus, as a separate and independent cause of action created by statute, the legislature, as it does with any cause of action it creates, has the power to define and adjust the remedy. Since section 538.210 only placed limits on the remedy of a cause of action the legislature created, it did not violate the right to a jury trial under the Missouri Constitution.[83]

C. Watts v. Lester E. Cox Medical Centers

The Missouri Supreme Court would go on to overrule *Adams*, only three months after its ruling in *Sanders*, in *Watts v. Lester E. Cox Medical Centers*.[84] The court was once again asked to determine if section 538.210 violated the right to a trial, this time in a case involving a plaintiff whose child was "born with disabling brain injuries" due to negligent medical care.[85]

To determine if the plaintiff's right to a jury trial had been abridged by the legislatively imposed cap that reduced the plaintiff's jury-awarded noneconomic damages, the court broke down the right to a jury trial provision in the Missouri Constitution into two parts: (1) "the right of trial by jury as heretofore enjoyed," and (2) "shall remain inviolate," and analyzed them independently.[86] Thus, the first question was whether the plaintiff's cause of action was one available at common law and therefore "heretofore enjoyed" when the constitution was adopted.[87] If so, then the court would move to the next question and ask if that right "remain[ed] inviolate" or if the alleged infirm statute had violated the constitutional right.[88]

82. *Sanders*, 364 S.W.3d at 204.

83. *Id.* The *Sanders* court also held the cap did not violate the separation of powers provision of the Missouri Constitution. *Id.* at 205. The court found that the cap did not interfere with either the fact-finder's job of determining the damages nor judges' ability to render a verdict or enter judgment, but only informed these duties. The court cited *Adams* in its proposition that because the remedy available in a statutorily created cause of action is a matter of law, it does not fall within the purview of the jury. In other words, once the jury has determined the facts, their duties as fact-finders have been completed, and the application of the cap is a matter of law, not in conflict with the jury's factual determinations. The court went as far as saying that "to hold otherwise" would be say to the legislature could neither "create nor negate causes of action" or proscribe the measure of damages; it "would be to tell the legislature it could not legislate." *Id.*

84. 376 S.W.3d 633, 636 (Mo. 2012) (en banc).

85. *Id.* at 635.

86. *Id.* at 637–38 (quoting MO. CONST. art. I, § 22(a)).

87. *Id.*

88. *Id.* at 638.

The court answered the first question in the affirmative, finding that Watts's medical negligence claims were recognized at common law.[89] Moreover, the court pointed out that statutory caps on damages awards did not exist and had not even been contemplated by the common law at the time Missouri adopted its constitution and the "heretofore enjoyed" language.[90] Therefore, "[t]he right to trial by jury 'heretofore enjoyed' was not subject to legislative limits on damages."[91]

Having determined that Watts's claims were entitled to a jury trial at common law, the court next determined if that right "remain[ed] inviolate" after application of the section 538.210 cap.[92] The court found that once the right to a jury trial attaches to a cause of action, the plaintiff has the full benefit of that right, including the jury's determination of damages—a question of fact.[93] That right is to be "free from the reach of hostile legislation."[94] Because section 538.210 "directly curtail[ed] the jury's determination of damages," it "infring[ed] on the right to [a] trial by jury."[95]

The court disposed of the defendant's *Adams*-based arguments by overruling *Adams*, finding the reasoning in *Adams* fundamentally flawed in four ways such that it could not prevail on stare decisis alone.[96] *Adams*'s first major flaw was that it misconstrued the nature of the right to a trial by jury, which, the court found, attaches in any action available at common law that is "a civil action for damages."[97] If the determination of whether a jury trial attaches is contingent on whether the action is for damages, it follows that any limitation placed on the damages directly curtails one of the most significant roles of the jury—it "pays lip service to the form of the jury but robs it of its function."[98]

The second flaw *Watts* found in *Adams*'s reasoning was its justification of the cap under the guise that it did not interfere with the jury's fact-finding, but only applied a separate legal determination in the

89. *Id.*
90. *Id.* at 639.
91. *Id.*
92. *Id.*
93. *Id.* at 640.
94. *Id.*
95. *Id.* The court went on to cite to other states with similar right to jury trial constitutional provisions to support its proposition that determination of damages is a question of fact, and when that fact is determined by a jury, any legislation curtailing or capping the findings of the jury in effect disregards the jury's findings and thus violates the right to a jury trial. *Id.* at 640–41.
96. *Id.* at 642–46.
97. *Id.* at 642.
98. *Id.*

application of the cap.[99] The court concluded that the logical extension of such a rationale would be a statutory limit on the constitutional right to trial by jury, essentially a "legislative alteration of the Constitution."[100]

The court also found that *Adams*'s reliance on the United States Supreme Court was unfounded because the cited case interpreted the Federal Constitution and addressed only civil penalties, not common law damages.[101] Lastly, *Adams* relied on a Virginia Supreme Court constitutional case and a United States Supreme Court case interpreting the language of the Seventh Amendment right to jury trial provision in the Federal Constitution.[102] This was important because the right to jury trial provisions in the Federal and Virginia constitutions do not share the same language as the right to jury trial provision in the Missouri Constitution.[103] Such a distinction was crucial because the Missouri Constitution demands that the right to a jury trial "remain inviolate."[104] "The different language entail[ed] a different analysis," and reliance on these cases was improper.[105] In light of all these reasons, *Watts* held *Adams* effectively permitted legislative enactments to infringe on a constitutional guarantee and "overruled [it] to the extent that it holds that the section 538.210 caps on noneconomic damages do not violate the right to trial by jury."[106] The language of this holding would prove fatal to the wrongful death plaintiffs challenging section 538.210 in *Dodson v. Ferrara*.[107]

99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.* at 643–44.
103. Indeed, the Seventh Amendment right to jury trial reads:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury *shall be preserved*, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII (emphasis added). Similarly, the court in *Adams* relied on *Etheridge v. Medical Center Hospitals*, 376 S.E.2d 525, 531–32 (Va. 1989), which upheld a noneconomic damages cap against a right to a jury trial under the Virginia Constitution. However, Virginia's right to jury trial provision reads: "trial by jury is preferable to any other, and ought to be held sacred." VA. CONST. art. I, §11. This language is different—and less stringent—than Missouri's right to a jury trial provision, which states that the right to a jury trial "shall remain inviolate." MO. CONST. art. I, § 22(a).
104. MO. CONST. art. I, § 22(a).
105. *Watts*, 376 S.W.3d at 644.
106. *Id.* at 646.
107. 491 S.W.3d 542, 561 (Mo. 2016) (en banc).

V. THE LATEST CHAPTER: *DODSON V. FERRARA*

A. The Majority Opinion

In *Dodson v. Ferrara*, the Supreme Court of Missouri upheld the section 538.210 noneconomic damages cap and affirmed its application to Dodson's noneconomic damages award arising from his wrongful death claim.[108] Writing for the court ("the Majority"), Judge Russell began the opinion by stating the issues before addressing plaintiff's arguments that because of *Watts*, section 538.210 did not apply in wrongful death cases and that imposing the cap only on wrongful death plaintiffs was a violation of the equal protection, right to a jury trial, and separation of powers provisions of the Missouri Constitution.[109]

The Majority rejected the argument that, in light of *Watts*, the noneconomic damages cap did not apply in wrongful death cases, stating that the applicable precedent was *Sanders v. Ahmed*, not *Watts*.[110] The court based this distinction on the type of injury that gave rise to the cause of action.[111] *Watts* involved personal injury, a cause of action recognized at common law in 1820 when the Missouri Constitution was adopted, and therefore protected by the constitutional provision of right to a jury trial.[112] *Sanders*, as in the present case, involved a wrongful death cause of action, and thus *Sanders* was dispositive of the right to a jury trial and separation of powers claims.[113] The court also pointed out that the distinction between the two classes of plaintiffs in *Watts* and *Sanders* was a product of the court's interpretation of the right to a trial by jury, and thus application of the section 538.210 cap to wrongful death plaintiffs was not a violation of equal protection.[114]

1. Right to a Trial by Jury and Separation of Powers Challenges

In typical fashion, the court began its right to a jury trial analysis with the constitutional language of right to a jury trial and its meaning as it had been interpreted by previous courts. The court then stated that *Sanders v. Ahmed* squarely answered the question at hand, holding that

108. *Id.* at 567–68.
109. *Id.* at 550.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*

the noneconomic damages cap did not apply to wrongful death claims in a case with facts that were "virtually indistinguishable."[115]

Plaintiffs, however, raised three arguments as to why *Sanders* was not dispositive: (1) the *Sanders* court upheld an earlier version of the statute that was "fundamentally different" from the one applied in this case,[116] (2) "*Watts*, not *Sanders*, actually control[led] the outcome of this case," and (3) section 538.210 was not severable and therefore was invalid as a result of the holding in *Watts*, which found the damages cap unconstitutional as applied to personal injury cases.[117] The court quickly disposed of the first and third arguments, finding that the court's analysis in *Sanders* was not affected by the changes in the statute,[118] and section 538.210 was indeed severable because even when the invalid portion of the statute was stricken, "[t]he remaining provision still coherently and validly limits the recovery of noneconomic damages in any action against a health care provider for 'death' arising out of medical negligence."[119]

With regard to the second argument, the Majority pointed out that the court in *Watts* did not expressly overrule *Sanders*, but "differentiated common law causes of action as not being subject to legislative limits on the right to trial by jury."[120] Because *Sanders* noted that wrongful death causes of action were not recognized at common law but were created by statute, that analysis was the correct one to apply.[121] The court emphasized that absent an express overruling of precedent, the court will not assume a precedent has been overruled *sub silentio*.[122]

The court also rejected the plaintiff's argument that *Watts* was applicable even if wrongful death causes of action were not recognized at common law, because the right to a jury trial nonetheless attaches so long as the claim is one "analogous to" an action existing at common law,

115. *Id.* at 554.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at 558–59. The invalid portion of section 538.210 was the phrase "personal injury" as this was found unconstitutional per the Missouri Supreme Court's holding in *Watts*. *Id.*
120. *Id.* at 555.
121. *Id.*
122. *Id.* at 555 n.5. Indeed, the wording of the holding in *Watts* appears to be a validation of this presumption, as the court in *Watts* only overruled *Adams* "to the extent that it holds that the section 538.210 caps on noneconomic damages do not violate the right to trial by jury." Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633, 646 (Mo. 2012) (en banc). However, in *Watts*, the right to a jury trial was upheld in regard to a personal injury claim. *Id.* at 636. While it did not expressly exclude wrongful death claims, it did not include it in a sufficiently express manner to overcome the presumption of validity absent a contrary showing of overrule.

quoting *State ex rel. Diehl v. O'Malley* for support.[123] The Majority distinguished *Diehl* on the grounds that *Diehl* concerned whether a claimant brought a civil action for damages or an equitable or administrative claim and thus had no relevance to the question presented in this case: "whether the constitutional right to a jury trial bars enforcement of legislatively created limitations on the amount of damages recoverable under a statutory wrongful death cause of action."[124]

Moreover, the Majority disagreed that there was any common law cause of action to which wrongful death was analogous.[125] The case cited by the plaintiffs, *James v. Christy*,[126] was a property cause of action by the father for the lost services of his son.[127] There court allowed the father's estate to recover for the lost services of his son, but that did not mean Missouri recognized a wrongful death cause of action in tort at common law.[128] The action in *James* was simply not the same as an action for wrongful death and was not even a question of tort, but one that rested "upon entirely different principles."[129] Thus, while they both may have been for monetary damages, the cases stemmed from entirely different principles of law and were not analogous.[130]

Since Missouri did not recognize a common law wrongful death claim and a statutory wrongful death claim was not "analogous to" a common law loss of services action, the Majority held that *Sanders* controlled and section 538.210 did not violate the right to a jury trial when applied to wrongful death claims.[131] Similarly, *Sanders*'s holding that section 538.210 did not interfere with either the jury's ability to render a verdict or with the judge's task of entering judgment was also applicable and therefore the separation of powers provision was not violated.[132] As

123. *Dodson*, 491 S.W.3d at 555 (quoting State *ex rel.* Diehl v. O'Malley, 95 S.W.3d 82, 86 (Mo. 2003) (en banc)).

124. *Id.*

125. *Id.* at 556.

126. 18 Mo. 162 (1853).

127. *Dodson*, 491 S.W.3d at 556.

128. *Id.* at 557. At least one commentator appears to agree with the *Dodson* plaintiff's proposition that *James v. Christy* did indeed allow for a wrongful death cause of action prior to the codification of the cause of action in Missouri, and therefore at common law. *See* Daniel J. Sheffner, *Wrongful Death's Common Law Antecedents in Missouri*, 70 J. MO. B. 194, 195–96 (2014).

129. *Dodson*, 491 S.W.3d at 557 (quoting Hennessy v. Bavarian Brewing Co., 46 S.W. 966, 967 (Mo. 1898)). The court went on to add that the loss of services cause of action was not dependent on the death of the son and did not hinge on proof of negligence, rather it was one that sounded in contract. *Id.*

130. *Id.*

131. *Id.* at 558.

132. *Id.* at 562.

Sanders disposed of both of these claims, the only remaining constitutional claim for the plaintiffs was equal protection.

2. Equal Protection Challenge

The Majority applied a rational basis test to uphold section 538.210 against equal protection attack under both the Missouri and United States Constitutions.[133] The Majority cited to *Adams*, which also had applied rational basis, specifically pointing out the *Adams* analysis of the legislative history of section 538.210 and the "array of evidence" that led to the conclusion that the existence of a medical crisis was plausible.[134] Moreover, the damages cap was rationally related to a legitimate state interest in the effort to alleviate any threat of rising medical malpractice premiums and to prevent physicians from leaving "high risk" medical fields.[135]

The Majority reasoned that the distinction of the two classes of plaintiffs was permissible and did not violate equal protection for two reasons. First, the classification of medical malpractice plaintiffs that were not subject to the damages caps was not created by the legislature, but was created by the court in *Watts* as a result of its interpretation of the right to a jury trial provision.[136] Second, the two classes of plaintiffs are not similarly situated; plaintiffs whose family members were killed as a result of medical negligence are not similarly situated to plaintiffs who themselves suffer an injury from medical negligence.[137] Therefore, the noneconomic damages cap imposed by section 538.210 on wrongful death plaintiffs did not deny them equal protection of the law.[138]

B. Separate (Concurring) Opinion

Judges Fischer and Wilson wrote a concurring opinion ("the Concurrence") to emphasize why *Sanders* controlled the disposition of the case. The Concurrence argued that reliance on *Diehl* was misplaced

133. *Id.* at 559–60. The court determined rational basis was the appropriate standard because wrongful death plaintiffs were not a suspect class and, as the court had already concluded, no fundamental right was affected because the right to a jury trial did not attach to wrongful death claims. *Id.*

134. *Id.* at 560–61.

135. *Id.* (quoting Adams v. Children's Mercy Hosp., 832 S.W.2d 898, 904 (Mo. 1992) (en banc)).

136. *Id.* at 561.

137. *Id.* at 561 n.12. Because the two sets of plaintiffs are not similarly situated, "there can be no equal protection violation either in the constitutional provision or this Court's application of it." *Id.*

138. *Id.* at 561.

because the question at issue was not whether this was a civil action (to which the right to a jury trial attaches) or an equitable action (to which it does not), but whether the right to a jury trial prohibited the enforcement of legislatively imposed caps on damages.[139]

The Concurrence said that as a result of this distinction, reliance on *Diehl* was misguided. That case focused on whether a cause of action—whether statutory or common law—was for damages, therefore implicating the constitutional right to a jury trial. The analysis here differed, according to the Concurrence, because it dealt with the question of whether the right to a jury trial barred the enforcement of legislatively imposed damages caps.[140] This analysis had been applied by the court in *Sanders* on a wrongful death cause of action arising out of medical negligence, and therefore *Sanders* controlled the disposition of this case.[141]

Moreover, the Concurrence argued that *Watts* did not overrule *Sanders*. The Concurrence shared the Majority's concerns of overruling a court decision *sub silentio*.[142] Furthermore, it argued that "*Watts* could not have overruled *Sanders*," because the issue in *Watts* was the validity of a statutorily-imposed damages cap on the amount recoverable under a common law cause of action, not the validity of such caps on amounts recovered under a statutorily created cause of action, as was the case in *Sanders* and in the case at issue.[143]

The Concurrence pointed out that Judge Teitelman's dissent (discussed *infra* section V.C.2.), with its reliance on *Diehl*, was the same argument made by the dissent and rejected in *Sanders*.[144] It argued that if the analysis in *Diehl* was the proper way to determine the

139. *Id.* at 568 (Fischer and Wilson, JJ., concurring). To highlight this point, the Concurrence cited *Estate of Overbey v. Chad Franklin Nat'l Auto Sales N., LLC*, 361 S.W.3d 364 (Mo. 2012) (en banc). *Id.* at 569. In *Overbey*, the Supreme Court of Missouri faced the question of whether the constitutional right to a jury barred the enforcement of legislatively imposed caps on punitive damages. The court in *Overbey* held that Missouri precedent allowed the plaintiffs to have their case heard by a jury as the legislature had allowed for their recovery of actual and punitive damages on their statutory cause of action. However, once it had been determined that the right to a jury trial attached because it was a claim for damages and not a claim in equity, a subsequent capping of the punitive damages was not a violation of the right to a jury trial. In other words, this was an entirely different question than the original one—whether it was a suit in law where the right to a jury trial attaches, or a suit in equity where it does not. *Id.* (citing *Overbey*, 361 S.W.3d at 376).

140. *Id.* at 569–70.

141. *Id.*

142. *Id.* at 570. The Concurrence pointed out that *Watts* did not even mention *Sanders*, further reinforcing the notion that *Watts* did not overrule *Sanders* and should not be read as doing so. *Id.*

143. *Id.*

144. *Id.* at 571.

constitutional validity of legislative caps on statutory causes of action, the court could not have reached the result it did in *Sanders*.[145] In light of this discrepancy and the aforementioned reasons, the Concurrence found that the court was compelled to follow *Sanders* in deciding this case.[146]

Ultimately, the Concurrence reasoned, the concern is not whether the court believed that *Diehl*, *Sanders*, or *Watts* was decided correctly, but whether these holdings are authoritative constructions of the constitution—constructions that the legislature and other stakeholders have relied on and therefore "cannot be ignored or overruled without a substantial showing that they were incorrectly decided or that they reached a proper result on improper grounds."[147] With no such showing here, the Concurrence found that they cannot be ignored and that *Sanders* must control.[148]

C. The Dissents

1. Judge Draper's Dissent

Judge Draper's dissent attacked the validity of section 538.210 on equal protection grounds, criticizing the Majority for its failure to take into account all arguments in applying the rational basis test.[149] Judge Draper was concerned with the Majority's failure to take into account significant evidence calling into question the legitimacy of any alleged "crisis" that led to the enactment of section 538.210.[150] Judge Draper referenced language by the Missouri Supreme Court in other cases and scholarly materials that raise questions as to whether "this medical malpractice 'crisis' was manufactured and continues to be exacerbated today" by groups that look to influence citizens and politicians into enacting policies favorable to their interests.[151] Judge Draper argued that these commentaries, along with subsequent remedial measures taken by the legislature to raise the damages cap, were sufficient evidence to call into question the legitimacy of such a "crisis" and that the majority failed to afford these considerations proper weight under a rational basis test.[152]

145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* at 568, 571.
149. *Id.* at 572 (Draper, J., dissenting).
150. *Id.*
151. *Id.*
152. *Id.*

2. Judge Teitelman's Dissent

Judge Teitelman felt that the issue did not need to reach equal protection grounds, as wrongful death plaintiffs were entitled to the right to a jury trial under the proper analysis.[153] That analysis was the one set out by the Court in *Diehl*, which did not require that the wrongful death cause of action have a common law equivalent, but only that it be *analogous* to a common law cause of action.[154] That analogous cause of action was the one upheld by the court in *James*, where a father's estate was permitted to pursue a civil action for damages when his son was killed due to negligence.[155]

Judge Teitelman was concerned that interpreting the right to a jury trial so narrowly would lead to its withering, eventually allowing legislatures to control how disputes that were unforeseen in the nineteenth century when the constitution adopted the common law causes of action are mediated.[156] Judge Teitelman's dissent cited *Diehl* for what he felt was the right balance—a case where a woman's right to a jury trial was preserved in an age and sex-based employment discrimination claim even though no such wrong or cause of action was recognized at common law.[157]

Dodson's wrongful death cause of action was like that of the plaintiff in *Diehl* in that both were "analogous to common law causes of action that traditionally carried the right to a jury trial because [they] seek[] redress for wrongs to a person."[158] Here, the wrong for which redress was sought was the death of a loved one, analogous to the claim in *James* for the loss of services awarded to the father for his son's death.[159]

But Judge Teitelman did not rest his argument on the loss of services cause of action. He also cited explicit language from the court in *James* that seemed to leave the door open for the possibility that the father could have recovered "for the loss of the society or comforts afforded by a child to his parent."[160] However, as the father died before the case was settled, those claims died with him, and such noneconomic damages could not be recovered by his estate, an inanimate legal entity.[161] Therefore, while the father's estate could not recover for the loss of the society or comforts of

153. *Id.* at 572–73 (Teitelman, J., dissenting).
154. *Id.* at 573 (emphasis added).
155. *Id.* (citing James v. Christy, 18 Mo. 162, 163 (1853)).
156. *Id.* at 574.
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*

the son, Judge Teitelman read the court's discussion of the matter and its implication that the father may have been able to recover noneconomic damages for his son's death to support the proposition that Missouri common law permitted actions that are analogous to modern statutory wrongful death actions.[162]

Judge Teitelman criticized the Majority's claim that the cause of action in *James* was "not the same as an action for the wrongful death of his son" as irrelevant, because Missouri law, specifically *Diehl*, does not require that the common law cause of action be identical to the modern statutory one.[163] *Diehl* expressly held that the appropriate determination is "whether the modern statutory [cause of action] is 'analogous to' or a 'modern variant of' a common law civil action for damages that was triable by jury in 1820."[164]

According to Judge Teitelman, because of the precedent set out by *Diehl*, the right to a jury trial attached to Dodson's wrongful death cause of action and the only question that remained was whether section 538.210 violated that right by capping the jury's noneconomic damages award.[165] *Watts*'s holding answered that question: "once the right to a jury trial attaches, . . . [the] right is 'beyond the reach of hostile legislation.'"[166] As the statutory cap on the *Dodson* noneconomic damages jury award was a legislative curtailment of Dodson's constitutional right to have a jury determine his award, it was unconstitutional. Therefore, both *Sanders* and this case were wrongly decided.[167]

VI. ANALYSIS AND IMPLICATIONS

The court in *Dodson* employed valid reasoning in line with most of the country, but in doing so legitimized the perverse incentive commentators claimed was created by the Missouri Supreme Court's decisions in *Sanders* and *Watts*. The incentive validated by *Dodson* is that it now may be more economically viable for a doctor to kill a patient rather than only injure him.[168] Furthermore, with this ruling, the Missouri Supreme Court in *Dodson* essentially passed a large part of the medical community's alleged burden on to the individuals who are

162. *Id.*
163. *Id.* (quoting *id.* at 557 (majority opinion)).
164. *Id.* at 574–75 (quoting State ex rel. Diehl v. O'Malley, 95 S.W.3d 82, 86, 87 (Mo. 2003) (en banc)).
165. *Id.* at 575.
166. *Id.* (quoting Watts v. Lester E. Cox Med. Centers, 376 S.W.3d 633, 640 (Mo. 2012) (en banc)).
167. *Id.*
168. *See Medical Negligence*, *supra* note 54, at 166–70.

affected by the most grievous injury that can result from medical negligence: death. While it is true that the individuals who actually suffer the harm cannot benefit from any award given because of their death, there is also something perverse about medical personnel and health providers potentially paying less when their negligence inflicts the most harm possible.

Moreover, the result that doctors could face less financial liability when their mistakes kill people rather than merely injure them is one that does not seem to serve either the corrective justice or economic model of tort law. Corrective justice is not served when the families of the plaintiffs are not compensated properly for their loss.[169] While such damages are difficult to calculate, calculation by a jury of peers that has been presented the particular facts of a case is more conducive to corrective justice than an arbitrary number that is established before the development of any facts.[170] It is odd that corrective justice is not warranted simply because a cause of action was not codified until the nineteenth century.

On the surface, the economic model appears to be served by legislature's justification for caps: plaintiffs are provided some compensation for the death of a loved one, defendants are still held accountable, and caps help prevent excessive or arbitrary damages awards that may cripple the health care system and cause harm to citizens by limiting their access to healthcare.[171] However, any economic model debate for the capping of noneconomic damages awards should also keep in mind the "incentive" effect of such awards on doctors. That is, health care providers will not have the same incentive to prevent death as they otherwise would if exposed to greater liability.[172] The capping of noneconomic damages awards in only wrongful death suits

169. For a thorough discussion of corrective justice and its nexus with tort law, see Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348 (1990).

170. As one scholar points out, "[t]ort cases are local in the sense that they focus upon the equities created by a single event or by a series of related events." *Id.* at 2351. Thus, tort cases by their nature require a look at the particular circumstances of each case, which seems to advise against a notion that a generalized remedy can be fair to the aggrieved parties. *See id.*

171. The classic economic model of tort compensation advocated full value compensation to the plaintiff for his injuries, but its main focus or goal is the incentive such compensation provides defendants to avoid injuring others in the future. The Missouri legislature may have felt that wrongful death plaintiffs received the "full value" for their injuries under the act, while still providing sufficient deterrence value to the defendants. *See* LAYCOCK, *supra* note 2, at 167.

172. Indeed, the economic model of tort compensation is focused less on compensation to the plaintiff and more on "optimal deterrence." THOMAS J. MICELI, THE ECONOMIC APPROACH TO LAW 16 (2d. ed. 2004).

limits the economic incentive for doctors to take greater care to prevent death in all cases. Moreover, plaintiffs bringing suits for the death of children or elders are adversely affected as the economic losses for elders and children tend to be minimal, or even nonexistent.[173] Capping noneconomic damages in these cases would deprive plaintiffs of adequate compensation for the death of their loved ones, a tragic repercussion of caps on noneconomic damages in wrongful death claims.

Even though the Missouri Supreme Court may have overlooked the policy implications that its decisions in *Sanders*, *Watts*, and now *Dodson* create, the decision was nonetheless well-reasoned under the black letter law of Missouri and most of the nation. Strong arguments can be made regarding the absurdity of refusing to extend the right to a jury to claims that were not in existence at common law or against the notion that wrongful death actions were not available at common law. Nevertheless, the fact remains that the longstanding rule in American and British legal systems excluded wrongful death as a common law claim. Accordingly, and therefore not improperly, Missouri has drawn a line of demarcation barring the right to a jury trial right for claims that did not exist at or prior to 1820.[174]

But is wrongful death "analogous" to a common law claim to which the right to a jury trial attached, and is that even a relevant question (as Judge Teitelman's dissent and Judge Fischer's concurrence point out)? The Majority poses a convincing argument rejecting Judge Teitelman's claim in his dissent that wrongful death is analogous to the plaintiff's claim for the loss of services of his son in *James*.[175] However, how are the sex and race-based employment discrimination claims in *Diehl* any more analogous to a common law claim than the wrongful death action in *Dodson*? This is not directly answered by the Majority, but the answer seems to rest on the fact that the plaintiff's claims in *Diehl* involved a personal injury—or "redress of wrongs done to a person," as the court in *Diehl* put it—while wrongful death claimants suffer no such wrong.[176]

173. MO. ANN. STAT. § 538.205(1) (West 2008 & Supp. 2013) (amended 2015, 2017). Section 528.205 defines "economic damages" as: "damages arising from pecuniary harm including, without limitation, medical damages, and those damages arising from lost wages and lost earning capacity." *Id.* In wrongful death cases, medical damages would be those incurred prior to the death. Therefore, in the case of a child, recovery of economic damages would be limited to those medical damages before death, as a child would not be able to recover for lost wages and earning capacity as in contemporary times children are not usually employed.

174. *See supra* notes 45–52 and accompanying text.

175. *See supra* notes 125–30 and accompanying text.

176. State *ex rel.* Diehl v. O'Malley, 95 S.W.3d 82, 87 (Mo. 2003) (en banc) ("An action for damages under the Missouri Human Rights Act seeks redress for an intentional wrong done to a person. It is a modern variant of claims for relief, called forms of action, known to

That is, their grief may be personal, but the actual "wrong" was inflicted on the now-deceased person. But this distinction appears to be drawn on barely colorable semantics; it is doubtful that anyone who has ever lost a loved one due to another's negligence will not feel they have been wronged. Nevertheless, this distinction was sufficient to pass muster for purposes of determining if a wrongful death claim was analogous to a common law claim to which the right attached, considering that it was widely held at common law that any action for injuries suffered died with the plaintiff.[177]

Moreover, according to the Majority and emphasized by Judge Fischer's concurrence, this distinction does not even matter and the reliance on *Diehl* is unfounded. Even if, as in *Diehl*, it was found that wrongful death was a common law claim to which the right to a jury trial attached, this still does not answer the question as to whether a legislatively-imposed cap on damages is unconstitutional. Judge Fischer made a strong argument for the "legislative override" of jury damages awards.[178] It is an approach that has been followed in some states and rejected by others.[179]

However, Judge Fischer's arguments, as they pertain to Missouri law, have a glaring flaw: they rely on Missouri Supreme Court cases that address the capping of punitive damages.[180] This is a crucial difference

the courts in 1820 for redress of wrongs done to a person."); *cf.* Dodson v. Ferrara, 491 S.W.3d 542, 557 (Mo. 2016) (en banc) (emphasis added) ("The father's recovery in *James* [the cause of action the dissent claimed is analogous to wrongful death] flowed from the impairment of his property rights . . . not from a tort claim based on the *personal injury* sustained by the son resulting in his death.").

177. *Actio personalis moritur cum persona* is the Latin common law maxim that translates to "a personal action dies with the person." *See* 12 AM. JUR. TRIALS 317, *supra* note 45.

178. FRIESEN, *supra* note 43, at 6–18.

179. It was followed by Missouri itself before *Watts* overruled *Adams*. *See* Adams v. Children's Mercy Hosp., 832 S.W.2d 898, 907 (Mo. 1992) (en banc) (finding cap did not infringe upon the right to jury trial because it was applied after the jury had completed its fact-finding task); *accord* Arbino v. Johnson & Johnson, 116 Ohio St. 3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶ 37 (holding facts are not ignored or replaced when the judge applied the cap to the jury's findings as a matter of law); Etheridge v. Med. Ctr. Hosps., 376 S.E.2d 525, 529 (Va. 1989) (finding application of cap was a matter of law and did not infringe on jury's fact finding). *But see* Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 164 (Ala. 1991) (finding damage assessments of Alabama juries are protected by constitutional guarantee); Smith v. Dep't of Ins., 507 So. 2d 1080, 1088–89 (Fla. 1987) (per curiam) (finding arbitrary cap on jury's determination of damage award prevented plaintiffs from receiving full benefit of constitutional right to a jury trial).

180. *Dodson*, 491 S.W.3d at 568–69 (Fischer & Wilson, JJ., concurring). The Concurrence cites to *Scott v. Blue Springs Ford Sales, Inc.*, 176 S.W.3d 140, 142 (Mo. 2005) (en banc) and *Estate of Overbey v. Chad Franklin Nat'l Auto Sales N., LLC*, 361 S.W.3d 364, 376 (Mo. 2012) (en banc) in support of the proposition that so long as the jury was allowed to

because courts have recognized punitive damages as fundamentally different than economic and noneconomic damages. While the latter pertain to a jury's assessment of damages inflicted on a plaintiff, punitive damages are not a question of fact and instead are used to serve the singular purpose of punishing a plaintiff.[181] Moreover, punitive damages are rarely assessed in medical malpractice claims; instead, they are prevalent in business contract and intentional tort cases.[182] Thus, Judge Fischer lumps the capping of punitive damages with those of noneconomic damages and overlooks the different nature and purposes of the different types of damages awards. While a cap limiting punitive damages may indeed be constitutional under the right to a jury trial provision, it does not speak to whether such caps are valid in regard to noneconomic damages. Indeed, it appears that question has already been answered by the Missouri Supreme Court, which may be the reason why Judge Fischer cited to cases capping punitive damages.[183]

Despite the questionable reasoning of the court to deny wrongful death plaintiffs the constitutional right to a jury trial, the Majority's conclusion was consistent with the court's prior decisions in *Sanders* and *Watts*. However, the shakiness of this reasoning should have been a factor in considering whether the section 538.210 cap violated equal protection. Indeed, Judge Draper's dissent argues that the court did not consider much in its upholding of the cap under a rational basis test and cites literature and other evidence warning against such a cap.[184] Other states have factored such evidence into their analyses, including Wisconsin and West Virginia.[185]

Reading the opinion, it is clear the Majority did not put much weight on the conflicting evidence, giving it only passing reference in its

determine the findings, application of the cap did not perturb those findings. However, both cases dealt with the jury assessing punitive damages and the application of a punitive damages cap.

181. *See Overbey*, 361 S.W.3d at 376 n.3 (internal citations omitted) (quoting Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 432, 437 (2001)) ("'[A] jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas, its imposition of punitive damages is an expression of its moral condemnation.' Therefore, unlike compensatory damages, 'which present a question of historical or predictive fact, the level of punitive damages is not really a "fact" "tried" by the jury.'"); *see also* Durrance, *supra* note 35, at 576.

182. Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623, 633 (1997).

183. *See* Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633, 636 (Mo. 2012) (en banc) (holding a noneconomic damages cap "unconstitutional to the extent that it infringes on the jury's constitutionally protected purpose of determining the amount of damages sustained by an injured party").

184. *Dodson*, 491 S.W.3d at 572 (Draper, J., dissenting).

185. *See supra* note 31 and accompanying text.

conclusion that any doubts regarding the existence of a medical crisis must be resolved in favor of the legislature.[186] Interestingly, the court cited the reasoning of the *Adams* decision when it first upheld the now thirty-year-old cap in 1992.[187] Thus, while Judge Draper cited more recent evidence and literature questioning the validity of a medical crisis to support the upholding of the cap, the Majority appeared to rely only on the precedent in *Adams*.[188]

This oversight is magnified considering at least one other court has considered the age of the statute as a reason for striking a cap, finding the crisis that had given rise to the legislatively imposed cap a decade earlier did not warrant the maintaining of the cap if the crisis was no longer ongoing.[189] Consequently, without even considering the medical crisis that the cap was intended to alleviate, the Majority upheld the two classes of plaintiffs created by the court's decisions in *Watts* and *Sanders*: personal injury plaintiffs who are not subject to the noneconomic damages cap and wrongful death plaintiffs who are. While such a distinction may be valid under a rational basis test if a medical crisis was indeed impacting the medical field, this classification of plaintiffs is improper if no crisis, i.e., a legitimate state interest, exists. Therefore, whether a medical crisis was still ongoing should have been given more weight by the Majority in upholding the cap against equal protection attack.

The Majority in *Dodson* appeared concerned only with its duty of judicial interpretation of a legislative act. This is not a criticism, and it is important for the judiciary to observe restraint when justice does not call for them to strike down a law. However, tort law is an area of law that has been shaped and developed predominantly by the common law, i.e., the judiciary.[190] And justifiably so, as judges, equipped with a uniquely balanced viewpoint within the tort system, are perhaps the most ideal to preside over such matters. Legislators, while capable of seeing the "big picture" and making determinations on broad legislative facts, cannot legislate individual cases and therefore face the difficult challenge of legislating damages awards for cases that often turn on facts and circumstances unique to each case. Jurors, on the other hand, see the individual circumstances but lack the "big picture" and therefore may

186. *Dodson*, 491 S.W.3d at 561 (citing Adams v. Children's Mercy Hosp., 832 S.W.2d 898, 904 (Mo. 1992) (en banc)).

187. *Id.*

188. *Id.* at 572 (Draper, J., dissenting).

189. *See* Ferdon ex rel. Petrucelli v. Wis. Patients Comp. Fund, 2005 WI 125, ¶¶ 113–14, 284 Wis. 2d 573, 701 N.W.2d 440, 468.

190. *See, e.g.*, SCHWARTZ ET AL., *supra* note 26, at 3–7.

give an unjustifiably large award, unaware of the repercussions on the tort and insurance systems in general.[191]

These considerations lead to the conclusion that judges may be the most ideal for dealing with these issues. Judges see individual cases, sometimes often, and do so with an awareness of their role in the grand scheme of things. Therefore, the idea that judges may be the best equipped to decide whether a cap that will arbitrarily limit damages awards is more efficient and more effective than a judge equipped with remittitur power, even if it is ultimately rejected in granting deference to the legislature, is one that warrants attention. Yet it was a consideration that was notably absent from all of the opinions in *Dodson*.[192]

VII. CONCLUSION

Ultimately, the role of the judiciary is to adjudicate, and that is what the Missouri Supreme Court did in upholding Missouri Revised Statutes section 538.210 in *Dodson v. Ferrara*. While the effectiveness of capping damages awarded by juries to alleviate purported crises in the medical field may be the subject of debate, it is not the role of the judiciary to substitute its wisdom for that of the legislature. Reasonable minds may differ, especially under a rational basis standard. While other courts may be convinced by evidence discrediting medical field crises legislators cite in the enactment of jury damages award caps, the court in Missouri was not sufficiently convinced to find that the section 538.210 damages cap was not advancing a legitimate state interest. As the court decided, there was indeed a legitimate state interest associated with the cap, and it was its duty to uphold section 538.210, provided it was rationally related to the purported state interest, no matter how unwise the court might consider the legislation.

However, plaintiffs in Missouri are likely to continue to attack the medical crisis that insurance lobbyists and legislators insist the state has a legitimate interest in curbing. Furthermore, the distinct treatment of personal injury and wrongful death plaintiffs in regards to the capping of their jury damages awards is unlikely to be upheld under heightened scrutiny or if the court becomes convinced by the evidence against the

191. LAYCOCK, *supra* note 2, at 166.

192. Perhaps this is due to the hostile relationship the Missouri judiciary has with remittitur, having abolished the common law doctrine of remittitur in *Firestone v. Crown Ctr. Redevelopment Corp.*, 693 S.W.2d 99, 110 (Mo. 1985) (en banc), *superseded by statute*, MO. ANN. STAT. § 537.068 (West 2008 & Supp. 2013). However, the power of remittitur has since been reinvested in the court by the legislature, making it clear that it is there for judges to control the size of jury awards if they are egregious. *See* MO. ANN. STAT. § 537.068 (West 2008 & Supp. 2013) (effective July 1, 1987) (Missouri remittitur statute).

existence of any medical crisis that would justify the curbing of plaintiffs' jury damages awards. Moreover, serious doubts remain as to whether wrongful death claims lack common law antecedents that deprive them of the right to a jury trial, or whether this is even a valid distinction upon which to draw a line to determine whether a plaintiff is entitled to a jury determination of damages free from hostile legislation. As Justice Holmes once observed, "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."[193] Thus, section 538.210 continues to be applied to wrongful death plaintiffs, but this is an issue that is likely to get another look in the near future.

193. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).