The Case for Eliminating the Cap on Damages For Loss of Consortium Claims in Wrongful Death Cases

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I. Introduction

The New Hampshire legislature is currently considering Senate Bill 462, which would amend RSA 556:12 to remove the cap on damages for loss of consortium claims in wrongful death cases.[2] As plaintiff's attorneys, we all have seen firsthand the disparate impact of the caps on recovery for damages to the familial relationship allowed for the spouses and children of persons killed by the negligence of another. This article will discuss the history of damage caps in New Hampshire, and it explain why we support eliminating this arbitrary limitation on recovery for loss of consortium claims in wrongful death cases.

II. History

Wrongful death claims did not exist at common law. They are creatures of statute, enacted by the legislature. RSA 556:12 has undergone many iterations since its enactment in 1887. Approximately 25 years ago, the legislature amended the wrongful death statute to add claims for surviving spouses and children to recover for their loss of familial relationship or loss of consortium. Unfortunately, by way of floor amendments, those claims were arbitrarily capped at $150,000 for spouses (1997) and $50,000 for children (1998). These caps have not been increased in 25 years to reflect inflation or societal changes. In fact, our Supreme Court when addressing an earlier cap on wrongful death recoveries and our Federal Court when addressing these caps observed that New Hampshire's "limitation death statute lies in the backwater of the modern stream" because the overwhelming majority of states have no caps on wrongful death damages and all of those who do have higher caps than our own.[3] Senate Bill 462 seeks to correct this arbitrary limitation.

To the best of our knowledge, the caps on recovery for loss of familial relationship in wrongful death claims are the only existing caps on tort damages on the books, other than the $475,000 cap on recovery of damages in tort claims brought against the State of New Hampshire or its municipalities, which recognizes a limited exception to sovereign immunity, and the $250,000/$1,000,000 cap on recovery of damages from a volunteer of a non-profit organization who harms another during his or her volunteer service, which recognizes volunteer immunity. All other caps sought to be imposed on tort claims in New Hampshire have been deemed unconstitutional by the New Hampshire Supreme Court, in violation of Part I, Article 14 of the New Hampshire Constitution.

In 1980, our Supreme Court struck down a $250,000 cap on non-economic damages for being unconstitutional in violation of our equal protection clause in its unanimous decision in *Carson v. Maurer*.[4] In so doing, it found that the right to recover for personal injuries is an important substantive right and any legislative limitation on that right must withstand intermediate scrutiny, meaning the limitation "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of legislation." The *Carson* Court found the non-economic damage cap to be arbitrary, precluding the most seriously injured victims of medical negligence from recovering full compensation for their injuries.[5] It noted that damage awards are a very small fraction of insurance premium costs and that damage awards rarely exceed $250,000 in New Hampshire, so the cap was unnecessary.[6] This has been our experience in practice as well.

The *Carson* Court recognized the difficulty for jurors in calculating damage awards for non-economic elements of damages due to a lack of a mathematical formula, but observed that our jury system works and if there ever is an excessive verdict, the remedy is a remittitur, or reduction of the verdict within the discretion of the trial judge.[7] The Court found that limiting damages precludes plaintiffs from recovering fully for their damages and "[s]ociety cannot escape its responsibility to provide justice simply by eliminating the rights of its citizens."[8] Since the *Carson* decision, our Supreme Court has consistently stricken down arbitrary statutory caps on damages such as the ones in this statute.

In 1991, the Court struck down an $875,000 cap on non-economic damages in tort cases in *Brannigan v. Usitalo*.[9] In so doing, the Court noted that even fewer tort plaintiffs will sustain non-economic losses of $875,000 than the $250,000 cap it struck down in *Carson*, stating: "It is even more unfair and unreasonable to impose the burden of supporting the insurance industry solely upon those who are even more severely injured and therefore in even more need of compensation."[10] The Court made clear that the *Carson* decision applied to the damage cap itself - - not just to a damage cap in medical malpractice cases, rather it applied to all claims for personal injuries.[11]

In 1999, the Court struck down the then existing $50,000 statutory cap on damages in wrongful death cases where the decedent died without dependents as unconstitutional, observing that the purpose of Part I, Article 14 of the New Hampshire Constitution is "to make civil remedies readily available and to guard against arbitrary and discriminatory infringements on access to the court.[12] While the Supreme Court has not had the chance to address the caps this amendment will eliminate, we submit that it would most likely follow its longstanding jurisprudence and find them unconstitutional as well.

Our Federal Court recently declined to apply New Hampshire damages law in a wrongful death case due to the lower damages cap being "outmoded" and not representing the state of modern times in our society.[13] The *Lacaillade* Court surveyed other state laws and found that, other than Maine and New Hampshire, no other New England state or New York imposed any limitation on damages in wrongful death cases. Maine and the limited number of other states around the country that did have damage caps were much higher than New Hampshire.

The *Lacaillade* court chose to apply Maine's damages law, which had a $500,000 cap for loss of consortium in wrongful death claims, holding:

> Given that the overwhelming majority of states impose no cap on damages in a wrongful death action, and those that do have generally set a higher cap than New Hampshire, the Court finds that Maine's wrongful death damages law is <u>better calculated to serve the total ends of justice than the competing law of New Hampshire</u>.[14]

At the time of that decision, in 2011, Maine's cap for loss of consortium damages for wrongful death claims was $500,000. In 2019, the Maine legislature amended its statute, increasing its consortium cap to $750,000 and the sky did not fall. In 2023, Maine amended its cap again, increasing it to $1,000,000 with annual increases for inflation, with no impact to the tort system in Maine and without the sky falling on businesses and insurers.

The reasons the sky did not fall when Maine increased its caps are most likely the same ones identified by our Supreme Court in <u>Carson</u> in1980:

1. The damage limitation on consortium claims in death cases is arbitrary.
2. Businesses already consider negligence claims when making insurance decisions, which include consortium claims for spouses of living plaintiffs.
3. Damage awards are a very small fraction of insurance premium costs.
4. Very few damage awards will ever even reach the cap.
5. There are far fewer wrongful death cases than negligence cases.
6. Juries do a good job following the law and issuing awards.
7. If a verdict is excessive, a judge has the discretion to reduce it.

In fact, testimony from insurance companies at the Maine legislature suggested that by eliminating or increasing the damage caps, more cases would settle out of court for existing policy limits and fewer cases would go to trial because insured businesses and people would not want to risk a higher verdict.

III. Argument

The testimony discussed above only confirms what our experience as trial lawyers has taught us: damages caps are bad for citizens, society, and for the civil justice system. Caps on damages undermine incentives to make society safer because they subsidize corporate negligence, since corporations that injure or kill citizens face no meaningful consequences for their actions. Caps on damages weaken the deterrent effect of tort law because they reduce the risk of liability to negligent actors. Caps only impact the worst injuries - - here the loss of a person's life and the loss of a spouse, mother, or father. Caps, especially in wrongful death cases which are largely based on economic losses to the estate, discriminate against people who are poor, disabled, elderly, or infants because they will not have the economic losses to justify pursuing a claim if they have no income that can be claimed as damages.

Caps on consortium claims in wrongful death cases also have a disparate impact on plaintiffs from consortium claims where a plaintiff survives, but is catastrophically and permanently injured, yet both plaintiffs' spouses are deprived of their familial relationship and spousal consortium. Why should a husband whose wife is rendered permanently comatose from a brain injury caused by negligence be able to be fully compensated by a jury for his loss when a husband whose wife is killed by negligence is limited to a capped $150,000 recovery? Whether or not the victim has died should have no bearing on the jury's assessment of value or award for loss of spousal consortium. The loss is the same, a jury would analyze it the same, and a jury would probably award the same damages. The difference is the judge is mandated by statute to reduce the verdict in the latter case to the legislatively imposed cap, thereby nullifying the jury's verdict.

Damage caps on consortium claims on wrongful death cases also most significantly impact the families who need it most and disparately impact the most vulnerable members of our society who are not able to participate in the workforce - - children, the elderly, the disabled, and homemakers. Damages in wrongful death cases are limited by statute to the economic losses incurred by the state, the conscious pain and suffering of the decedent, and the hedonic damages incurred by the loss of the decedent's life. When a decedent is a homemaker who does not work outside of the home, or elderly and retired, or catastrophically disabled and unable to work, the economic losses to the estate may be minimal, especially if the death is instantaneous and there is no conscious pain and suffering to be claimed. In such cases, the major loss to the estate is the loss of the relationship with the husband, wife, mother, or parent who was killed by someone else's negligence.

Another point to consider is New Hampshire's ever-changing economic landscape. 25 years ago, when these caps were enacted, an award of $50,000 to a child for the loss of his or her parent might have paid for the child's college education. Times and the cost of living have changed, however, and now that limitation would not even pay for a year of college for most children.

Finally, and most importantly, damage caps deprive plaintiffs of the sacred right to trial by jury afforded by our constitution. Jurors follow the law. Jurors take their job seriously. Jurors are the ones who should be evaluating and awarding damages in wrongful death cases—not the legislature. No one will dispute that we do not have runaway juries in New Hampshire. We also do not have frivolous civil claims in New Hampshire because it is cost prohibitive for plaintiffs to bring them and because New Hampshire lawyers value their reputations with the Courts and with opposing counsel. Our civil justice system has significant safeguards against frivolous claims and runaway juries. We need to trust our civil justice system to work as our constitution intended and eliminate damages caps in loss of familial relationship cases and all cases.

IV. Conclusion

SB 462 is extremely limited in scope. It does not create a new cause of action or new classes of plaintiffs. It does not require new elements of proof. It will not trigger new insurance policy limits and it does not require limits to increase because loss of consortium and loss of familial relationship claims are considered derivative of, and consequential to, the underlying negligence claim and part of that underlying cause of action.[15] This statutory amendment merely eliminates the arbitrary limitation on damages created by the cap and allows spouses and children to recover for the loss of their family member when that family member is taken away by the negligence of another. We hope that this bill will eliminate this arbitrary cap and allow juries to fully compensate families who suffer the loss of the consortium of their loved ones.

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Elie joined Abramson, Brown & Dugan in 2017 after graduating from Suffolk University Law School, where he served as an editor on the Suffolk University Law Review. Since then, Elie has represented numerous medical negligence victims and their families in cases involving catastrophic injuries and wrongful death. In addition to his practice, Elie serves on the New Hampshire Association for Justice's Board of Governors and Publications Committee. He is also the editor of the Verdicts and Settlements Report in the New Hampshire Trial Lawyer's Quarterly.

[2] https://legiscan.com/NH/text/SB462/id/2864230
[3] *See Maguire v. Exeter & Hampton Elec. Co.*, 114 N.H. 589, 592 (1974) (addressing $20,000 cap on damages for wrongful death claimants with no dependents); *Lacaillade v. Loignon Champ-Carr, Inc.*, 2011 U.S. Dist. LEXIS 116596 (DNH October 7, 2011) (DiClerico, J.).
[4] 120 N.H. 925 (1980).
[5] *Id.* at 941-942.
[6] *Id.*
[7] *Id.* at 942.
[8] *Id.* at 943.
[9] 134 N.H. 50 (1991).
[10] *Id.* at 58.
[11] *Id.* at 57.
[12] *See Trovato v. Deveau*, 143 N.H. 523, 525 (1999).
[13] *See Lacaillade*, 2011 US Dist. LEXIS 116596 *11.
[14] *Id.* at **12-13. (emphasis added).
[15] *See Guilfoy v. United Servs. Auto Assn.*, 153 N.H. 461, 464 (2006).