Hiding in Plain Sight— Catch-22 on Nondisclosure of Damages Caps to Jury

by: Donald Capparella

The wave of tort reform has crashed on Tennessee. On October 1, 2011, the Tennessee Civil Justice Act will go into effect.[1] Among its many new provisions is a $750,000 cap on non-economic damages in all personal injury cases, including auto accidents, medical malpractice—all injury cases.[2] But caps are old news. Also included is a lesser known but fascinatingly unworkable provision requiring non-disclosure of the damages cap to the jury.[3]

Many question the constitutionality of caps on non-economic damages. This article raises a different question—is the new law even workable in a practical sense, given the non-disclosure provision? How can we pick a jury in Tennessee in a personal injury case? Don't we have to ask the jury if they know about the new caps on damages in order to exclude jurors who know about the caps? But by asking the jury if they know, haven't we just disclosed to them what they are not supposed to know, thereby disqualifying all of them?

Some of you may be shaking your head at this point. The Legislature in its wisdom could not have created such an impossible Catch-22. Let's examine it. The Legislature has told us that "the limitation on the amount of non-economic damages imposed by subsections (a)(2) through (e) shall not be disclosed to the jury, but shall be applied by the court to any award of non-economic damages."[4] It is thus the public policy of this State that a juror sitting in a personal injury case should not know about the caps; else why is disclosure forbidden?

The lawyers for the parties and the trial judge certainly cannot disclose the existence of the caps to the jury. However, the statute does not limit non-disclosure just by the judge and the lawyers. It says the limitation on the amount of damages "shall not be disclosed to the jury." We must assume, then, that no one can disclose the existence of the damages caps to the jury. Therefore, it is important to know if somebody else may have disclosed to the jury that Tennessee has passed a law creating caps on damages.

Perhaps it was the newspaper that disclosed the caps to the proposed juror. After all, there was plenty of press coverage about tort reform, including the caps. Perhaps it was the television or radio, who also reported extensively on tort reform and the caps. Governor Bill Haslam campaigned on a platform listing tort reform as one of his primary goals for the State. Maybe potential jurors noticed all of the billboards listing the "577 jobs per week" that supposedly would be created by the passage of the Tennessee Civil Justice Act.

The law says that the caps cannot be disclosed to jurors, but what if the caps have already been disclosed? All potential jurors are also citizens of this State. And as citizens, they are presumed to know the law.[5] The non-disclosure provision seems to be mandating ignorance of the law.

The Tennessee Constitution states that "the right to trial by jury shall remain inviolate...."[6] The essential purpose of voir dire is "insure the selection of a fair, competent and impartial jury."[7] Tennessee Rule of Civil Procedure 47.01 and Tennessee Code Annotated Section 22-3-101 give parties an absolute right to examine prospective jurors. The non-disclosure provision in the Act tells us that the caps shall not be disclosed to the jury, presumably because the jury would be tainted by such knowledge.[8]

Therefore, we are faced with a riddle wrapped in mystery inside an enigma. How can we insure that a jury does not know about the caps without asking them, when asking them has the effect of disclosing the existence of the caps? The law requires us to voir dire a jury so that they are fair and impartial, but the new Act tells us that a jury cannot be told about the caps, for fear that they will be unfair and wrongly influenced by the caps. There is little doubt that knowledge of caps on damages significantly influence juries, though in ways that may be surprising.[9]

It is ironic that the same public law that adopts the $750,000 non-economic caps, a law available to everyone, also says that prospective jurors cannot be told about the new law. A public law restricting the public's knowledge of that same law would seem to be self-defeating. Any citizen with knowledge of the law, according to the statute, would not be qualified to serve on the jury.

The nondisclosure provision is not unique to Tennessee. The wave of tort reform has left other states in the same predicament, but strangely, very little has been written about this conundrum. Only two articles have discussed the nondisclosure provision regarding damages caps, with one of them arguing in favor of nondisclosure, while the other argues for disclosure.[10] A couple of states that have passed damages caps also include a provision preventing disclosure of those caps to the jury, while Massachusetts expressly allows disclosure.[11]

According to Kang, only one case has actually ruled on whether the nondisclosure provision itself is constitutional.[12] In *Murphy v. Edmonds*,[13] the Court of Appeals of Maryland "upheld a state cap on non-economic damages..." The Court also upheld, with very little discussion, the constitutionality of the nondisclosure provision. A few other cases have discussed nondisclosure laws, without ruling on either their constitutionality or whether they are workable.[14] However, there is very little written on the sheer unworkability of a provision that requires a jury not to know about a public law, and has been the subject of massive media campaigns.

Perhaps the first nondisclosure provision in a law capping damages is the 1991 Civil Rights Act.[15] It provides for caps on both punitive and compensatory damages in employment discrimination cases. It also provided that "the court shall not inform the jury of the limitations [on damages."].[16] The legislative history behind the adoption by Congress of the federal nondisclosure provision is murky.[17] The only comment by a legislator about the purpose of the provision was by Senator John Danforth, one of the Senate bill's co-sponsors, who said:

> The bill specifically provides that the jury shall not be informed of the existence or amount of the caps on damage awards. Thus, no pressure, upward or downward, will be exerted on the amount of jury awards by the existence of the statutory limitations.[18]

The concern of Senator Danforth is that knowledge of the caps by the jury could push them in either direction, either up or down. Presumably, both plaintiff and defense counsel would want to know if potential jurors have knowledge of the caps.

One could argue that the federal experience with caps in employment discrimination cases has lasted since 1991, so it can't really be that unworkable. However, employment discrimination cases usually involve both federal and state claims, and very often the state claims have no caps on damages for the same federal claims. In Tennessee, for example, there is no cap on damages under the Tennessee Human Rights Act even though there are caps for the corresponding claims under 42 U.S.C. Sec. 1981a. The existence of parallel state claims that are not capped can reduce the potential draconian impact of the federal caps on damages.

Federal courts are also allowed to reallocate damages between state and federal claims when the jury awards damages in excess of the federal caps. Thus, the jury's ultimate decision can be allowed by the Court by simply reallocating damages capped by federal law to uncapped state claims.[19] The ability of federal courts in employment discrimination cases to reallocate damages between federal and state claims allows the work of juries in many cases to escape the caps.

In my opinion, the primary reason why the unworkability of non-disclosure of caps provisions has not received more attention is that the publicity surrounding the tort reform movement has increased dramatically in the last twenty years since the 1991 Civil Rights Act was passed. More and more states have embraced caps on damages, though the caps are of different amounts and work differently in each state. There is a far greater chance that potential jurors know something about the caps.

Continued on Page 13 ➲

Continued from page 11

There is little question that tort reform and damages caps have a far higher profile than they did twenty years ago. One author arguing for the necessity of nondisclosure does so on the grounds that caps have a significant impact on juries when they know about them. The article states that "[t]oday, however, most citizens probably know little if anything about the caps. Undisclosed statutory caps operate outside the awareness of most jurors; jurors likely assume that the plaintiff will receive the award of damages that they assess." [20]

If that was ever true (the article was published in 1999) it is certainly no longer true, at least in Tennessee. In fact, the article acknowledges that "[t]his may change, however, as statutory caps become increasingly common and enter popular consciousness." That day has come. Candidate Bill Haslam received 1,041,545 votes in winning the race for governor of Tennessee. One of his top priorities in his campaign, and since he became Governor, has been tort reform. The current caps on damages are one of the most important parts of tort reform, and there was a spirited battle at the Legislature as to the size of the caps on damages. Any Google search on caps on damages in Tennessee results in multiple articles on the internet, and there have been multiple newspaper and radio and television reports about the Tennessee Civil Justice Act.

The Court in *Sasaki v. Class*[21] reversed a jury verdict because the plaintiff's attorney in closing argument told the jury only that it could award damages "up to $50,000."[22] There was no express mention of the caps on damages in that case. Thus, even hinting at the existence of caps is forbidden. It follows from cases like *Sasaki* that "jurors should not be informed of the caps, even by other members of the jury."[23] This is rightly called a "paradox: how could the court or attorneys discover which jurors had such knowledge and should be excluded without themselves revealing in some way that such caps exist?"[24]

What if we give each juror a questionnaire which they fill out in private? Won't that fix the problem? Let's ask them if they know anything about whether there are any limitations on damages in Tennessee. If they answer "Yes," they know something, they are disqualified. We can then pick the jury from those who are left. Ignorance is bliss.

This is still unworkable, because you would have to ask the question many different ways to have any chance of uncovering the forbidden knowledge. You would have to ask about damage caps, damage limits, explain the difference between non-economic damages and other kinds of caps in other types of cases. In doing so, you contaminate most of the jury just by asking them, even in private. Surely those who claim ignorance of the law would know something is up.

You might also miss someone who does not even know what they don't know, or does not understand the question. This would also skew the jury towards the least informed among us.[25] In addition, "jurors who have some knowledge of the law may be incorrect in their understandings."[26] The potential juror could have the wrong amount of the cap in mind, or have learned about a different sized cap from another state, or think it only applies to punitive damages. That person could then misinform the rest of the jury during deliberations.

It has been argued that not disclosing the caps to the jury threatens the "integrity" of the entire jury system.[27] Why? Lawyers and judges are required to withhold critical information from the jury. If the jury awards damages in excess of the caps, they may read in the paper the next day that the $3 Million Dollar verdict they reached for the plaintiff was substantially reduced. What about the jury who spends two days deliberating on whether to award $750,000 or $1.5 Million, only to find out later their deliberations were a waste of time. They will certainly feel their time and effort was disrespected.

In one real case, a jury's verdict of $8.6 Million Dollars was reduced by the federal cap on damages in employment cases to $300,000.[28] Someone might say, "good," the caps did their job to curb an excessive jury verdict. This begs the question of who should be deciding what is excessive and what is not. A jury hears the actual case and facts and reaches their judgment through deliberations. The legislature arbitrarily prejudges all future cases not knowing the actual facts, and says no reasonable jury can award more than $750,000 no matter what the facts are, no matter what the circumstances.

Rights like trial by jury are enshrined as constitutional rights because we don't want the vagaries of the electoral process to allow temporary political majorities to trample on such rights as trial by jury, freedom of speech or freedom of the press. The caps on jury verdicts have done just that—trampled on a constitutional right—the right to a trial by jury.

The additional provision that the caps on damages cannot be disclosed to the jury at all raises a different problem—it is unworkable. Keeping a jury in ignorance is impossible regarding the existence of a highly publicized public law creating caps on damages, especially in this modern age of Google. Trying to find out if potential jurors know about the caps without disclosing their existence is simply absurd.

I do not know how this dilemma will manifest itself going forward. Perhaps lawyers in trials will demand the right to ask potential jurors if they know about the caps on damages. This would bring the problem to a head, and the appellate courts, and most likely, the Supreme Court, will have to work it out. Until then, picking a fair and impartial jury in this day of caps on damages will be well nigh impossible.

Who says there is no harm in asking? In this case, the harm is in the asking--asking the jury if they know about the caps on damages. Isn't the decision to not disclose a public law to a jury like trying to hide something in plain sight? ■

Donald Capparella is a shareholder in the firm of Dodson, Parker, Behm & Capparella. He practices all types of civil litigation, especially business litigation, insurance matters, appeals and all types of tort cases.

(Endnotes)

[1] Pub. Ch. 501, H.B. No. 2008.

[2] TENN. CODE ANN. § 29-39-102 (a) (2) (2011).

[3] TENN. CODE ANN. § 29-39-102 (g) (2011).

[4] *Id.*

[5] *Bryan v. United States*, 524 U.S. 184, 194-96 (1998) (citing the "traditional rule that ignorance of the law is no excuse").

[6] Art. I, Sec. 6.

[7] 4 Tenn. Prac. Rules of Civil Procedure Ann. § 47:1 (4th Ed. 2011), citing *Danmole v. Wright*, 933 S.W.2d 484 (TENN. CT. APP. 1996).

[8] Michael S. Kang, *Don't Tell Juries About Statutory Damage Caps: The Merits Of Nondisclosure*, 66 U.Chi.L.Rev. 469 (1999); Rebecca Hollander-Blumoff & Matthew T. Bodie, *The Effect of Jury Ignorance About Damage Caps*, 90 IOWA L. REV. 1361 (2005).

[9] Both those arguing for and against disclosure of caps to juries make a persuasive case that knowledge of the caps does influence juries. See *supra* note 8. Such knowledge seems to increase verdicts in the less severe cases, and decrease them in the more severe ones.

[10] See *supra* note 8

[11] See Maryland, MD. CTS. & JUD PROC CODE ANN. § 11-108(d)(1) (2011); Colorado, COLO. REV. STAT. ANN. § 13-21-102.5(4) (2011). Two others allow the court to inform juries of the statutory limit. Massachusetts, MASS. ANN. LAWS ch 231, §. 60H (2011);

[12] Kang, 66 U.CHI.L.REV. at 476.

[13] 325 Md. 342, 601 A.2d 102,118 (1992).

[14] See Kang, *supra* note 12.

[15] 42 U.S.C. § 1981a(c)(2).

[16] Id.

[17] Hollander-Blumoff & Brodie, 90 IOWA L. REV. at 1367-69.

[18] 137 Cong.Rec. S15,484 (daily ed. Oct 30, 1991), reprinted in 1991 U.S.C.C.A.N 549, 602-03.

[19] See 90 IOWA L. REV. at 1374 n.91, listing several cases and stating that most courts have held that district courts have the power to reallocate a total damage award between state and federal claims. See *also Trentham v. Hidden Mountain Resorts, Inc.*, 2010 WL 2757190, *5 (E.D. Tenn. 2010). In *Trentham*, the jury awarded $65,586.00 in damages for pain and suffering, an amount in excess of the $50,000 federal cap on damages, among other damages awards. Upon motion, the District Court reapportioned the damages that were in excess of the cap to plaintiff's claim for age discrimination under the Tennessee Human Rights Act.

[20] Kang, U.CHI.L.REV. at 486.

[21] 92 F.3d 232, 235-36 (4th Cir. 1996).

[22] *Id. See also E.E.O.C v. E.M.C. Corp. of Mass*, No. 98-1517, 2000 WL 191819, at *19 (6th Cir. Feb. 8, 2000) (holding that counsel cannot mention caps to jury, but finding error was harmless because jury awarded damages equal to the statutory maximum).

[23] Hollander-Blumoff & Brodie, 90 Iowa L. Rev. at 1398 (citing *Sasaki*, 92 F.3d at 237).

[24] *Id.* at 1398.

[25] *Id.*

[26] *Id.*

[27] Id. at 1363, 1403.

[28] *Passantino v. Johnson & Johnson Consumer Products, Inc.*, 212 F.3d 493 (9th Cir. 2000).