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Right Sizing Nuclear Verdicts: Reforming Tort Litigation in Texas

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In the late 1990s and early 2000s, Texas was the beneficiary of sweeping tort reform legislation, particularly in medical malpractice cases. The Medical Malpractice and Tort Reform Act of 2003 capped damages for those alleging medical malpractice against their physicians, including a $250,000 cap on noneconomic damages (like pain and suffering). Now, over 20 years later, it is evident the legislation accomplished its goal of curbing the increasingly volatile verdicts in medical malpractice cases and stemming the flow of qualified physicians from leaving the state.

Now, legislators are turning to personal injury and wrongful death cases, which have seen explosive, so-called "nuclear" verdicts in recent years. In fact, Texas is a leading state for nuclear verdicts, with over 200 verdicts totaling more than $45 billion between 2009 and 2023. Perhaps most perplexing of them all is the *Werner* verdict: In 2018, Werner Enterprises was hit with a $100 million verdict in a wrongful death case in which the decedent veered over the center line of the highway to impact the Werner vehicle. Yet the *Werner* verdict isn't the worst among them: other nuclear verdicts in Texas routinely land in the hundreds of millions of dollars, even into the billions.

Whereas plaintiffs' personal injury lawyers tout these verdicts as justice delivered fairly compensating plaintiffs for their injuries and losses, the negative repercussions of these verdicts to Texas cannot be understated. Nuclear verdicts have direct impacts on consumer prices (they increase insurance premiums), leading some businesses to reconsider whether operating in Texas is worth the risk of litigation for simple negligence, somehow spun into a story of corporate greed and malfeasance.

Though there are signs the Texas Supreme Court is beginning to exact closer scrutiny on these outsized verdicts, the process has been slow. Enter the Texas legislature. HB4806, introduced and filed by Rep. Greg Bonnen (R-Friendswood), seeks to do for personal injury and wrongful death litigation what the Medical Malpractice and Tort Reform Act of 2003 did for medical malpractice litigation. HB4806 primarily addresses the two drivers of nuclear verdicts: (1) future economic damages (*i.e.*, future medical expenses); and (2) noneconomic damages, which by nature are challenging to quantify.

As to future economic damages, HB4806 proposes to require the same evidentiary standards as should be imposed on past economic damages. In other words, whereas past medical expenses must be established as reasonable and necessary, so too should future economic damages. In fact, HB4806 specifies that future medical expenses must be established through admissible evidence and expert testimony that incorporates verifiable market data of the costs of reasonable and necessary future medical expenses. In practice, this would significantly curb the rise of "life care plans." Hawked by so-called experts, life care plans outline future medical expenses totaling hundreds of thousands – even millions of – dollars, including everything from over-the-counter medications (like Tylenol) to medical devices (like TENS units) to treatments (like water-based therapies). These plans are offered to the jurors as recommendations, despite evidence reflecting the plaintiff no longer relies on pain management medication, medical devices, or treatments.

As to past and future noneconomic damages, HB4806 revises the definitions of noneconomic damages to include greater specificity, ensuring jurors are not left to imagine what could possibly be included in phrases as

broad as "pain and suffering." This is significant insofar as noneconomic damages, in particular, are the avenues by which most verdicts "go nuclear." By injecting greater specificity into the definition of the damages element, it is far easier for trial and appellate courts to determine whether there is sufficient (or any) evidence in the record warranting submission of the damages element to the jury in the first place.

HB4806 also limits the nature of unsubstantiated arguments plaintiffs' attorneys can rely on to anchor the jury to outsized verdicts award, *e.g.*, the costs of fighter jets and Monet paintings or the concept of $0.01 per mile driven.

Finally, HB4806 caps noneconomic damages in a meaningful way, capping: (1) past and future mental or emotional anguish damages in wrongful death cases to $1 million; (2) past and future physical pain and suffering at the lesser of three-times past and future health care expenses or $100,000 per year of the individual's life expectancy; (3) past and future mental or emotional anguish damages in emotional injury cases to $1 million; and (4) past and future mental or emotional anguish damages in personal injury cases to $250,000.

Plaintiffs' attorneys are quick to agree that valuing noneconomic damages is challenging, impossible even. And – so they argue – the determination should be left exclusively within the province of the jury. Yet this position completely disregards the psychological and emotional manipulation plaintiffs' attorneys have developed over the years and deployed with great success, all at the expense of the broader public, who is left paying the verdict through increased consumer prices and insurance premiums.

There is no shortage of lobbying against HB4806, and it remains unclear whether the proposed bill will gain any traction in the 89th Legislature. If it does, it will be a positive step forward for a long overdue rebalancing of interests in personal injury and wrongful death litigation in Texas.

Our team will continue monitoring HB4806 and similar legislation progressing during this legislative term and will provide updates at critical junctures. To discuss how this could impact your litigation defense strategies in Texas, please reach out to Kimberly A. Chojnacki or any member of Baker Donelson's Houston office.