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PERSPECTIVE

Another nail in the coffin for MICRA

By Bruce M. Brusavich

Last year the U.S. Supreme Court decided *Timbs v. Indiana*, 139 S. Ct. 682 (2019), which held that the excessive fines clause of the Eighth Amendment was incorporated or applicable to the states through the due process clause of the 14th Amendment. I co-authored, with constitutional attorney Robert S. Peck of the Center for Constitutional Law in Washington D.C., a guest column here explaining how this decision supported the rationale that the Seventh Amendment right to a jury trial was also incorporated and therefore applicable to the states. This meant that the damage caps of MICRA could not survive ("MICRA can't survive *Timbs*"), Daily Journal, Feb. 26, 2019).

At oral argument in *Timbs*, Justice Neil Gorsuch belittled the position taken by the Indiana solicitor general that the Bill of Rights were not already incorporated through the 14th Amendment when he questioned "Most of the incorporation cases took place in like the 1940s, and here we are in 2018 still litigating incorporation of the Bill of Rights. Really? Come on, General."

Recently, the U.S. Supreme Court held that the Sixth Amendment right to a unanimous jury verdict of guilt for serious crimes was also applicable to the states through the 14th Amendment due process clause. *Ramos v. Louisiana*, 2020 DJDAR 3504 (April 20, 2020). Ramos was convicted of a serious crime in Louisiana by a vote of 10 to 2. At the time, Oregon was the only other state that allowed for non-unanimous jury verdicts to convict a person of a serious crime.

Like he did in the *Timbs* case, Justice Clarence Thomas wrote a concurring opinion in *Ramos* agreeing with the result, but taking the position the Sixth Amendment should more properly be incorporated and applied to the states through the privileges and immunities clause of the 14th Amendment. The privileges and immunities clause provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

With the incorporation of the Eighth Amendment in *Timbs* and Sixth Amendment in *Ramos*, the only Bill of Rights the Supreme Court has not yet specifically addressed is the Third Amendment prohibition on citizens being required to quarter troops, the Fifth Amendment requiring indictment by a grand jury, and the Seventh Amendment right to a jury trial. If there was any doubt after *Timbs* that the majority of the Supreme Court believed that the entire Bill of Rights have already been incorporated through more than 100 years of U.S. Supreme Court precedent, it would seem inconceivable that the Sixth Amendment right to a jury trial by unanimous verdict is incorporated but the Seventh Amendment right to trial by jury is not.

The majority opinion authored by Justice Gorsuch details the history of the right to a unanimous jury verdict of guilt going back to 14th century English common law. The common law right to trial by jury, which was one of the most important rights recognized by our Founders and is the only provision in the Bill of Rights which *every state* petitioned to be included in the Bill of Rights, has a long history, dating back 50 years before the Magna Carta to the time of King Henry II (1154-1189). After a brutal civil war, King Henry II was restructuring the government and wanted to provide assurances to the people that they would share in governance, particularly with respect to trials being conducted by their peers.

In 1975 Traveler's Insurance Company and Argonaut Insurance Company threatened doctors that their malpractice insurance premiums would be increasing by 486% and 350%, respectfully. The first-term, 36-year-old governor panicked and called for a special session of the Legislature to be convened to deal with the "crisis" as doctors were threatening to leave the state. When Gov. Jerry Brown signed the package of reforms known as the Medical Injury Compensation Reform Act, or MICRA, medical malpractice victims found themselves victimized again by this legislation which, among other things, imposed a one-size-fits-all cap of $250,000 on non-economic damages. Not passed by the Legislature were a series of proposals to do something about malpracticing doctors who maim and kill their patients with impunity. Medical errors now constitute the third leading cause of death, according to a recent study at John Hopkins Medical Center authored by Martin Makary, M.D. and Michael Daniel, M.D. published in the British Medical Journal.

As set forth in a law review article detailing the creation of MICRA in Sacramento, the author found an unsigned veto message in the legal files left by Brown which stated that the bill "did not deal effectively with the problem of the negligent practitioner, without whom there would be no malpractice crisis... [The bill fail [ed] to provide added disciplinary powers which are needed to protect the consumers of California from malpractice." Amanda Edwards, "Medical malpractice non-economic damage caps," Harvard Law Journal on Legislation Vol. 43 Number 1, Winter 2006.

The fallacy of the medical malpractice "crisis" in 1975 was confirmed six years later when Traveler's Insurance Company agreed to resolve a lawsuit filed by 5,500 Southern California doctors, agreeing to refund up to $50 million dollars in overcharged medical malpractice premiums. The doctors had established that there was no increase in medical malpractice lawsuits or payouts that justified the premium increases. S.D. Diamond and Harry Nelson, "Doctors will get refund on insurance - firm agrees to repay

possibly $50 million dollars for overcharges," Los Angeles Times Orange County Edition, Feb. 6, 1981. In 1985 the California Supreme Court, with a number of justices having been appointed by Brown, upheld the constitutionality of MICRA finding legislative interference in the determination of the non-economic damages by a jury a legitimate legislative action in response to a "crisis" in medical malpractice insurance under the rational relationship standard of a due process analysis. *Fein v. Permanente Medical Group*, 38 Cal. 3d 137 (1985).

In 1993, Brown was quoted as saying that it had become clear that rising malpractice insurance premiums were the result of "insurance company avarice" and not, as the insurance industry claimed in the 1970s, soaring legal costs. He also admitted that the law "has revealed itself to have an arbitrary and cruel affect upon the victims of malpractice. David Lazarus, "An issue potentially enough to divide Brown and Nader; the malpractice damage cap," Los Angeles Times, Aug. 7, 2015. As Amanda Edwards noted in her law review article, MICRA has a disparate impact on women and minorities, since they tend to earn less and therefore have smaller economic damage claims.

Despite having another eight years as governor from 2011 to 2018, Brown failed to lift a finger to address the injustice of the MICRA he had created and then admitted was unjust and unnecessary. While raising hundreds of millions of dollars, including money from the medical- hospital-big pharma industries, for his elections and pet projects like the bullet train, he did nothing to encourage the repeal or modernization of MICRA.

With a Legislature in the grip of the medical industrial complex, consumers and their attorneys placed an initiative on the 2014 statewide ballot, Proposition 46, which would have at least adjusted the MICRA cap for inflation to approximately $1.1 million dollars. The medical industry spent $60 million dollars to defeat the measure during a historically low voter turnout. Therefore, it is up to the courts to address the unconstitutionality of MICRA under the Seventh Amendment right to jury trial as incorporated by the 14th Amendment.

Addressing the issue determined by the California Supreme Court in *Fein* that the Legislature was within its purview to enact MICRA, conservative, pro-constitutional supporters of justices like Gorsuch should be proud of his eloquent dismissal of such a notion in *Ramos*. "All this [Lousisiana's numerous claims as to why it would be impractical to ban non-unanimous jury verdicts now] overlooks the fact that, at the time of the Sixth Amendment's adoption, the right to a trial by jury *included* a right to a unanimous verdict. When the American people chose to enshrine that right in the Constitution, they weren't suggesting fruitful topics for future cost-benefit analysis. They were seeking to ensure that their children's children would enjoy the same hard-won liberty they enjoyed. As Judges, it is not our role to reassess whether the right to a unanimous jury is "important enough" to retain. With humility, we must accept that this right may serve purposes evading our current notice. We are entrusted to preserve and protect that liberty, not balance it away aided by no more than social statistics."

Justice Samuel Alito wrote a dissent in *Ramos* joined by Chief Justice John Roberts and Justice Elena Kagan, relying on the doctrine of stare decisis based upon the decision in *Apodaca v. Oregon*, 406 U.S. 404 (1972), in which a fractured court upheld Oregon's use of non-unanimous verdicts in state criminal trials. No such obstacle would confront the court when it is eventually asked to find the Seventh Amendment right to trial by jury applicable to the states. Although the California Supreme Court has never examined the constitutionality of MICRA under California's own "right to a jury trial", incorporation of the Seventh Amendment by the U.S. Supreme Court would be binding upon our courts. U.S. Supreme Court case law, at least since *Kennon v. Gilmer*, 131 U.S. 22, 29-30 (1889), recognizes that compensatory damages are in fact within the sole province of the jury to determine.

In *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998), a case argued by Chief Justice Roberts while he was still in private practice, the defense argued that the jury's responsibility had ceased upon verdict and there was no "right to a jury determination on the amount of the award." In the opinion written by Justice Thomas, the Supreme Court rejected that argument and stated that "if a party still demands, a jury must determine the actual amount of...damages" and the Seventh Amendment "includes the right to have a jury determine the amount of...damages." Any other amount, the court further held, failed to preserve the jury-trial right.

A new constitutional attack of MICRA, including a violation of the Seventh Amendment right to trial by jury, was to have begun on March 18 in the Los Angeles County Superior Court with the case of *Maisy Hernandez, et al. v. John P. Cardin, Jr., M.D.*, BC637928. The court has already signed an order bifurcating the MICRA affirmative defenses to be the subject of a bench trial on the constitutionality of MICRA following a successful plaintiff's verdict. The trial date was vacated due to the COVID-19 pandemic and court closure, so the injustice of MICRA will continue a little longer for Maisy and other malpractice victims but the day will surely come when the Seventh Amendment will be recognized as incorporated and applicable to the states through the 14th Amendment, striking down MICRA as a forbidden infringement on the right to trial by jury. ■

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