



## Sweeping Legislation Rewrites Rules for Injured Texans

# Measure to Cap Damages Has Far-Reaching Effects

When the curtain came down on the 78<sup>th</sup> legislative session on June 2, the final gavel marked the last-minute passage of the mega House Bill CSHB 4, a massive attack on the civil justice system. The long dispute over limits of damages for pain and suffering ended, finally, not with a bang but with a whimper of compromise.

Called by political proponents "a monumental and model tort reform package," the 11<sup>th</sup> hour deal placed a cap of \$250,000 for all doctors or nurses individually named in a lawsuit. A second \$250,000 cap would apply to a hospital or nursing home sued. A third \$250,000 in damages would be available if more than one health care institution was named in the case.

**On the surface, it appears that in a case with more than one health care institution involved, a plaintiff could be awarded up to \$750,000. In actuality, the probability of a case in which two medical facilities could be sued is rare, so the cap on damages effectively is \$500,000, not \$750,000. That is a compromise between the House version of the bill which limited noneconomic damages to \$250,000 and the Senate version which proposed caps of \$750,000 in cases with multiple defendants.**

An issue marked by controversy since its inception, HB 4 received high priority on the 78<sup>th</sup> legislative agenda. The author of the manipulative measure to undermine the rights, safety and well being of Texas families and small businesses, Rep. Joe Nixon, R- Houston guaranteed an intense floor fight in his strong-arm decision in a private committee meeting to combine the extremely controversial "tort reform" measure (the original HB 4) with the much more popular and officially emergency medical malpractice reform legislation (HB 3). Using the so-called "medical liability insurance crisis" as an opportunity to cap damages in all lawsuits, the combined bill, representing the interests of the medical and insurance industries, was ramrodded through a full House already primed to approve medical malpractice reform.

### What Nixon's "Justification" of Devious Move Overlooked

The author of HB 4, declaring political war on opponents of "tort reform," introduced the combined bill with the statement that "Texas faces a general environment of excessive litigation."

**If this claim is true, why has the number of new personal injury-type civil cases filed from 1990-2000 decreased 58 percent in Texas?**

[Texas Judicial System Annual Reports, Office of Court Administration, State of Texas]

**Why are the role and frequency of class actions in Texas state courts below the national average and currently diminishing?**

[G. Miller, Class Actions in the Gulf South, Empirical Analysis of a Cultural Stereotype, 74 Tul L. Rev. 1655 (2000)]

**Why are Texans more concerned with the budget crisis, skyrocketing homeowners insurance and school finance than overhauling the justice system?**

[Results of poll commissioned by Texas Trial Lawyers Association, 4/16/2003]

### Broad Rewrite of Civil Justice Laws Adds Insult to Injury for Texans

A giant step backward for anyone harmed by corporate or medical negligence, the civil liability measure places an arbitrary limit on the value of life, while taking away a jury's

right to determine a fair award in each and every individual case. **In a medical malpractice case, if a loved one is killed by medical negligence, the intangible loss to the family is worth \$250,000.** The cap is just one part of the sweeping legislation, which rewrites the rules for how and when Texans can file lawsuits if they are injured by faulty products, inadequately tested medicines or incompetent doctors, allowing companies and manufacturers to argue that they are not responsible if their products meet minimum

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## Voters to Decide Amendment Fate on September 13

The recently-legislated House Bill 4's challenge to Article I, Section 13 of the Texas Constitution will be put to a voter test on **September 13**. This article, called the "open courts" provision, and Section 19, guarantee of due process, have preserved the rights of Texas plaintiffs to a remedy by due course of law since the first Constitution of Texas as a sovereign republic.

The numerous court decisions upholding the open courts provision and due process guarantee have construed that the legislature has no power to restrict or limit access to the courts.

On September 13, voters will be asked to approve House Joint Resolution 3, the proposed amendment to the open courts provision that would allow the legislature to determine what rights we have or don't have at the court house, including caps on damages but not limited to medical malpractice.

Passage of this controversial and possibly unconstitutional amendment would give lawmakers the explicit power to cap noneconomic damages in malpractice and other suits, including wrongful death.

The choice of a fall election date, a time of historically low voter turnout, is, in itself, a political ploy, calculated to ensure that the fewest number of voters will decide the fate of a crucial amendment affecting all Texans, and costing cities an estimated \$9 million statewide.

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## Bill To Change Texas Way of Selecting Judges Fails

The chance to change control of the Texas judiciary was left in limbo at the June adjournment of the 78<sup>th</sup> legislative session. Voters will not have the opportunity to trade in Texas' judicial selection system, because SJR33, passed by the full Senate on April 28 and sent to the House Committee on Judicial Affairs, never moved beyond that point.

The proposed constitutional amendment allowing the governor to appoint judges, with confirmation of a Senate majority and a non-partisan retention election at the end of each judge's appointed term, applied to the Texas Supreme Court, the Court of Criminal Appeals, intermediate appeals courts, state district courts and family and probate courts.

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# AMA MISINFORMATION, DEFAMATORY CLAIM UNDERSCORES NEED FOR VIGILANT VOTERS TO PROTECT RIGHTS OF INJURED

President-elect of the 300,000 member American Medical Association, Dr. Donald J. Palmisano, high profile spokesman for change in malpractice tort laws, misrepresented, on national TV, damages received by a California child victim of medical negligence. Palmisano claimed on Jim Lehrer's *NewsHour* that "\$42 million was given to that child."

**In truth, "that child," blind and brain damaged, eventually received less than \$2 million, amounting to little more than \$4000 a year for his lifetime of medical care and other costs.**

Now 12, Steven Olsen fell on a stick when he was 2. At the hospital, he was pumped

up with steroids and sent home with a growing brain abscess. Three times his parents took him back to the doctor and asked for a CAT scan. Three times their request was denied and he returned to the hospital, comatose. At trial, medical experts testified that had he received the \$800 CAT scan, which would have detected a growing brain mass, he would have his sight and be perfectly healthy today.

Steven's parents called on Palmisano to issue a correction to his inflated and defamatory claim: "Steven has been victimized by the medical system, the tilting of the scales of justice in the tort system, and now by you and the organization you represent.

We request that your correction and apology be to *NewsHour* by January 31 [2003] in order to set the record straight before Congressional debate [on a national malpractice damage cap] begins."

**Palmisano never responded. Neither did the AMA apologize for misinformation but did remove the statement on their web site about Steven—a tacit admission of wrongdoing.**

The next president of AMA, also a lawyer and founder of Intrepid Resources, a company that advises physicians how to limit malpractice claims and avoid resulting losses, directs a customized program to "provide complete independent risk management and claims-handling services." Palmisano has drawn criticism from some members of the medical community for a reference in his *Primer of Malpractice Law* to the legal "low hurdle" for doctors. "Although the physician may aspire to give the best care, the law does not require the best," Palmisano responded, and "the law requires a minimally acceptable level of care, thus my analogy to the 'low hurdle.'"

Steven's legal fees and court costs, following numerous defense delay tactics and appeals, were \$914,000. The jury supplemented this amount with \$7.1 million in non-economic damages for his avoidable life of darkness and suffering. Because of California's cap on non-economic damages, the judge reduced this to \$250,000, a cap that Palmisano and the AMA recommended for the nation.

"When he went into the hospital [10 years ago], no one asked his party affiliation," Kathy Olsen says of her son, who, because he must be watched constantly, necessitated her leaving her job. "He was a casualty of the system. Which lawmakers were looking out for him?"

We elect representatives to set policy. Today, we are seeing that policy controlled by the Palmisanos of this country who have given lawmakers free reign to limit all damages. Our only recourse in protecting the rights of all those harmed by medical negligence is to vote—if given the opportunity—**against** any proposal, issue or amendment that would destroy those rights and **for** the Steven Olsens of this country who will never vote in an election.

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## As I Live and Learn

### RIGHT TO SUE IS "HIGHEST PRIVILEGE" OF AMERICAN CITIZENSHIP

I cannot count the times that potential clients, in describing the events that bring them to my office, have prefaced their comments with the same statement: "I'm not one of those people..."

I've heard it so often that I can finish the sentence for them. They are humbled, uncertain and practically apologetic, so instilled is the impression that it's **wrong** to sue.

Recently, I had the opportunity to experience a momentous event in which a friend and distinguished lawyer received a lifetime achievement award. Accepting the honor, he cited a passage from a case decided by our Supreme Court in 1907, and it struck me that the language is timeless and its intent as appropriate today as it was nearly a century ago in reminding us of the importance of the right to sue.

The case was *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142. Mr. Chambers was killed in a railroad accident in Pennsylvania where he and his family lived. Mrs. Chambers sued for his wrongful death in Ohio, the principal place of business of the railroad. A trial resulted in a verdict of \$3,000. The case was appealed to the Ohio Supreme Court, where the railroad contended that by the applicable Ohio statute, since Mr. Chambers was not a citizen of Ohio, his widow could not bring a lawsuit for his death that occurred in Pennsylvania. The Ohio Supreme Court agreed and reversed the decision. An appeal was accepted by the United States Supreme Court. The federal question was Article 4, section 2, which declares that

"the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." The majority opinion was written by Justice Moody:

**"In the decision of the merits of the case there are some fundamental principles which are of controlling effect. The right to sue and defend in the courts is the alternative to force. In an organized society it is the right conservative of all other rights and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each State to the citizens of all other States to the precise extent that it is allowed of its own citizens. Equality of treatment in this respect is not left to depend upon comity between the States, but is granted and protected by the Federal Constitution."**

Although the court affirmed the Ohio Supreme Court, even Justice Harlan in his dissent agreed with the principle at issue, in its eloquent expression by Justice Moody.

The constitutional protection of an American citizen's right to sue is still a *living* principle, an *essential* privilege. What a regressive reflection of our society that there are those who would degrade and deny that right. The evolution of their efforts is sadly revealed not only in my clients' need to qualify "I'm not one of those people," but in the countless injured who never take legitimate action, fearing the *stigma* popularly attached to seeking justice!



Kari Todd on the job as crossing guard at Brookside Intermediate School



Four generations of the Todd family are represented at a Memorial Day gathering at the Friendswood home of Alton C. Todd, shown above with granddaughter Avery, his parents Lucille and Ruel Todd, and daughter Jennifer, holding Presley

## Births, Marriage, Moves, Job Changes Mark Life Changing Events in Todd Family

On January 25, one of Alton C. Todd's twin sons, Michael, was married in Las Vegas to Rhonda Rivas of Friendswood. The newlyweds are now residing in League City. Mike works in petroleum land services in the company founded with his brother Matt, TNT (Todd and Todd) Land and Minerals, Inc.

On February 19, Alton Todd became a grandfather of twins. Avery Christine and

### ALT-RUISM

**"The more corrupt the state, the more numerous the laws."**

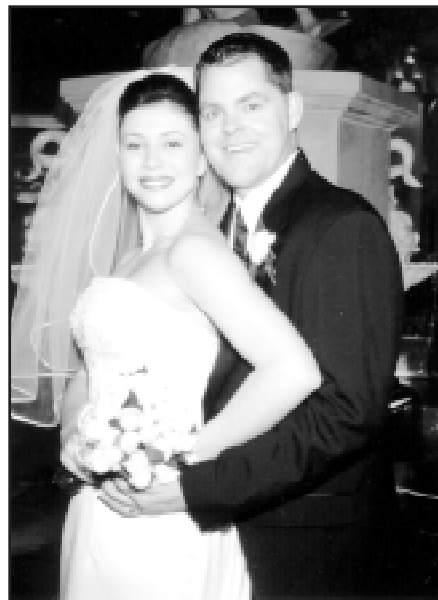
[Tacitus, Roman senator and historian c.55-c.177AD].

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Presley Anne, whose combined birth weights were about 5 lbs., went home with parents Chris and Jennifer Todd Evans on April 28, each weighing more than 5 lbs. An excellent obstetrician, the miracles of modern medicine and the personal professional attention received at Clear Lake Regional Medical Center kept them thriving until the preemies' release near their actual due date. Their father is a pilot for Southwest Airlines and Jennifer, now a busy stay-at-home mom, a flight attendant with Southwest.



Michael Todd and the former Rhonda Rivas wed in Las Vegas on January 25, 2003

On March 1, Todd's parents Lucille and Ruel Todd moved from Hamilton, TX to the Village on the Park, 400 E. Parkwood Avenue, assisted living facility in Friendswood, located about a mile away from the Todd residence and closer to several grandchildren. While the senior Todds miss their home and many friends in Hamilton, they feel comfortable in making this important move at this time in their lives. Mr. Todd celebrated his 86<sup>th</sup> birthday on June 6.

In late April, Attorney Jeff Todd accepted a job offer with the Galveston firm of Greer, Herz and Adams and is based in the South Shore office in League City. Jeff and his wife Dana, who was recently admitted to the Texas bar, moved from Atlanta, where Jeff worked in the legal department of Delta Airlines, while Dana earned her Juris Doctorate at Emory University School of Law. Jeff, a Seton Hall University School of Law graduate, began his legal career in Washington, D.C. after passing the bar in New York. He was admitted to the Texas bar November 1, 2000, and both Jeff and Dana have passed the bar in New Jersey and Georgia.

Daughter Kari Todd, Friendswood resident, has enjoyed a new position this year as crossing guard at Brookside Intermediate of the Clear Creek Independent School District.

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## Senate Bill Fails To Change Judicial Selection System

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Although sponsored by Sen. Robert Duncan, R-Lubbock, and favored by Texas Supreme Court Chief Justice Tom Phillips, also a Republican, the Texas Republican party and chairwoman, Susan Weddington, didn't like the proposal. Republicans currently hold all of Texas' statewide elected offices and have made advances in judicial races throughout the state.

Judicial election reform is not only a divisive issue within the GOP but is a tough topic to win bipartisan support. The argument by either party that the proposal would take away voters' right to choose their judges (most of whom most voters know nothing about) is a faulty one in that the retention elections would give the electorate a continuing voice in the process.

The need to change the partisan campaign and judicial election system in Texas is a cause championed by Texans for Public Justice, who recently published results of a year-long study, showing that incumbent justices on the state's 14 intermediate appellate courts took 72 percent of their campaign money from lawyers, some of whom may have had cases pending before the very judges soliciting donations. The report noted an even heavier percentage of lawyer donations to lower appellate courts.

While the general population would likely agree that a judiciary dependent on the Bar is a flawed system, some justices say (as if to condone the generous donations received from lawyers) that few people, other than attorneys, are interested in judicial elections. That may be true, but voters won't get the chance to confirm or disprove that claim, not this year.

## Damage Cap Bill Has Far-Reaching Effects

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safety standards. In particular, drug manufacturers often would be shielded from liability for selling medicines that comply with federal Food and Drug Administration guidelines. Federal product standards are limiting at best, often drafted by industries themselves, which don't cover all aspects of safety, and almost never address the foreseeable life of a product.

The bill also creates incentives to entice more and earlier settlements of lawsuits, giving defendants more freedom to blame others for an injury if a case does go to trial.

House provisions that would have forced medical malpractice insurers to lower their rates after the damage awards take effect were removed in the Senate version by committee Chairman Bill Ratliff, R-Mount Pleasant, who expressed concern about the constitutionality of inserting insurance reform provisions into a law that was otherwise aimed at lawsuit reform. Ratliff rationalized that since the medical malpractice insurance problem was "the most critical symptom of a general tort law problem...if we fix the basic tort problem, insurance will balance itself."

**Ratliff's conclusion assumes a perfect world. In reality, states with caps saw insurance premiums for medical malpractice coverage rise 48 percent between 1991 and 2002, compared to 36 percent escalation in states without caps on non-economic damages.** [Study released June 2003 by Weiss Ratings, independent insurance-rating agency, Palm Beach Gardens, FL]

The Senate version also modified protections the House bill offered to manufacturers and retailers of defective products and altered a provision that would penalize a plaintiff

who rejected a defendant's settlement offer to provide some risk for a defendant who refuses a plaintiff's offer to settle. But, Ratliff included a novel provision to limit lawyer fees in class-action lawsuits that net only minimal awards for their clients. If class members get coupon awards, attorneys would also be paid in coupons, the bill, as approved, stipulates.

### Texans' Nightmare Is Insurance Companies' Dream

Most of the provisions of HB 4 become effective July 1, following the governor's signing-into-law one of the most radical and far-reaching pieces of legislation in Texas history. The overweight, unbalanced bill does not address the high numbers of medical errors that occur each year across the state. It does not increase the power of the Texas Board of Medical Examiners to discipline bad doctors. It does not address the issue of increasing medical liability insurance premiums or protect good doctors from these increased costs. And, oddly, it does not place caps on a corporation's damages against another corporation!

A measure that further strips away the rights of Texans by limiting their access to the civil justice system, HB4 is a dream come true for insurance companies, giving them legal sanction to minimize the consequences of mistakes and abuses caused by their policyholders, while not reducing rates.

### CLOSING STATEMENT

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Thank you for the opportunity to represent  
your interest and for recommending  
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