

A Law Too Constitutional to Enforce, Too Doubtful to Defend

by Cory L. Andrews

"Fiat justitia ruat caelum"—let justice be done, though the heavens fall. The words are carved behind the bench of the Supreme Court of Georgia. This month, in *Clark v. Leigh*, the court let something fall. It declined to enforce a statute that Georgia's elected representatives passed in 2005: the \$350,000 limit on noneconomic damages in medical-malpractice suits.

The remarkable part is not the result, but the reasoning. The justices could not bring themselves to say the cap is unconstitutional. They said only that a 2010 precedent declaring it so—*Atlanta Oculoplastic Surgery v. Nestleffutt*—was not clearly wrong enough to overrule. On that precedent, the court writes: "Some of us find this history and precedent sufficiently compelling to conclude that *Nestleffutt* was correct. Some of us are less certain about that." A concurring justice, Charlie Bethel, calls the underlying doctrine "unsettling" and admits "reason to doubt" that it means what the court says it means.

Refusing to give effect to a law is among the most muscular things a court can do—and here it was done by judges who concede they are unsure *Nestleffutt* was rightly decided. That should trouble anyone, left or right, because it answers the only question the case really poses: Who decides? Who sets the terms on which Georgians' doctors may be sued—236 legislators who face the voters every two years, or nine justices parsing what a single word, "inviolable," meant in 1798?

The 2005 cap was a policy judgment about a real dilemma. Lawmakers concluded that runaway verdicts were driving physicians out of the state and out of high-risk specialties, and they weighed the losses of injured patients against a competing harm: the patient who cannot find an obstetrician, the rural ward that goes dark. Reasonable people land in different places on that question—which is precisely the point. A court sees only the plaintiff in the room. A legislature can also weigh the Georgians who never make it into the courtroom: the future patients who pay, in dollars and in access, for limitless awards. Balancing the seen against the unseen is classic legislative work.

The court dressed its decision in the robes of restraint—precedent, humility, a refusal to "rewrite" statutes, the observation that "nothing has changed" since 2010 "other than the makeup of this Court." But that last point proves too much. It means a constitutional mistake, once entered, is permanent: every future correction can be waved off as mere turnover on the bench. That is not modesty. It is a ratchet that turns only one way—locking in the boldest act a court performs, then throwing away the key, all while the justices admit they cannot vouch for the lock.

Nor does the doctrine fit the rest of Georgia law, and the most damaging witness is Justice Bethel himself. For a century, Georgia has let the legislature swap an entire category of jury-triable claims—an injured worker’s suit against his employer—for the no-jury workers’ compensation system. No one thinks that offends the right to a jury. Bethel’s reaction to squaring that with *Clark*: it “makes no sense at all to me.” If the legislature may abolish the jury outright for a whole class of injuries, how can it be powerless merely to cap one kind of damages? When a justice who voted to keep the precedent calls the rule flowing from it incoherent, that is not a quibble. It is a confession.

The deeper objection is one of accountability. Get tort policy wrong, and voters can replace the legislature in two years. Get the Constitution wrong, and the only remedy the court has left Georgians is a constitutional amendment—two-thirds of both chambers, then a statewide vote. A live, contested question has been hauled out of the one arena where citizens can actually win it. And when state high courts make judgments like this, they should not be surprised when the contest to control the bench grows as costly and as partisan as any campaign for the Legislature.

The cap may be wise or foolish. That argument belongs under the [Gold Dome](#), not behind the bench. The loss in *Clark v. Leigh* is not just a damages limit. It is a decision taken, by the court’s own admission, on a theory it would not defend. Let justice be done. But in a republic, let it be done by those the people can answer to.