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The Inequitable Impact Of Non-Economic Damage Caps: Three Academic Studies Demonstrate Severely Injured and Female Patients Are Hurt the Most

Doctors and their insurers argue that California's 1975 law limiting "non-economic" damages in medical malpractice cases should be adopted by every state. But three 2004 studies analyzing the impact of California's Medical Injury Compensation Reform Act (MICRA) document its harsh treatment of the most vulnerable victims. MICRA limits at \$250,000 the amount of non-economic damages a plaintiff can recover at a medical malpractice trial.

The three studies were conducted by three different types of researchers: physicians from Harvard Medical School; social scientists at the RAND Institute for Civil Justice; and a law professor at the University of Buffalo. Yet each study reached the same conclusion—caps are a particularly harsh method of reducing malpractice awards against doctors. RAND Institute policies prohibit its researchers from making normative judgments, but the other researchers were blunt in condemning MICRA's unfairness.

Harvard Medical School: Reductions Imposed on Gravely Injured Patients' Awards Were Seven Times Larger than on Awards to Those with Minor Injuries.ⁱ

To measure the impact of the \$250,000 non-economic damages cap the authors examined data from 152 plaintiff verdicts in California malpractice trials from 1985 to 2002. A surgeon and an internist, both with experience assessing injury types in malpractice litigation, independently scored the severity of each injury using the National Association of Insurance Commissioners (NAIC) nine-point scale. To ensure sufficient sample size for analyses, the nine levels of injury were collapsed into six categories: temporary injury and five levels of permanent injury—minor, significant, major, grave and death. Among their findings:

- **Average reductions for grave injury were seven times larger than those for minor injury.** The study found strong evidence that caps' fiscal impact on verdicts was distributed inequitably across different types of injuries. Mean reductions forced on grave injuries were seven times those imposed on minor injuries. Earlier studies had indicated, according to the authors, that plaintiffs with the most severe injuries appear to be at highest risk for inadequate compensation even without caps, so those worst-off may suffer a kind of "double-jeopardy" under caps.
- **Verdicts for injuries such as deafness, numbness, disfigurement, chronic pain and the like, which do not impair physical functioning or cause wage loss or high health care costs, were virtually wiped out by the cap because**

they attract relatively small economic damage awards. The balance between economic and non-economic components of the award is critical. Non-economic damages constitute 10 percent or less of the overall award in verdicts with proportionally small reductions, but they account for the vast majority of awards with the largest reductions. Hence, the drastic impact of caps on claims that center primarily on non-economic damages.

- **The authors concluded that caps are a clumsy and inequitable solution to the perceived problem of unjust jury awards.** Indeed, the authors noted that previous studies suggest that juries actually do a reasonable job of determining damages in negligence cases.
- **The authors suggest that if policymakers are determined to limit non-economic damages they should consider a sliding scale for non-economic damages based on severity of injury and age of the patient.** Under an alternative approach the award in each severity bracket would be capped, but at a level more commensurate with the severity of the injury than a flat cap permits. They conclude that “a decision to limit damages awards represents a social judgment that stabilizing the liability insurance market must be prioritized over allowing juries to determine levels of compensation for medical injuries... from an ethical perspective, care should be taken to choose that policy option that infringes least on the interest of patients and society in fair compensation. Use of a sliding scale of damages represents a more rational balancing of interests.”

Rand Institute: Severely Injured Patients’ Awards Reduced the Mostⁱⁱ

Rand Institute researchers examined data from 257 plaintiff verdicts in California malpractice trials from 1995 to 1999; 195 were trials with non-fatal injury claims and 62 were death claims. The source for the data was the California Jury Verdicts Weekly (CJVW), a private publication that follows what juries are awarding for specific types of claims in the state. The authors cautioned that CJVW does not capture all trials and they have no way of determining the number of trials missed, so the results reported should be viewed just as a sample. Finally, the authors stated that they made no attempt to calculate the effects of MICRA on malpractice insurance premiums or on availability of malpractice insurance coverage in California. Among their findings:

- **Overall MICRA reduced defendants’ liabilities by 30 percent.** Jury awards in the sample of cases totaled \$421 million, but with the judge reducing non-economic damages to comply with the MICRA cap on non-economic damages and the MICRA limitation on attorney fees, the final judgments in those cases dropped to \$295 million or 30 percent. In death cases, defendants’ liabilities were reduced by 51 percent, compared with a 25 percent reduction in non-fatal injury claims.
- **The MICRA cap was imposed in 45 percent of the cases studied.** Verdicts in death cases were capped more often (58 percent) than those in non-fatal injury cases (41 percent). When their awards are capped, plaintiffs typically lost many hundreds of

thousands of dollars. The median reduction in non-economic damages in all cases (fatal and non-fatal) was \$366,000.

- **Plaintiffs with the most severe injuries felt the impact of MICRA the most often.** The study showed that plaintiffs with the most serious injuries, such as brain damage, a variety of catastrophic injuries, and paralysis, had their awards capped most frequently, and when they do, they suffered median reductions of more than a million dollars (compared with a median reduction of \$286,000 for all non-fatal injury cases).
- **Cases with the greatest percentage losses in total awards are those with small economic losses but great damage to the plaintiff's quality of life.** These cases, with economic damages of less than \$100,000 frequently had non-economic damages awarded by the jury of more than a million dollars because the jury believed the plaintiff had suffered marked changes in the quality of life. An example is the case of a 42-year old woman who underwent an unnecessary mastectomy because of a mistaken diagnosis of cancer; the jury verdict was \$78,000 for economic losses and \$1.5 million for the non-economic losses to her quality of life. Under the MICRA cap, the judge reduced her total award to \$338,000, 78 percent less than what the jury had decided was fair compensation.

University of Buffalo: Women's Damage Awards Reduced the Mostⁱⁱⁱ

Professor Lucinda M. Finley at the University of Buffalo School of Law^{iv} examined California jury verdict data to ascertain the effect of the cap on non-economic damages on various types of injuries and different types of injured plaintiffs. Using Westlaw and Lexis searches of California jury verdicts in medical malpractice cases from 1992 through 2002, she selected jury verdicts for plaintiffs that separated economic from non-economic damages, had an award of non-economic damages in excess of \$250,000 and identified the gender of the plaintiff for the study. Among the findings:

- **California women sustain greater proportional losses from the cap than men.** Comparison of 67 jury verdicts for women with 64 for men in California between 1992 and 2002 showed that MICRA reduced women's total verdicts by an average of 48 percent, as contrasted with a 40 percent reduction for men. The average compensatory award to male plaintiffs was significantly higher than women's to begin with. The MICRA cap served to increase the disparities. Before applying the cap, women's average jury awards were 52 percent of men's average awards. After the MICRA reduction, the women on average recovered only 45 percent of men's average recoveries.
- **California caps have a particularly harsh impact on women who are victims of gynecological malpractice.** In the 28 cases studied, MICRA produced an average 64 percent reduction in women's recovery. These are cases where only women are plaintiffs, exclude obstetrical cases involving injury to the baby and include misdiagnosed and delayed treatment for cervical or ovarian cancer, unnecessary hysterectomies, misdiagnosed ectopic pregnancies that ruptured, improperly performed

episiotomies during delivery, vulvular burns with misapplication of caustic chemicals and death after cesarean section from undiagnosed internal bleeding.

The author explained that gynecological malpractice injuries impact women in unique ways—impaired fertility, impaired sexual functioning, incontinence, miscarriage, scarring in personally sensitive body areas—and, as a result, do not have significant economic losses in wage or medical expenses associated with them. Instead these injuries are primarily a matter of emotional suffering, lost sense of self, impaired self-esteem and the ability to engage in intimate relationships, physical pain and suffering and reduced quality and enjoyment of life. Since a high proportion of the award in gynecological malpractice cases depends on non-economic damages to obtain justice, no wonder then, that caps have a notably adverse impact on women.

- **Women and elderly victims suffer significant disparate impact from caps.** “They will lose greater percentages of their total compensatory awards than men who are of working age,” Professor Finley said.^v The negative effect will be especially pronounced for elderly women. Also adversely impacted are the recoveries in those cases where the victim died as a result of the negligent misconduct. In this group, the greatest effect is where the infant or child dies. The significance of these losses will be seen in loss of deterrence, greater dependence upon general societal funds to pick up the slack and the lost opportunity to bring these problems to public notice and regulatory attention. According to the author, “the most profound loss of all will be to the fairness and equality of our civil justice system, as the effects of cap laws send the message that women, the elderly, and the parents of dead children should not bother to apply.”^{vi}

ⁱ David M. Studdert, Y. Tony Yang, Michelle M. Mello, “Are Damage Caps Regressive? A Study of Malpractice Jury Verdicts in California,” The Harvard School of Public Health, *Health Affairs*, July/Aug. 2004, Vol. 23, Issue 4, pg. 54.

ⁱⁱ Nicholas M. Pace, Daniela Golinelli, and Laura Zakaras, “Capping Non-Economic Awards in Medical Malpractice Trials, California Jury Verdicts Under MICRA,” Prepared for the Rand Institute for Civil Justice, July 2004.

ⁱⁱⁱ Lucinda M. Finley, “The Hidden Victims of Tort Reform: Women, Children and the Elderly,” paper delivered to Thrower Symposium, Emory Law School, February 19, 2004.

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^v Finley, *supra* at 62.

^{vi} Finley, *supra* at 63.