

The discriminatory math of MICRA

By Micha Star Liberty



Few issues we deal with have caused as much trouble and turmoil as MICRA, the Medical Injury Compensation Reform Act of 1975.

Signed into law by then-Gov Jerry Brown during his first term, MICRA has ever since been a battlefield in the tort wars between trial lawyers and the medical industrial complex of doctors, hospitals and malpractice insurance firms. Consumer Attorneys of California has been at the forefront of efforts to correct the historic wrong of MICRA. For more than four decades, CAOC has pushed for change through the courts, in the state Legislature, and via the ballot box.

Beyond the overarching injustice of MICRA, this antiquated \$250,000 cap on non-economic damages in medical negligence cases is among the most discriminatory laws on the books. The outdated cap is, of course, unfair to many who have suffered medical harm, regardless of gender. But it has a disproportionate impact on women and communities of color.

The cap on noneconomic damages has not changed in the 45 years since the law was approved, a time that has seen the value of everything skyrocket with inflation – except the value of a life.

In much the same way that the glass ceiling undercuts the income of working women, the malpractice cap on noneconomic damages means that compensation for those harmed by medical negligence is largely determined by the income of the person who was injured.

The calculus is simple and sexist. While damages for pain and suffering are strictly limited, the law allows compensation for lost future income for people killed or injured by medical negligence. With Caucasian women still earning 79% of what men do (for women of color it is even less at 68% for African Americans and 58% for Latinas), their economic damages are significantly diminished for the exact same injuries. A study by law professor Lucinda Finley at the University of Buffalo concluded that noneconomic damage caps

amount to a form of discrimination against women and contribute to unequal access to justice or fair compensation.

A stay-at-home parent with no income or a parent who works only part-time to be able to spend time with the children will be treated very differently under the cap than someone who is working full-time at a high-paying job. Even with today's workforce, those stay-at-home parents and parents working only part-time outside the home are overwhelmingly women.

Of course, economic damages are a factor only if a person harmed loses income. A woman whose child was killed by medical negligence, or who lost her ability to have children due to medical negligence, or who underwent an unnecessary mastectomy due to medical negligence, is not likely to lose that much income. But she has clearly suffered a grievous injury. Her compensation for her loss is limited to an amount far below what anyone would consider fair today.

It's no small irony that among the biggest defenders of MICRA is an organization focused squarely on women's health issues, Planned Parenthood. For more than a decade, the organization's leadership in California has suggested that adjusting the cap for inflation would lead to a significant increase in medical malpractice insurance premiums and subsequently cause a significant decrease in the number of doctors

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The content in this edition was written before the COVID-19 pandemic. Obviously, we support our health care system and the men and women who work so tirelessly to keep us all healthy and safe. The medical negligence discussions in this issue relate only to those medical practitioners who violate their patients' trust and should not be construed as an attack on the medical system itself, or the doctors, nurses and others who are doing the best they can under very trying circumstances.

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Compensate those who have been injured by the negligence of others and, through that compensation, hold the wrongdoers to account for their errors. Through accountability, the community identifies dangers and encourages safety.

Laws that protect the negligent and impose the costs of negligence on the injured patients and their families distort social policy and make the health care system less safe. To the extent that health care providers are immunized, in whole or in part, from being held to account, the incentive to improve is diminished.

Civil litigation performs one more important role in our society: It satisfies the need for justice. "The more effectually to accomplish the redress of private injuries, courts of justice are instituted in every civilized society, in order to protect the weak from the insults of the stronger, by expounding and enforcing those laws,

by which rights are defined and wrongs prohibited. This remedy is therefore principally to be sought by application to these courts of justice; that is, by civil suit or action." (Blackstone, W., *Commentaries on the Laws of England*, 1753, Vol. 2, Book III, Chap. 1, pp. 23 (J.B. Lippincott Co., 1893 ed.))

The lawyer representing the victim of medical negligence has an awesome responsibility: To be the champion of those who are unable to help themselves, to turn advocacy into accountability, and to turn accountability into justice.

Thank you to all of the authors in this issue – John Blumberg; Steve Heimberg and Catherine Kim; Mike Kessler; Jessica Pride and Alana McMains; Ken Sigelman; and David Smith – for donating your time and talent. Your insights and wisdom make all of us better advocates and, thus, better champions of justice. ■

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providing care to pregnant women. But the facts say otherwise.

States without caps have more doctors per capita than states with caps. Here on the West Coast, both Oregon and Washington have more doctors per capita than California, and neither has a cap on medical malpractice damages. The state of New York has no cap on damages and at least 30% more doctors per capita than California.

California's federally funded community health centers and free clinics are eligible for extensive free medical malpractice coverage from the federal government. Most Planned Parenthood clinics are self-insured, because the services they provide seldom lead to malpractice liability. The need for clinics or Planned Parenthood to purchase malpractice insurance is minimal. Even if malpractice premiums were to rise as the result of a change in the cap, the impact on clinics' budgets would be quite small. The Congressional Budget Office says that malpractice accounts for just a fraction of one percent of health care costs.

Of course, women aren't the only ones who take a disproportionate hit under MICRA. The law has its biggest impact on anyone who has little or low income, including children, the elderly, stay-at-home parents and working-class Californians. The late Congressman John Conyers (D-Michigan) observed in 2004 that this same math means malpractice caps discriminate against people of color.

As 2020 moves forward, California will very likely see another attempt at the ballot box to modernize MICRA. The executive board of CAOC is monitoring the progress of the ballot measure, which as I write has not yet qualified for the Nov. 3 election. It will face formidable, deep-pocketed opposition. Indeed, the medical industry spent nearly \$60 million to defeat a similar measure in 2014, outspending proponents roughly 6 to 1.

Whatever the outcome, one thing is clear. For our organization, MICRA will not go away as a target for wholehearted opposition. Whether change comes via the ballot, the Legislature or the courts, this unjust, outdated and discriminatory law must be abolished. ■