

The Faces of
Medical
Negligence



Diane Stewart

Gilroy, Calif.

MICRA impedes justice for victims of medical negligence

By Dr. David Stewart

01/13/11

I read with great interest the Capitol Weekly's Dec. 16 article "MICRA: Long-simmering dispute looming in Capitol."

My interest in MICRA, California's law that limits pain and suffering compensation to \$250,000 in medical malpractice cases, is twofold: I am both a physician and the son of a victim of profound medical malpractice. I have firsthand experience with the implications and practical effect of MICRA.

From our family's perspective, the MICRA cap on pain and suffering is a massive impediment to obtaining justice when families like ours see a loved one become the victim of medical negligence.

My mother's case is easy to understand. Her physicians failed to show up when she developed acute abdominal pain following an elective orthopedic procedure. When she died, the hospital deleted critical records in a presumptive attempt to keep our family from learning the truth.

A few days after my mother was buried, we requested a conference with her physicians and nurses. Our request was denied, and we were referred to Stanford Hospital's risk management office. Our family requested our mother's medical record six times, only to be told the information we were requesting didn't exist or was not part of her legal medical record. It was only after the Public Health Investigator identified that medical notes had been deleted that we received a letter from the hospital's attorney requesting a "resolution."

Our family believes our mother's physicians deceived us and that the hospital committed fraud to deliberately obstruct and obfuscate our ability to learn the truth. My surgical mentors counseled me to "get the best lawyer you can."

My sister and I contacted nearly 30 attorneys and were repeatedly informed about the practical aspects of MICRA. The conversations would always begin the same: "How old was she, and was she working?" Once we told these lawyers she was 72 years old and retired, they would decline to represent our family.

Under MICRA, it takes as much as \$100,000 to bring a medical malpractice case to trial. But if a victim is unemployed or young or old, an attorney could expect to recover less than those costs.

From an attorney's perspective, a medical malpractice case without economic or punitive damages is economically unfeasible no matter how egregious the circumstances.

The practical implication is discouraging. If you are very young, retired, or unemployed, it is nearly impossible to seek justice even if the malpractice is obvious and, as in our mother's case, horrific. The chance that these cases will go to trial is even more remote. MICRA effectively denies the most vulnerable members of our society – the elderly, the young, the disabled and anyone else lacking a salary – any chance of seeking justice, of learning the truth and obtaining accountability.

This isn't just a profound injustice to huge portions of our population, it is morally and ethically repugnant.

Our family takes particular exception to the comments of vice president of governmental affairs for the Community Clinic Association of Los Angeles, Louise McCarthy. She states, "This discussion needs to be about patients, period" and "the argument has not been about changing the impact on the patient, it (is) about changing the dollars the attorney could collect."

Ms. McCarthy couldn't be further from the truth. This is a discussion about accountability and justice, which the public deserves. This is all about the patients, period.

The comments of Dustin Corcoran, CEO of the California Medical Association, are even more troubling.

"The trial attorneys want to legislate their way to a big pay day. (He doesn't) think it's much more than that to them."

Our family interprets Mr. Corcoran's comments as a gross misrepresentation of the issue. The MICRA dispute is about learning the truth and obtaining justice when the health care establishment makes egregious errors and refuses to be accountable.

We would remind Ms. McCarthy and Mr. Corcoran about the central tenet of public health: Social Justice.

Social Justice is predicated on the idea that every member of society should have an opportunity at justice, no matter what their age or economic status is. The time has come to restore the balance of power between the health care establishment and the patients they serve.

From our perspective, the argument advanced by some that MICRA reform is about lawyers enriching themselves is hypocritical, as the same argument can also be applied to a health care industry that would prefer not to be held accountable when serious medical errors occur.



Jessie Geyer

Antioch, CA

Jessie's Story

A few days before Halloween 7-year-old Jessie Geyer began to feel lousy. She had a high fever and severe leg pain. It was bad enough feeling sick, but the second grader worried that she might have to miss out on the Halloween parade at her school, as well as trick or treating.

Her illness worsened and she realized she would have to miss the fun. But the ever-cheerful little girl told her Mom to make sure and save her costume for next year. "She was in such good spirits," her Mom, Michelle Geyer, says.

Before the week was out, Jessie was dead, a victim of sepsis that both her pediatrician and the emergency room doctor who treated her failed to diagnose. An antibiotic could have saved her.

Her parents, Mark and Michelle Geyer, are still trying to get on with their lives, after experiencing the worst thing that can happen to a parent. Jessie's younger brothers also continue to struggle.

The effort to find accountability in Jessie's death has compounded the pain. Attorneys from major law firms declined to take her case because of California's 29-year-old Medical Injury Compensation Reform Act (MICRA). The law, an anachronism that protects doctors and insurance companies while wounding patients and their survivors, limits "pain and suffering" damages to \$250,000 - a figure that was set in 1975 and would be \$900,000 today if adjusted for inflation.

"Getting a lawyer was horrible," says Michelle. She contacted several top San Francisco area law firms and they told her "you have an excellent case, but this would be a bad business decision" because of the MICRA law.

Like most Californians, the Geyers had never heard of MICRA. It's one of California's "best kept secrets," says Michelle.

But now they are dead set on amending or eliminating it.

"We're looking for accountability," says Mark.

Jessie's illness began two days before Halloween, on Oct. 29. She awoke with a high fever and intense leg pain. They took her to her pediatrician at Diablo Valley Pediatrics, who said it looked like a bacterial infection and told the Geyers to take Jessie to John Muir Medical Center.

The doctor there took an x-ray, which he said showed nothing unusual, and decided she probably had a flu-related virus. He gave her a non-prescription pain reliever and sent them home.

A series of failed communications ensued between the two physicians, according to Mark Geyer. "It's like a popup between short and center; it falls in."

Because of that, Jessie never had a culture taken. And no antibiotics were prescribed.

"Both doctors blew it," says Mark.

Meanwhile, Jessie sat at home, getting worse, while her parents believed she was on the road to recovery. "That's what haunts me," says Michelle. "She was home two days, and she was dying."

On Halloween night the leg swelled and the fever broke. Jessie got clammy. She weakened quickly, and went into shock. Mark rushed her to the Sutter Delta Medical Center emergency room, then went back to get Michelle, at the doctor's suggestion.

"We told her to fight, and that we loved her," says Mark. "She said, 'I love you.' She closed her eyes and the monitor went flat."

The stunned parents - Michelle went into hysterics while Mark became all but catatonic - didn't know what had taken Jessie's life. They were not to find out for months, when a forensic pathologist working the Centers for Disease Control discovered that she had died from a group A streptococcal infection that had spread throughout her body.

The death could have been prevented with proper medical attention.

When they learned that, the Geyers embarked on their search for an attorney. They finally found one, after being rebuffed by a bunch of lawyers who would not touch it. The cap on damages does not work for children, stay-at-home Moms, the retired and others who don't have an income.

The Geyers got to where they are - the suit has been filed in Contra Costa County and awaits depositions - by being persistent. The county coroner's office, for example, wanted to list Jessie's death as having an "undetermined cause." The Geyers wouldn't settle for that. They believe "there are a lot of other people like us...who just gave up," as Mark says.

The Geyers want two things, in addition to prevailing in the malpractice suit. They want the MICRA law amended to adjust the damage cap for inflation; and they want it to cover people who don't have incomes, like children and the elderly.

"In the world of 2004," the Geyers write on their website, dedicated to 'Jessie's Law,' "\$250,000 is often not sufficient to bring the case to trial, considering the expense of the attorney, the many depositions, the research and the high cost of expert testimony.

"This is particularly unfair to children...because they are not eligible for 'actual damages' since they are not considered wage earners. The result is that very few malpractice cases where children are the victims and parents consumed with the greatest loss of all never make it to court."

"The system is broken," say Michelle Geyer. "We have a really bad combination. The health care system combined with this MICRA law is horrific."



Steven Olsen
Chula Vista, Calif.

Steven's Story

It's hard to say what brings tears to Kathy Olsen's eyes faster – talking about her son's past, or the young man's future.

Steven Olsen was a mischievous two-year-old in 1992, the kind of kid happy to lead his 3-year-old sister into trouble on a regular basis. His response when mom put up a gate to keep the kids from climbing the stairs? No problem – Steven would turn a laundry basket into a step; up and over they'd go. And when dad blocked off the ladder to the backyard slide? Steven turned a tricycle into a step stool.

“He figured this all out,” she says. “He was really quite intelligent.”

That all changed in late February 1992, when a freak injury followed by a downward spiral of medical errors left the boy severely brain-damaged. This tragic series of events turned the Olsens into forceful advocates in the battle to roll back California's medical malpractice caps, set in place by the watershed Medical Injury Compensation Reform Act of 1975. MICRA's \$250,000 cap on human suffering, the Olsens argue, led to an inadequate financial settlement and didn't allow the family to fully hold accountable the people responsible for destroying their son's life.

The Olsen's ordeal began during a visit to a relative's mountain cabin outside San Diego, where Steven tripped while running and fell face-first onto a sharp stick that penetrated deep into the right front part of his mouth, face and sinus cavity. Surgeons at Children's Hospital of San Diego repaired the damage and took cultures to test for infections as a precaution, then sent the family home.

A few days later, Kathy and her husband, Scott Olsen, noticed that Steven was becoming lethargic. A fever spiked. The Olsens brought him back to the hospital. As the medical teams tried to figure out what was happening, the couple suggested the face-impalement may have caused additional problems and asked for a brain scan. The medical team rejected the request and diagnosed meningitis, the first in a series of errors that eventually sent Steven into a two-week-long medically induced coma.

By the time the nightmare stabilized, Steven was severely brain-damaged from an undiagnosed and ruptured abscess inside his skull caused by the impalement. That unseen damage would have been discovered had the doctors heeded the Olsens' request for a scan. And it likely would have been treated even sooner had the medical team checked the lab results on the cultures that had been taken during the first hospital visit.

The fallout of that missed diagnosis of a treatable infection was horrific: The bright and creative problem-solving toddler was left severely brain-damaged, blind and incapable of all but the most basic tasks. As his parents look to the future, they fear for how his later years will play out, in part because MICRA had capped a jury verdict of \$7.1 million in pain and suffering damages at \$250,000.

The Olsens did receive \$4.1 million in economic damages from the jury and a pre-trial settlement with some of the defendants. That total immediately shrank by a quarter for lawyers' fees, and by another \$115,000 for the expert witnesses who testified in the trial. Other expenses, including nursing care and a private school for the disabled that helped Steven regain some of his speech and coordination, also have accounted for more than \$100,000 in costs.

Steven also receives \$718 a month disability support from Social Security, which was cut in May from \$908 a month. The Olsens say a conservator controls the money on Steven's behalf, but they fear it will run out. "I don't think his money will last as long as he will," Kathy Olsen says, tears again streaming down her cheeks. Yet she also thinks her son is lucky that they've been able to advocate for him. "We're survivors in a system that isn't really set up to help somebody," she says.

Most of the young man's medical costs have been covered by health insurance through Scott Olsen's job as an automotive technical writer, but he will soon age out of that coverage. They fear that once they pass on, responsibility for Steven's care will ultimately fall to government programs rather than to the people most responsible for his condition – the medical team that made the critical and avoidable errors when the boy was two.

Steven's medical problems have transformed the Olsen's family life. When he was injured, the family had four pre-teen children living and sharing bedrooms in a two-story house in suburban San Diego.

Kathy Olsen quit her career as a store manager for Sears to become Steven's primary care-giver rather than hiring aides to cover the hours when she otherwise would be working. Scott Olsen believes his career as a technical writer has suffered because of his repeated and extended absences during Steven's many medical crises – including 23 surgeries.

"Everyone's been good," he says, adding that he has appreciated the support and understanding from bosses and co-workers. "But it doesn't help when they ask, 'Can everyone come in tomorrow?' and I say I can't because the kid's in the hospital."

The Olsens had to move from their two-story home into a nearby ranch house because Steven could no longer navigate the stairs he used to scramble up like a monkey. They also needed more room – because of the constant need for care, Steven could no longer share a room with a sibling. Through the conservatorship, Steven owns half of the house, which underwent renovations to make it easier for him to maneuver, and to add a full-access bathroom off his bedroom.

Out back, the yard has a play set and a swimming pool where Steven, despite having limited control of his motion (the brain injury caused cerebral palsy), likes to swim, and gets regular exercise. Steven's a generally happy young man despite his disabilities, though he has trouble sometimes controlling emotions and impulses because of the areas of the brain that have been damaged. At the start of the interview for this story, he said he was interested in talking but after insisting on showing me his bedroom and how his favorite toys worked (we walked down the hall together, Steven kissing my shoulder most of the way until his mother persuaded him to stop) he decided he no longer wanted to talk.

He requires near-constant supervision, and help. He can tend to most of his bathroom needs during the day but has to be diapered at night. For his own safety, his room – outfitted like a young boy's – has a locking door with an alarm in his parents' bedroom to keep him from wandering around at night. Leg braces help him stand and he has limited abilities to use a cane for walking around.

A circle of friends and relatives have pitched in to give the Olsens some time for themselves (a cousin stayed with him during the interview), but caring for their son has become the focal point of their lives. Steven has regular preventive appointments with a pediatrician, a neurologist/neurosurgeon, an orthopedic surgeon, an ear/nose/throat specialist, schedules that pick up when he encounters unexpected problems. A physical therapist the couple pays for privately visits the house three or four times a week to help keep Steven's limbs, over which he has limited control, as functional as possible.

"He is highly maintained," Kathy Olsen says. "We go every six months. I don't want anything else to happen to him."

Yet Steven is not coddled. "He needs to know what he can do for himself," the mother says. "Getting in our van, I put his foot there and say, 'Now, plant your foot and get your butt up on that seat.' He has learned what I think are some of the independent skills that he has to learn. He has to function."

The Olsens' experience with the legal system, and their frustration with the MICRA cap, turned them into reluctant activists. They have taken part in rallies, spoken at conferences on the issue and testified before Congress on how the MICRA cap has affected their lives. They are particularly galled by pronouncements and political spin by proponent of the caps.

"We probably wouldn't have done anything, but then we kept hearing from insurance companies and the other side about how this cap is helpful to people like us," Scott Olsen says. "If they would have just shut up, we probably would never have done anything."

The Olsens are particularly irked by the Californians Aligned for Patient Protection (CAPP) group, which is supported by doctors, hospitals and other medical care providers, and whose board of directors is composed of leaders of for-profit medical groups.

"They don't protect patients at all," Scott Olsen says. "Their whole premise seems to be that this is helpful to the person that's been injured by malpractice. They can collect the award

faster, they settle much quicker. This isn't right. If they would just say, 'We don't want to pay for it,' that's fine. Just be honest about it."

The couple also occasionally fields calls from people who have been similarly affected by medical malpractice, but – particularly those involving the death of a child – can't find lawyers to take on the cases because the cost of going to trial exceeds the possible judgment.

"Unfortunately, if you kill a child, there's no economic damages," Scott Olsen says. "Or it's someone with no income that it happens to." The MICRA cap, the couple says, effectively bars those families from seeking redress through the courts.

Scott Olsen says dismissive attitudes by defenders of the caps also galvanized them. He cites a comment by then-U.S. Rep. Christopher Cox (R-Newport Beach) in the mid-1990s that referred to pain-and-suffering awards as "feelings" damages. "That," Olsen says as his now-adult son struggles nearby to eat lunch without help, "just set me off."

California's MICRA law has been used as a blueprint for similar laws in other states, and it pushes for federal legislation – efforts that also brought the Olsens to witness chairs in legislative hearings, and rallies fighting the measures. They've appeared on national television talk shows and news programs, from the old "Phil Donahue Show" to NBC's "Today" show. They also are active with Consumer Watchdog (Kathy Olsen sits on the board) and the Center for Justice and Democracy, and have worked on projects with the Consumer Attorneys of California.

"There were so many things that were not right that you have to do what you can," Kathy Olsen says, arguing that the issue is not a face-off between doctors and lawyers, but between insurance companies and doctors and their patients. She sees the MICRA cap as part of the broad power the insurance companies have amassed, which now extends to dictating to doctors how they treat patients.

For all the broad policy elements of medical malpractice caps, the full impact is on the micro level. Over the course of a nearly two-hour interview, the Olsens' dug into two decades of memories to detail the dizzying litany of treatments, complications and medical crises that their son has endured due to the medical negligence of his doctors. Finally, memory spent, Kathy Olsen went off to the family computer to print out a list.

She returned a few minutes later with four stapled sheets holding 56 separate entries listing all of Steven's serious medical encounters, from the first emergency room visit through November 2009, the last time she had updated it.

"People who are 21," she says, "shouldn't have a medical history like this."



Olivia Cull
Los Angeles, Calif.

Los Angeles Times

Parents assail malpractice caps after daughter's death at UCLA hospital

Limits on payouts made it hard to find a lawyer when Olivia Cull, 17, died after a routine procedure. And the couple settled their lawsuit before all the information they wanted was revealed, her mother says.

By Molly Hennessy-Fiske

Los Angeles Times

January 22, 2011



Robert and Joyce Cull, pictured here in daughter Olivia's bedroom, say limits on damages after she died two years ago made it hard to find a lawyer and to get UCLA to fully disclose what went wrong during a routine procedure. (Rick Loomis, Los Angeles Times / January 19, 2011)

Two years ago last week, Olivia Cull, 17, was taken off life support. The standout student — who planned to study classics at Smith College — had slipped into a coma during a routine, outpatient procedure at Mattel Children's Hospital UCLA in Westwood.

The story of her death was presented to Congress a few days ago, among cases cited by patient advocates pushing to lift the caps on damages for medical malpractice lawsuits.

As lawmakers search for ways to trim healthcare costs, debate continues over the country's medical malpractice laws. Physician groups say caps limit frivolous lawsuits that can drive good doctors out of business. But patients and their families argue that limits on payouts diminish accountability, making it hard to find lawyers to take cases and force full disclosure from doctors.

UCLA officials, who said they were "profoundly saddened by the death of this young woman," said they worked with state regulators and conducted a comprehensive investigation into her death.

"It is our policy and practice in all cases, including this one, to communicate honestly with patients and their family members regarding their care and treatment," officials said in a statement.

But Olivia's parents said going to court was the only way for them to learn the truth about their daughter's death.

As a baby, Olivia had surgery to correct a defect that left one side of her heart smaller than the other. A second surgery was delayed as she grew into a teenager who juggled violin practice, robotics club and theater rehearsals.

On Jan. 9, 2009, Joyce "Joy" Cull walked her daughter up the steps of the hospital for a procedure to prepare for the final corrective surgery. Doctors wanted to perform the operation before Olivia left for college on the East Coast in the fall.

Olivia was nervous, but her mother reassured her. The catheterization procedure would take only a few hours. Olivia had been through it several times before. Doctors said she would be home before dinner. In black marker on her left heel Olivia had written the ancient Greek letters for Achilles, a reminder to stay strong.

Used to consent forms

In the years Olivia was treated at UCLA, her parents became accustomed to consent forms. Waiting with Olivia before the procedure, Joy Cull, 52, had signed the standard surgical consents without a second thought. She never imagined they would have to cope with what seemed like pro forma warnings.

By the time a cardiologist brought the bad news to the recovery waiting room, Cull had a feeling something was wrong. There had been an "incident" in the lab, Cull remembers being told, and Olivia had been deprived of oxygen for 40 seconds.

"OK, 40 seconds — my kids can hold their breath in the pool that long," Cull thought.

In the catheterization lab, Olivia was still on the table. She looked as if she were asleep — except for the breathing tube in her mouth. On the floor near Olivia's head, Cull noticed a pool of blood.

She touched Olivia's short brown hair, her arm and heart-shaped face. Olivia's skin was cool. Behind her, Cull said, she heard a nurse sobbing.

A week after they came to the hospital, the Culls held a wake in Olivia's hospital room. Classmates visited from Brentwood's Archer School for Girls, leaving notes at the foot of her bed.

Eight days after Olivia arrived at the hospital, her parents had her removed from the ventilator. Olivia's 13-year-old sister crept into the bed beside her. Her 11-year-old brother stood with his parents, watching Olivia's chest rise and fall.

Olivia's heart went on beating for three days. On the third day, the Culls removed an internal breathing tube, and Olivia died.

Distraught, the Culls sought answers from their daughter's doctors. An autopsy conducted at UCLA showed Olivia suffered brain damage as a result of a heart attack she suffered at the end of the catheterization, due in part to her congenital heart defect.

The Culls did not believe the heart defect alone caused Olivia's death. They suspected something had gone wrong in the catheterization lab. Olivia's longtime cardiologist told them her weak heart was to blame, the Culls said, but to them that made no sense. Olivia was not an invalid; she had been a healthy, active teenager, a Girl Scout camp counselor.

Dissatisfied, they pushed harder, requesting Olivia's medical records. When they demanded answers from hospital officials, the Culls said, they were told to review the records and, if they found a problem, to contact a lawyer.

Robert Cull, 56, was an accomplished architect who helped design Ronald Reagan UCLA Medical Center. Joy, a homemaker, had a master's degree in fine arts. As they sifted through records, they wondered how others in similar situations made sense of it all.

"It's confusing," Joy Cull said. "I could imagine this happening over and over again because families don't have the resources to find out how their loved one passed away. We had to claw our way through the system."

To get more information, the Culls decided to sue the hospital. But like others, they had trouble finding a lawyer willing to take the case. Given the state cap on damages, they said, many lawyers did not consider their case worth pursuing.

Although doctors groups complain of frivolous malpractice lawsuits, the number of malpractice claims has actually decreased in recent years as families have had difficulty pursuing claims, Joanne Doroshov, executive director of the Center for Justice & Democracy, a New York-based advocacy group, told Congress at a hearing Thursday, the second anniversary of Olivia's death.

Wrongful death suit

In July 2009, weeks after first seeking counsel, the Culls filed a wrongful death lawsuit after lawyer Jin Lew at Los Angeles-based Michels & Watkins agreed to take the case pro bono. The suit alleged that the University of California Board of Regents, which runs the hospital, and everyone who cared for their daughter that day were "negligent, careless and unskillful."

The lawyers found that Olivia's medical records were incomplete, the Culls said, and filed more requests until the hospital supplied hundreds of additional pages.

In addition to the lawsuit, the Culls filed a complaint with Los Angeles County health officials that triggered an investigation by the state Department of Public Health. In February, state investigators reported that a postdoctoral fellow who treated Olivia removed her catheters without a doctor's supervision. Investigators also found that a second fellow who treated Olivia had not been cleared to treat patients.

That information was new to the Culls.

In the corrective plan required by the state, hospital officials defended both fellows, saying they were trained to remove catheters. The hospital made one change in response to the state investigation: It added another disclaimer to the consent form, warning patients they might be treated by doctors in training. Joy Cull wanted more. She attended each legal deposition with Olivia's doctors and nurses, filing additional complaints with state regulators based on what she heard. She called and wrote to state legislators, arguing against caps on medical settlements.

Through depositions, the Culls learned the identity of the two fellows the state faulted for mistreating Olivia. Joy Cull recognized one: He was the clean-cut young doctor who had handed her the medical release forms that day.

In June, Shirley Watkins, a partner at the law firm representing them, urged them to settle. She said they were unlikely to learn more about how their daughter died.

On Nov. 16, after months of reluctance, the Culls agreed. Hospital officials would pay them \$250,000, the maximum allowed under the cap. They also promised to make at least eight improvements in how they supervise doctors, remove catheters, document patients' heart rates and inform parents that trainees will be treating their children.

"UCLA Medical Center deeply regrets the death of Olivia Cull and takes responsibility for the care and treatment provided to her," hospital officials said in a statement the Culls insisted they release as part of the settlement, as close to an apology as they could get.

The Culls plan to use the settlement to fund scholarships in Olivia's memory.

Joy Cull remains dissatisfied. She thinks the threat of a larger settlement would have forced the hospital to reveal mistakes by doctors and staff, and to review and improve its policies.

"You just have to wonder how many other families are told, 'There was just nothing more we could do'."