MICRA – An Unjust and Unconstitutional Law Founded on Myths and Fallacies

by Joel R. Bryant

Perhaps the most frequently discussed and loathed law by consumer attorneys in California is MICRA. While I'm willing to bet that many attorneys do not know what MICRA stands for, we know all too well its adverse, discriminatory effect on America's most vulnerable persons. Specifically, due to MICRA's $250,000 cap on non-economic damages, injured children, elders and others with limited income often find that it is not economically viable to seek justice against those medical providers who negligently caused their severe injuries or death. Under MICRA, elders, children and the most severely injured people are denied full justice. Anything less than full justice is injustice. The persons and companies who cause the most harm receive the most benefit from MICRA. How can anyone in good conscience believe that such a law is good for ordinary Americans?

California's Medical Injury Compensation Reform Act of 1975 limits non-economic damages to $250,000 and limits attorneys' fees in medical malpractice cases against health care providers. Interestingly, there is no limit on the amount the doctor and hospital defendants can pay their attorneys. As a result, many victims of medical negligence without large wage loss claims or substantial future medical expenses cannot find an experienced attorney to represent them despite such serious injuries as a claim for loss of fertility or severe disfigurement or even the death of a child or senior citizen.

I learned this first hand when, four or five years ago, I attempted to find an attorney for the family of a 68-year-old woman who died as a result of a medication error during surgery. After four or five well-known medical malpractice attorneys rejected the case, I asked one of them why he rejected what I thought was a "slam dunk" wrongful death case. He responded, "Joel, only a fool would take a contingency fee case with a maximum recovery of $250,000 because it will cost me $75,000 of my own money in expert and court costs through trial, and whether the clients win or lose will come down to a popularity contest between my expert and the defense expert."

Every 80 seconds in America, a patient dies because of medical negligence. Another 300,000 people a year are injured, sometimes irreparably by the actions of their own doctors. Yet MICRA persists stronger than ever. MICRA has survived five governors, four recessions and more than a 300% boost in the consumer price index.

Compounding the injustice of the cap on damages set by California lawmakers is their failure to include a provision to adjust the cap for inflation. If the $250,000 limit set in 1975 were adjusted for inflation, that limit would be more than $1 million today. Viewed from another angle, at today's rate, $250,000 is the equivalent of about $60,000 in 1975.

The Myths vs. the Facts

Too Many Frivolous Lawsuits. Doctors and insurance companies love nothing more than chanting the mantra that there are far too many frivolous medical malpractice lawsuits. Researchers at Harvard University announced the results of a 2006 study showing that most negligence claims involve medical error and serious injury. They concluded that "portraits of a malpractice system that is stricken with frivolous litigation are overblown." In fact, they found that few claims were without merit, and those that were, generally did

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not receive any compensation. Most negligence claims were meritorious, with 97% of claims involving medical injury and 80% involving physical injuries resulting in major disability or death. Few claims in cases in which there were no errors were ever paid. The reality is that the researchers found the reverse; *i.e.*, non-payment of claims when error was involved was a bigger problem. According to the National Center for State Courts, only 4.4% of the civil caseload is comprised of tort cases. Of that, just 2.8% comprise medical malpractice cases. Even that tiny subsection has declined by 15% over the last 10 years.

Fleeing Doctors. Insurance companies also claim that medical malpractice lawsuits result in doctors fleeing states without caps, thereby creating physician shortages in those states. However, the facts do not support this. According to the American Medical Association, the total number of physicians in the U.S. rose to a record high in 2009. In fact, the number of physicians per 100,000 people is at an all time high of 317. Further debunking the myth is the fact that the number of physicians per 100,000 people is 21% higher in states **without** caps than in states with caps.

Skyrocketing Premiums. MICRA was endorsed by doctors and insurers who adamantly argued that the damages caps would solve the "insurance crisis" and "skyrocketing premiums" of the day. The reality is that after MICRA's enactment in 1975, premiums continued to rise. By 1988, California medical malpractice premiums had reached an all-time high — 450% higher than 1975 when MICRA was enacted. During the 1980s, California malpractice premiums continued to increase by more than 20% annually. Insurance companies conjured up the excuse that this was a result of court challenges to the law. In 1985, the California Supreme Court upheld the damage cap. Despite that ruling, malpractice premiums in California increased more dramatically in 1986 than any year since the passage of MICRA — nearly 40%.

Malpractice Lawsuits are a Huge Portion of Health Care Costs. Insurance companies have succeeded in convincing everyday Americans (in other words, the jury pool) that medical malpractice lawsuits comprise an enormous portion of health care costs. Bolstering this fact are numbers from the National Association of Insurance Commissioners which insists $6.6 billion was spent defending claims and compensating victims of medical negligence in 2009. Put in proper context, however, a total of $2.5 trillion was spent on healthcare in that same year, making the "giant" costs of medical malpractice lawsuits a mere 0.3% of the money spent on health care. On the other hand, the top five for-profit health insurers made a whopping $12.2 billion in 2009, while 2.7 million Americans found their coverage dropped.

Brainwashing Americans

While doctors and insurance companies deliberately try to shift the focus to insurance premiums, health care costs or alternative compensation systems, the reality is that preventable medical errors make up the sixth leading cause of death in America, ahead of diabetes, Alzheimer's and pneumonia. The Institute of Medicine ("IOM"), in 1999, estimated that as many as 98,000 people die every year as a result of preventable medical errors. Despite these numbers, insurance companies have succeeded in convincing Americans that preventable medical errors are not a huge problem. One in three Americans say that they or a family member has experienced a medical error, and one in five say that a medical error has caused either themselves or a family member serious health problems or death. When surveyed, however, half of respondents believe the annual death total from medical errors to be 5,000 or less which is nearly 20 times lower than the IOM's estimate.

Federal law requires hospitals to reports incidents in which physicians

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have been disciplined to the National Practitioner Databank, founded in 1990. In the two decades since its creation, nearly half of U.S. hospitals have failed to report even a single incident of doctor discipline. Exacerbating this problem are the loopholes hospitals take advantage of. For example, hospitals frequently restrict the privileges of physicians found liable for negligence and misconduct for 29 days to avoid reporting requirements associated with restrictions of 30 days or more.

While politicians and lobbyists try to keep the debate over medical negligence focused on things like doctors' insurance premiums or health care costs, the most important factor is overlooked — the injured patients. Not far behind the juror who brings up the McDonald's case during voir dire is the juror who says we need tort reform. Somehow, insurance companies have convinced everyday Americans to fight for something that is directly antithetical to their best interests.

Caps on non-economic damages do everything but "reform" medical negligence. Non-economic damages compensate people for very real injuries, more so than for any wage loss or medical expenses incurred. Why is it that a housewife who raises three young children or an elder with two grown children who each become the unfortunate victim of medical malpractice are each compensated a maximum of $250,000? Such absurd outcomes only perpetuate the epidemic of shoddy medical care and provide no incentive for bad doctors and hospitals to clean up their acts.

MICRA Limits Access to Justice

Fortunately, progress is being made in some parts of the United States. Both Illinois and Georgia have recently declared medical malpractice damages caps unconstitutional. The Illinois Supreme Court overturned its state's cap in *Lebron v. Gottlieb Memorial Hospital* in 2010. The *Lebron* case involved a baby who was born with severe brain injury, cerebral palsy and other cognitive deficits due to medical malpractice. Illinois law capped liability on physicians at $500,000 and hospitals at $1,000,000, far more than California's $250,000 cap. In reaching the decision to overturn the cap, the Illinois Supreme Court took a formulaic approach and found that the law violated the separation of powers clause of the Illinois Constitution, stating:

> **We explained that the purpose of the separation of powers clause is to ensure that the whole power of two or more branches of government shall not reside in the same hands. Each branch of government has its own unique sphere of authority that cannot be exercised by another branch. Thus, the legislature is prohibited from enacting laws that unduly**

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> ***infringe upon the inherent powers of judges.***

In a 2009 decision entitled *Nestlehutt v. Atlanta Oculoplastic Surgery,* the Georgia Supreme Court was similarly tasked with reviewing a higher cap than we have in California. In Georgia, noneconomic damages are capped at $350,000 in an action against a single medical facility, and $700,000 against multiple medical facilities. The Georgia statute also made clear that in no event shall the aggregate amount of noneconomic damages recoverable by a plaintiff exceed $1,050,000.

In overturning this law, the Georgia Supreme Court held that the caps violate the right to a jury trial, ruling: "A limit or cap on noneconomic damages, however, invades the right to a jury trial by usurping one of the fact-finding responsibilities of the jury," and the "cap so interferes with the determination of the jury that it renders the right of a jury trial wholly unavailable."

At the end of the day, the Georgia Supreme Court said it best with the following lines:

> ***The cap's greatest impact falls on those who are most severely injured, and creates classes of fully compensated victims and those only partially compensated ... Similarly, the noneconomic damages cap discriminates against low-income individuals who are unable to prove large economic damages but nonetheless may sustain large economic damages.***

Make no mistake about it, MICRA is an outright attack on our constitutional right to trial by jury. Article 1, Section 16 of the California Constitution clearly states that "Trial by jury is an inviolate right and shall be secured to all..." Those words empower a jury of our peers to make a determination of what is fair and just compensation for the harm caused to our clients. Much like any other personal injury case in which a jury's decision concerning noneconomic damages stands untouched, so too should the jury's decision stand in a medical malpractice case. Why don't insurance companies, doctors and hospitals trust California residents to determine what is fair and reasonable compensation for the injuries or death caused by a doctor or hospital's negligence? Certainly, if we can trust Californians to sit in judgment in a criminal trial when the possible penalties include life imprisonment or the death penalty, they can be trusted to sit on a civil jury and determine fair and just compensation for a person who has been harmed or killed by the fault of a doctor or hospital.

MICRA has been bolstered for far too long by the myths of increased health care costs and whatever other arguments may be the flavor of the month. Change, however, will not come easy and cannot come without the support (financial and otherwise) of consumer attorneys and others in California.

Be sure to educate your neighbors, friends and families about the evils of MICRA. Be sure to join and financially support CAOC, our friend in Sacramento, which remains ever vigilant in its fight against MICRA. When we defeat MICRA, it will be CAOC who leads the way. The physicians' and insurance companies' lobbies are far too strong, far too well-organized and far too wealthy to topple with just a few periodic jabs at the law.

I challenge CASD's members and other consumer attorneys to keep up the fight year after year until MICRA is overturned. It will not happen overnight and it will not be easy, but together we can deliver the knockout punch that persons in other states have been able to accomplish. Courts have overturned medical malpractice caps in at least 11 states in recent history – let's work to make California next. Our clients deserve it. **TBN**