



The TRUTH About Non-Economic Damage Caps

By Hugh M. Robert

Caps Hurt the Most Severely Injured women, children and elderly

“Non-economic damages” include things like pain, suffering, mental anguish, emotional distress, loss of a limb, blindness, paralysis, loss of sexual function, disfigurement, loss of bladder and bowel control, loss of enjoyment of life, loss of society and companionship, loss of consortium, injury to reputation and humiliation. The cap contains no provision for adjustment due to the effects of inflation. Limiting the amount of non-economic damages that a jury can award an injured party is a bad idea for many reasons, including the following:

- ***The \$250,000 cap is extremely discriminatory.*** Numerous studies have shown that the most severely injured are also the most affected by non-economic damage caps. Such caps also discriminate against children, women, the elderly, minorities and low wage earners. Studies confirming the discriminatory impact of non-economic damage caps have been performed by various types of researchers, including physicians from Harvard Medical School¹; social scientists at the RAND Institute for Civil Justice²; and a law professor at the University of Buffalo. Among other things, those studies have found the following:
 - Employment income is the basis for calculating most economic damage awards. Non-economic damage caps discriminate against children because children have no income upon which to base a calculation.
 - On average, women earn less than do men. Therefore, they will receive a lesser award of compensation than would a man with the same injury.
 - One of the more significant injuries that can be inflicted upon women is harm to reproductive capacity. However, that injury does not impact her earning capacity or entitle her to recover economic damages despite the devastating emotional impact that such a loss may cause.
 - Caps discriminate against retired seniors, who often suffer neglect and abuse in nursing homes and other long-term care facilities, because they also have no employment income.
 - Caps have an impact on the most serious injuries. Those impacted by more than half of the time are cases involving brain damage, catastrophic loss, and paralysis.

¹ Harvard Medical Practice Study, *Patients, Doctors, and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York*. (Boston: Harvard University School of Public Health, 1990).

² “Capping Non-Economic Awards in Medical Malpractice Trials.” Rand Institute for Civil Justice. 2004.



Caps Have Been Found Unconstitutional

* Kansas - *Mahomes-Vinson v. U.S.* 751 F. Supp. 913 (D. Kan. 1990) (\$1,000,000 overall damage cap and \$250,000 non-economic damage cap violated jury trial right); *Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d 251 (Kan. 1988), overruled in part by *Bair v. Peck*, 811 P.2d 1176 (Kan. 1991) (medical malpractice damage caps violated jury trial and due process rights and constituted preestablished remittitur).

* Ohio - *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (Ohio 1999) 86 Ohio St.3d 451 (\$250,000 non-economic damages cap, \$250,000 punitive damages cap, certificate of merit, modification of the collateral source rule violates separation of powers); *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552 (caps violate right to jury trial); *Morris v. Savoy*, 576 N.E.2d 765 (Oh.1991) (\$200,000 cap on malpractice general damages struck down on state due process grounds); *Jeanne v. Hawkes Hosp. of Mt. Carmel*, 598 N.E.2d 1174 (1991) (\$200,000 cap on malpractice general damages struck down on equal protection grounds) *Duren v. Suburban Community Hosp.*, 495 N.E.2d 51 (1985) (limit on survivorship claim damages of \$200,000 unconstitutional under both State and Federal Constitution).

* Alabama - *Smith v. Schulte*, 671 So.2d 1334 (Ala. 1995), (per curium) (\$1 million cap in wrongful death cases against health care providers violates of both equal protection and the right to jury trial); *Moore v. Mobile Infirmary Assoc.* (Ala. 1991) 592 So.2d 156, 158 (\$400,000 non-economic damage cap in medical malpractice cases violates jury trial and equal protection guarantees).

* Wisconsin - *Ferdon v. Wisconsin Patients Compensation Fund*, 2005 WI 125, July 14, 2005 (Wisc.)((\$350,000 cap on non-economic damages in medical malpractice cases violates equal protection.); *Martin v. Richards*, 531 N.W.2d 70, 93 (Wis. 1995) (retroactive application of \$1 million cap on non-economic damages violates due process).

* Illinois - *Best v. Taylor Machine Works* (Ill. 1997), 689 N.E.2d 1057 (\$500,000 cap on non-economic damages was a legislative remittitur, in violation of the separation of powers doctrine, and constituted impermissible special legislation as did abolition of joint and several liability and discovery statutes which mandate the unlimited disclosure of plaintiffs' medical information and records); *Wright v. Central Du Page Hosp. Ass'n* 347 N.E.2d 736 (Ill. 1976), (\$500,000 cap unconstitutional as denial of equal protection);

* New Hampshire - *Brannigan v. Usitalo* 587 A.2d 1232, 1237 (N.H. 1991) (\$875,000 limitation on non-economic damages recoverable in actions for personal injury violates equal protection); *Carson v. Mauer*, 424 A.2d 825, 836-38 (N.H. 1980) (abrogation of collateral source rule and \$250,000 non-economic damage cap in medical malpractice cases violate equal protection).

* New Mexico - *Trujillo v. City of Albuquerque* 125 N.M. 721, 733 (N.M. 1998) (New Mexico Tort Claims Act's cap invalidated because it did not serve an important government interest).



Caps Do Not Bring Down Insurance Rates

Today, medical malpractice rates have stabilized and availability has improved around the country. The rate reductions and flattening had nothing to do with tort restrictions passed in various states, rather can be attributed to modulations in the insurance cycle everywhere. Whether a state has enacted strong insurance regulatory laws has had more of an impact than limitations on awards.

According to the Congressional Budget Office:³

“Insurance Companies investment yields have been lower for the past few years, putting pressure on premiums to make up the difference. According to the General Accounting Office (GAO), annual investment returns for the nation’s 15 largest malpractice insurers dropped by an average of 1.6 percentage points, enough to account for a 7.2 percent increase in premium rates.”

“Several studies have found that various types of restrictions on malpractice liability by themselves do not affect economic efficiency: they modify the distribution of gains and losses to individuals and groups but do not create benefits or costs for society as a whole.”

“Potential savings from capping damages would not have a significant impact on total health care costs. Even with a reduction of 25 to 30 percent in malpractice costs would only lower health care cost by less than one half of one percent.”

The following are state specific examples:

Illinois. In October 2006, Illinois Division of Insurance announced that an Illinois malpractice insurer, Berkshire Hathaway’s MedPro, would be expanding its coverage and cutting premiums for doctors by more than 30 percent. According to state officials and the company itself, this was made possible because of new *insurance* reforms enacted by Illinois lawmakers in 2005, and expressly *not* the cap on compensation for patients that was enacted at the same time.⁴ The law requires malpractice insurers to disclose data on how to set their rates. This, according to Michael McRaith, director of the state’s Division of Insurance, allows MedPro to “set rates that are more competitive than they could have set before.”

Connecticut: “Rate increases are even slowing or stopping in some states that have not limited awards for pain and suffering, including Connecticut, where premium increases in the past have soared as much as 90 percent in a single year.”⁵ Connecticut has no cap on damages.

³ Economic and Budget Issue Brief, Congressional Budget Office. *Limiting Tort Liability for Medical Malpractice*. January 8, 2004.

⁴ See, Adam Jadhav, “Minor insurer is cutting malpractice rates for doctors,” *St. Louis Post-Dispatch*, October 13, 2006; 10/13/2006;

<http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=1&RecNum=5414>

<http://www.dailysouthtown.com/business/blesch/100695,1BIZ3-18.article>

⁵ Diane Levick, “Malpractice Premiums Begin to Level Off,” *Hartford Courant*, September 18, 2005



Caps Do Not Bring Down Insurance Rates (Cont.)

Maryland. “[T]he state’s largest malpractice insurer said it does not need a rate increase for next year, leading some to question whether the much-debated malpractice crisis ever existed.”⁶ In 2006, Maryland’s largest malpractice insurer, Med Mutual, announced plans to cut their malpractice rates by 8 percent in 2007.⁷ Maryland has had a cap on damages since 1986. Sixteen years later, during the most recent insurance crisis, the state still experienced premiums that “rose by more than 70 percent in the last two years.”⁸

Washington. In 2005, the state’s largest med mal insurer Physicians Insurance, which is owned by doctors, requested a 7.7 percent reduction in medical malpractice rates, with the company reporting record-breaking net income.⁹ Washington does not have a cap on damages.

THE CALIFORNIA EXPERIENCE

Thirteen years after the state’s severe \$250,000 cap on damages was enacted (MICRA, passed in 1975), “doctors’ premiums had increased by 450 percent and reached an all-time high in California.” But in 1988 California voters passed a stringent insurance regulatory law, Proposition 103, which “reduced California doctors’ premiums by 20 per within three years,” and stabilized rates.¹⁰

In the thirteen years after MICRA, but before the insurance reforms of Prop. 103, California medical malpractice premiums rose faster than the national average. In the twelve years after Prop. 103 (1988-2000), malpractice premiums dropped 8 percent in California, while nationally they were up 25 percent.¹¹ Moreover, the law has led to public hearings on recent rate requests by medical malpractice insurers in California, which resulted in rate hikes being lowered three times.¹²

The “liability insurance crisis” of the mid-1980s was ultimately found to be caused not by legal system excesses but by the economic cycle of the insurance industry. Just as the liability insurance crisis was found to be driven by this cycle and not a tort law cost explosion as many insurance companies and others had claimed, the “tort reform” remedy pushed by these advocates failed. It has failed again.

⁶ M. William Salganik, “Doctor insurer says malpractice rate increase not needed this year,” *Baltimore Sun*, August 20, 2005.

⁷ M. William Salganik, “Physicians’ insurer to lower premiums,” *Baltimore Sun*, Dec. 15, 2006.

⁸ James Dao, “A Push in States to Curb Malpractice Costs,” *New York Times*, Jan. 14, 2005.

⁹ Rebecca Cook, “How Sick is Malpractice Mess?” *Associated Press*, Jan. 17, 2005.

¹⁰ Foundation for Taxpayer and Consumer Rights, “How Insurance Reform Lowered Doctors’ Medical Malpractice Rates in California and How Malpractice Caps Failed” (March 7, 2003), <http://www.consumerwatchdog.org/healthcare/rp/rp003103.pdf>.

¹¹ Foundation for Taxpayer and Consumer Rights, “Insurance Regulation, Not Malpractice Caps, Stabilize Doctors’ Premiums,” <http://www.ftcr.org/healthcare/fs/fs003013.php3>.

¹² Foundation for Taxpayer and Consumer Rights, “California Group Successfully Challenges 29.2% Rate Hike Proposed by California’s Ninth Largest Medical Malpractice Insurer; Proposition 103 Invoked to Slash Medical Protective Company’s Requested Increase by 60%,” Sep 16, 2004, <http://consumerwatchdog.org/insurance/pr/pr004625.php3>.