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Changing the Medical Malpractice Dispute Process

What Have We Learned From California's MICRA?

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In 1975, amid growing concern over the price and availability of medical malpractice insurance, California changed the laws that govern how personal injury claims arising from health care treatment are litigated and resolved. Today, the same concerns are fueling a vigorous national debate, and Congress is considering various proposals that would impose new rules on all states that have not already adopted restrictions on malpractice litigation. Many proponents of such new rules point to California's Medical Injury Compensation Reform Act (MICRA) as a model for change.

MICRA limits (or "caps") to \$250,000 the amount a plaintiff can recover at trial for *non-economic* damages such as pain, suffering, emotional distress, or mental anguish. (*Economic* damage awards, for out-of-pocket expenses such as medical care costs and wage loss, are not capped.) A jury can award whatever amount it believes is appropriate for non-economic loss, but following the verdict the judge will reduce that portion of the award to \$250,000 (if necessary) prior to entering the final judgment in the case. MICRA also limits plaintiffs' attorney fees in malpractice cases according to a sliding scale based on the size of the recovery, with the fee percentage decreasing as the plaintiff's recovery increases. Prior to the enactment of the law, neither trial awards nor plaintiffs' attorney fees in California medical malpractice cases had any statutory limitations on their size.

The framers of MICRA hoped that the law would reduce the overall number of claims brought against health care providers and the costs of resolving those claims. In turn, it was hoped that any savings would be reflected in lower or stabilized premiums, the continuing availability of malpractice insurance coverage, and a robust number of health care providers continuing to offer a variety of routine and specialty services.

Key findings:

- The MICRA cap on non-economic awards was imposed in 45 percent of the trials resulting in plaintiff verdicts.
- Awards most likely to be capped involve death cases, cases with the severest non-fatal injuries, and/or plaintiffs younger than one year.
- Defendants' liabilities were reduced by 30 percent.
- Attorney fees were reduced by 60 percent.
- Plaintiffs' net recoveries (final awards less fees) were reduced by 15 percent.

A new RAND Corporation report, *Capping Non-Economic Awards in Medical Malpractice Trials: California Jury Verdicts Under MICRA*, examines the effects of MICRA on litigants in actual trials. The researchers analyzed data from 257 plaintiff verdicts in California malpractice trials from 1995 to 1999 and answered these questions:

- How have MICRA's caps on non-economic damages affected the final judgments in California jury trials?
- What types of cases and claims are most likely to have an award cap imposed following trial?
- What have been the effects of MICRA on plaintiffs' attorney fees?
- What have been the effects of MICRA on plaintiffs' net recoveries (the final judgments minus estimated fees)?

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The answers to these questions provide a clearer picture of MICRA’s effects in actual cases. However, with its focus on jury verdicts, the study did not look closely at the far greater number of matters that do not proceed all the way to trial. The study also did not address how MICRA may have ultimately affected medical malpractice premiums and coverage in California, as well as other important issues that include the quality of health care, defensive medicine, the shifting of costs to other benefit providers, and malpractice compensation transaction costs.

What Are the Impacts of MICRA on California Medical Malpractice Trials?

RAND found that MICRA-triggered changes in award size are a common feature of medical malpractice trials in California when the jury reaches a verdict in favor of the plaintiff.¹ The cap on non-economic awards was imposed in 45 percent of the cases won by plaintiffs in the sample. Defendants’ overall liabilities were reduced by 30 percent as a result of MICRA.

When their awards are capped, plaintiffs typically lose many hundreds of thousands of dollars. Certain types of claims and plaintiffs are most affected by MICRA:

- Death cases are capped more frequently than injury cases (58 percent versus 41 percent) and have much higher percentage reductions in total award size than injury cases, with a median loss of 49 percent when the award is capped versus a 28 percent drop for injury cases.
- Plaintiffs with the severest non-fatal injuries (brain damage, paralysis, or a variety of catastrophic losses) had their non-economic damage awards capped far more often than injury claims generally and had median reductions exceeding \$1 million (compared with \$286,000 for all injury cases).
- Plaintiffs who lost the highest percentage of their total awards due to the cap were often those with injuries that led to relatively modest economic damage awards (about \$100,000 or less) but that caused a great loss to their quality of life (as suggested by the jury’s million-dollar-plus award for pain, suffering, anguish, distress, and the like). These plaintiffs sometimes received final judgments that were cut by two-thirds or more from the jury’s original decision.
- Plaintiffs less than one year of age had awards capped 71 percent of the time, compared with 41 percent for all plaintiffs with identifiable non-fatal injuries. Injury cases with reductions of \$2.5 million or more usually involved newborns and young children with very critical injuries.

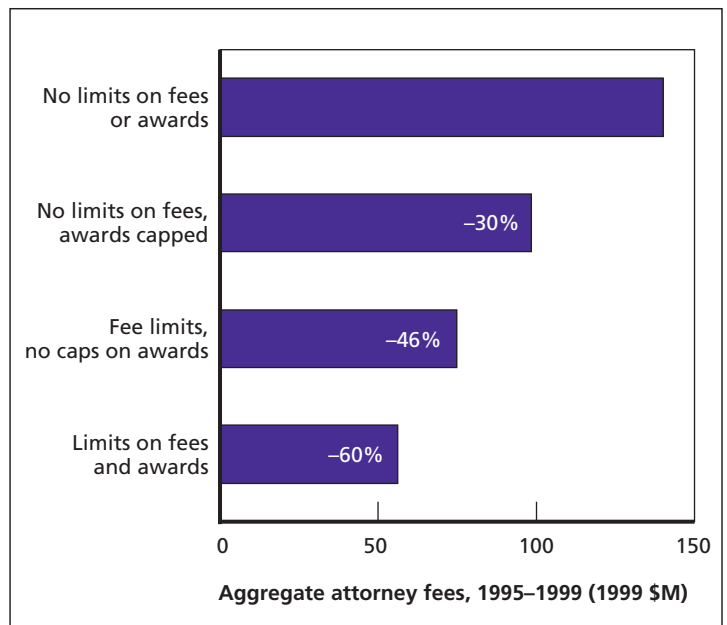
The sliding scale imposed by MICRA on plaintiffs’ attorney fees has also had a dramatic effect. The law prohibits attorneys from charging more than 40 percent of the first \$50,000 of any recovery,²

more than one-third of the next \$50,000, more than 25 percent of the next \$500,000, and more than 15 percent of any amount over \$600,000. To see what sort of impact resulted from the law, RAND estimated that, absent MICRA, the cases examined would have generated approximately \$140 million in fees for the plaintiffs’ attorneys, assuming a “typical” contingency fee rate of one-third of the recovery and using the jury’s original verdict for calculating that fee.

Figure 1 shows the impact of different assumptions on estimated attorney fees. Moving from the top to the bottom bar, the figure shows estimated total fees without MICRA, the effect of award caps alone on fees (a 30 percent decrease), effects of fee limits without any caps on awards (a 46 percent decrease), and the effect of MICRA with limits on both awards and fees, which yield aggregate fees of \$56 million. These results suggest that attorney fees in the trials under MICRA were reduced by 60 percent overall and that the sliding scale has a greater effect on those fees than the damage cap does.

Any change in the fees paid by plaintiffs will affect their “take-home” net recoveries (final judgments less fees) following these trials. Indeed, one reason given for including a fee scale in the original MICRA package was to lessen the impact of the award cap. RAND estimated that without MICRA (i.e., no limits on awards or fees), plaintiffs would have realized net recoveries totaling about \$280 million (see Figure 2). With both limits in effect, aggregate net recoveries would have dropped to \$240 million, a 15 percent decrease. The fee scale cuts in half what plaintiffs in the aggregate might have lost with only an award cap in place.

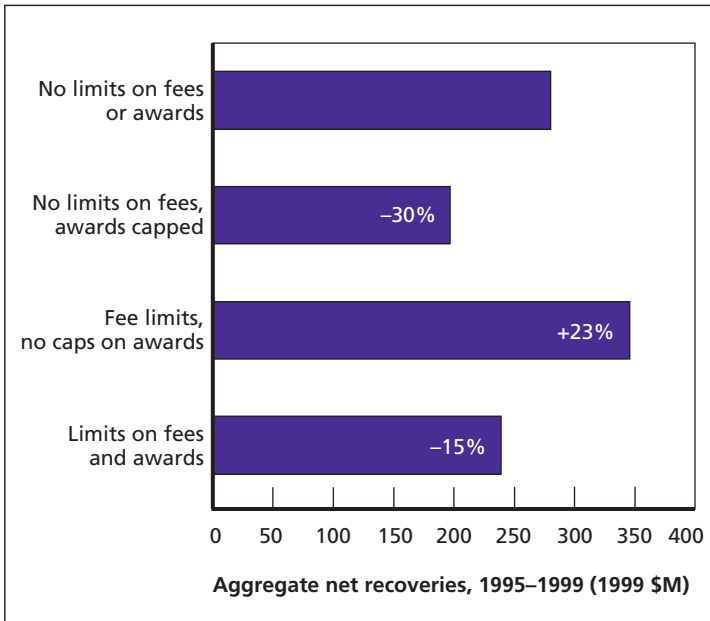
Figure 1
Effects of MICRA on Attorney Fees



¹ About 22 percent of California medical malpractice trials during the study period resulted in a verdict in favor of one or more plaintiffs in each case (compared with 53 percent for all other types of trials).

² The recovery includes payments resulting from final judgments (after any award reduction), settlements, and arbitration awards.

Figure 2
Effects of Fee Scales and Award Caps on Plaintiffs' Aggregate Net Recoveries



Although MICRA's effect on net recoveries yields a drop of just 9 percent for non-fatal injury cases only, there is great variation in the degree to which the net recoveries of individual plaintiffs are changed. Death claims, for example, see an overall drop of 44 percent in net recoveries despite the reduced fees. Net recoveries for all cases with original jury awards for \$250,000 or less in non-economic damages were increased by 19 percent, while those with non-economic damage awards over \$1 million were reduced by 28 percent. The change in net recovery was greatest in high-value death cases, with a 64 percent drop in aggregate size despite the limits on fees.

MICRA's Lessons for the Current Debate

MICRA appears to have had the intended *initial* result of limiting defendants' expenditures. Whether such savings have translated

into reduced premiums, greater availability of coverage, and a more stable health care delivery system—which were the California Legislature's *ultimate* goals for MICRA—is beyond the scope of this analysis.

The fee limits do help to offset award reductions (although the size of that offset varies markedly among individual plaintiffs). Aggregate net recoveries for plaintiffs are 15 percent less than they would have been without MICRA even though defendants are realizing a 30 percent drop in aggregate liabilities. The difference is made up by a sizable decrease in attorney fees. As such, MICRA has effectively shifted some of the costs for compensating medical malpractice from defendants to plaintiffs and to plaintiffs' counsel.

It is not clear how much MICRA has worked to discourage California attorneys from practicing in this field. But with the steep cuts in fees, attorneys may be even more selective about taking on new malpractice clients. Even without MICRA, malpractice attorneys would be highly selective in evaluating new clients because malpractice cases have a relatively low rate of plaintiff victory at trial and carry with them high costs for expert medical witnesses, which are almost always borne solely by the attorney if there is no recovery. With MICRA's cap on non-economic award size and its limits on contingency fees, potential plaintiffs who have incurred only low economic costs would have an even more difficult time finding representation, even if they might stand a good chance of receiving a high-value non-economic damage award from a jury.

Critics claim that laws like MICRA provide inadequate compensation for the most severely injured. Although the RAND study did not address the issue of what might be the proper amount of non-economic compensation for any particular plaintiff, the analysis revealed that jury awards for certain kinds of plaintiffs—those with the most severe non-fatal injuries, those with modest levels of economic loss, and those who died as a result of malpractice—are affected more often or to a greater degree by MICRA's cap on non-economic damages than are awards for other kinds of plaintiffs. If such differences are believed to result in an inequitable application of the cap, policymakers favoring award limits might consider "carve-outs" that would exempt exceptionally tragic or egregious cases from the proposed cap. ■

This research brief describes work done for the RAND Institute for Civil Justice documented in *Capping Non-Economic Awards in Medical Malpractice Trials: California Jury Verdicts Under MICRA* by Nicholas M. Pace, Daniela Golinelli, and Laura Zakaras, MG-234-ICJ, 2004, 114 pages, ISBN: 0-8330-3665-3, available from RAND Distribution Services (phone: 310-451-7002; toll free: 877-584-8642; or email: order@rand.org). The RAND Corporation is a nonprofit research organization providing objective analysis and effective solutions that address the challenges facing the public and private sectors around the world. RAND's publications do not necessarily reflect the opinions of its research clients and sponsors. RAND® is a registered trademark.

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