Using a law and economics approach to attack MICRA

The current $250,000 cap is like a flood rising against the roof of justice

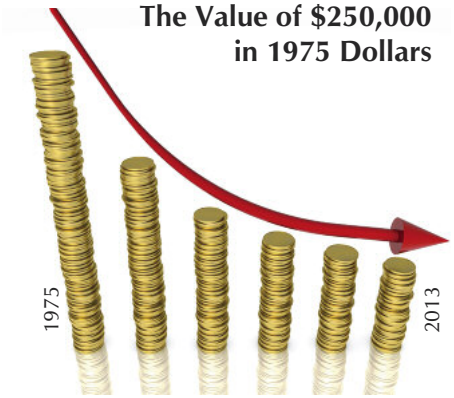
By Christopher B. Dolan

The current, valiant efforts to overturn MICRA in the Appellate Courts, which have unfortunately failed, have been based on arguments that MICRA violates the Equal Protection Clause and the inviolate right to a jury trial. This article will lay out a different law and economics appellate approach, denial of due process (access to justice), which I am currently taking following a verdict in a wrongful death case of an elderly woman who was killed as a result of a doctor's failure to monitor blood thinning medications leading to hemorrhage and death.

The case was what is commonly referred to as a "$250,000 case" meaning that there was no significant economic loss. The jury returned a non-economic damages verdict of $1 million and an economic damages amount of $136,648. Pursuant to post-trial motion, the verdict was reduced to $386,648 and then the economic damages were further reduced to present value. It was a travesty.

The defendant, Peter Curran, President of the San Francisco Medical Society, in a remarkable show of hubris, published, during jury deliberations, his "President's Message" in the Medical Society's monthly journal proclaiming ". . . never underestimate the importance of MICRA. Other than your own performance in the trial process, there is no greater deterrent to malpractice lawsuits than MICRA's cap on pain and suffering damages."

Finally, the truth about MICRA has been spoken. It serves as a bar to the halls of justice for the young, sick, and elderly whose lives are valued by this



In real dollars, the $250,000 cap set in 1975 is worth about $57,500 today.

Source: LA Times, July 9, 2013

sinful law at $250,000. The rising cost of litigating a malpractice case, when contrasted with the fixed $250,000 cap, is like flood water rising against the roof of justice drowning out malpractice victims' access to justice.

According to experts and independent studies, one of every 25 or 30 persons who enter a hospital will fall victim to medical error that causes injury or death. Between 100,000 and 200,000 persons die each year as a result of these acts of negligence and another 1,000,000 people are injured. (James K. Carroll et al., Report on Contingent Fees in Medical Malpractice Litigation, American Bar Association Tort Trial & Insurance Practice Section (2004) hereinafter "TIPS" at p. 3.)

"In fact, medical malpractice litigation is relatively uncommon, when compared to other tort litigation or to the potential number of medical liability claims. Only about one out of 50 valid medical malpractice events in this country is ever made the subject of a claim for injury. As a practical matter, physicians are seldom exposed to claims arising from professional negligence." (TIPS at p.3.)

Effective due process

Application of law and economics principals, when considered in the light of the uncontroverted factual and statistical history since 1976, when MICRA was enacted, conclusively demonstrates that victims of medical negligence cannot secure effective due process in pursuing a medical negligence claim through the courts.

The Supreme Court in *Boddie v. Connecticut* (1971) 401 U.S. 371, 374-375, has recognized a fundamental due process right for civil litigants to have access to justice.

> . . . . [T]hose who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle. The State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing

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>
> Resort to the judicial process by [ ] plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court. For both groups this process is not only the paramount dispute-settlement technique, but, in fact, the only available one. In this posture we think that this appeal is properly to be resolved in light of the principles enunciated in our due process decisions that delimit rights of defendants compelled to litigate their differences in the judicial forum.

(*Id.* at 376-377.)

> Due process requires, at a minimum, that people forced to resolve their disputes through the judicial process must be given a meaningful opportunity to be heard.
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> As the *Boddie* Court stated
>
> [a] statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question. No less than these rights, the right to a meaningful opportunity to be heard within the limits of practicality, must be protected against denial by particular laws that operate to jeopardize it for particular individuals.

(*Id.* at 379-380.)

The proponents of maintaining MICRA cite the public policy exposed in 1976 that "skyrocketing insurance rates" had to be controlled by capping non-economic damages so that doctors would not leave the state and Californians could obtain medical care. Unfortunately the right to medical care is not enshrined in the constitution but the right to counsel is. MICRA deprives those injured and killed by malpractice of this constitutional right.

The California Legislature, as recently as 2009, has stated that constitutional due process requires access to justice through the civil courts, with the assistance of an attorney.

In 2009, AB 590 (Feurer), clearly set forth the overriding fundamental public policy and fundamental due process right: Civil litigants must have the effective assistance of counsel to provide meaningful access to justice. This bill included legislative findings set forth, in relevant part, below:

> The critical need for legal representation in civil cases has been documented repeatedly, and the statistics are staggering. California courts are facing an ever increasing number of parties who go to court without legal counsel. . .
>
> The doctrine of equal justice under the law is based on two principles. One is that the substantive protections and obligations of the law shall be applied equally to everyone, no matter how high or low their station in life. The second principle involves access to the legal system. . . . For persons without access, our system provides no justice at all, a situation that may be far worse than one in which the laws expressly favor some and disfavor others. . . .
>
> The adversarial system of justice relied upon in the United States inevitably allocates to the parties the primary responsibility for discovering the relevant evidence, finding the relevant legal principles, and presenting them to a neutral judge or jury. Discharging these responsibilities generally requires the knowledge and skills of a legally trained professional.
>
> Because in many civil cases lawyers are as essential as judges and courts to the proper functioning of the justice system, the state has just as great a responsibility to ensure adequate counsel is available to both parties in those cases as it does to supply judges, courthouses, and other forums for the hearing of those cases.
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> ...The guarantees of due process and equal protection as well as the common law that serves as the rule of decision in California courts underscore the need to provide legal representation in critical civil matters when parties cannot afford the cost of retaining a lawyer."

(AB 590 Feurer (2009) emphasis added.)

The $250,000 non-economic damages cap, in consideration with the rising costs of litigation, and the unique evidentiary burden of production and proof in medical negligence cases, denies access to justice and violates the Due Process Clause.

Economics a barrier to access to justice

It is uncontroverted that California Civil Code section 3333.2 (MICRA), with its $250,000 cap, has gone unchanged since 1976. In wrongful death cases such as the one at bar, where the decedent was a low wage earner, and the Plaintiff, an adult daughter who was largely financially independent, the economics of litigating complex medical negligence cases creates a barrier to access to justice.

A review of several key economic indicators tied to the expense involved in prosecuting medical negligence cases illustrates the barrier to access to justice that the MICRA cap imposes on those seeking representation. This article will focus on those economic indicators directly associated with litigating civil actions and, particularly, medical negligence cases. These indicators include several of the more ubiquitous costs associated with civil litigation i.e., court costs, court reporter fees, and attorney fees (as measured by median income). Additionally, CACI 501 & 502, Standard of Care for Medical Specialists, requires the use of medical expert testimony to prove medical negligence, thereby making malpractice cases more expensive than any other.

Filing fees – the price of admission

In 1998, the cost of filing a complaint in actions with a claimed value over $25,000 was $182. Given the recent passage of SB 1021 (Stats, 2012, ch. 41) that fee is now $435. (Gov. Code, § 70611.) This is a 239 percent increase in just 14 years. (See History of Civil Fees.) The fee for filing a motion in 1998 was $14, it now is $60. (Gov. Code, § 70617(a).) (*Id*.) This represents a 328 percent increase over the same time period. (*Id.*) As of 2013, all plaintiffs filing civil actions must now deposit jury fees in the amount of $150 at the time of the first case management conference. (If they had even been one dollar before, this would amount to a 14,900 percent increase. (Code of Civ. Proc. § 631(b).) (*Id*.)

Court reporter fees

Court reporters, transcribing both pre-trial depositions and proceedings, as well as the trial itself, are an indispensable component to the judicial process; therefore, the costs associated with their services are a reliable indicator of costs associated with prosecuting malpractice actions. According to the Bureau of Labor Statistics (BLS), during the same time identified above for Court filing fees, 1999 to 2011, their mean annual wage rose from $38,040 to $53,710. This is an increase of 41 percent over this 12-year period. (United States Dept. of Labor Bureau of Labor Statistics (BLS), 1999 & 2012 National Occupational Employment and Wage Estimates (23-2091 Court Reporters))

In the case which I tried, pre-trial deposition transcript costs were $7,081.70, Plaintiffs' share of the court reporter fees at trial was $10,250.00.

Legal fees

The cost of legal services has risen dramatically since 1976. As lawyers are an indispensable part of the litigation process, their fees are a necessary and reliable indicator of the cost of seeking justice. Since MICRA was enacted, the costs of legal services have gone up 607 percent. (United States Dept. of Labor Bureau of Labor Statistics, 1999 & 2012 National Occupational Employment and Wage Estimates (23-1011 Lawyers).) Despite this, contingent fee attorneys, handling medical malpractice cases with low non-economic damages and the $250,000 cap, combined with the requirement to have the costs deducted prior to application of the fixed contingency fee structure (Bus. & Prof. Code, § 6146), have actually seen their real fees/wages decrease significantly over this same time period.

Not only has inflation decreased the value of the $250,000 recovery, the costs associated with handling a malpractice case have risen faster than inflation, thereby annually compounding the decrease in the real rate of compensation to both victims and their attorneys.

Medical expert fees

Medical expert fees, a required component of a medical negligence action, under CACI 501 & 502, have risen exponentially and create a barrier to access and contribute to the denial of due process. The mandated expense involved in retaining and utilizing medical experts in malpractice cases acts as a significant barrier to access to justice and obtaining due process for victims of physician negligence.

The rising costs of physician experts, and especially specialty physician experts, creates prohibitive costs for medical malpractice plaintiffs (and their lawyers to advance) to prove their cases.

Hourly expert medical fees in our case ranged from $320 to $900 per hour. According to the BLS Occupational Employment Statistics, Occupational Employment and Wages, May 2011 5 29-1069, the mean hourly wage for physicians and surgeons is $88.78. Therefore, the expert fees here are between 547 percent and 913 percent of the mean hourly wage of practicing physicians and surgeons. (Expert fees are unregulated and present a lucrative income opportunity to doctors who face caps of their rates based on managed care, and governmental fee schedules (Medi-Cal, Medi-Care, etc).

In our case, court reporting fees and expert fees, alone, amounted to over $65,071.70. This is 69 percent of the total $93,657 in costs. When added to the $17,331.70 in court reporter costs (18.5 percent of total costs), the percentage of total costs is 87.5 percent. MICRA, while capping victim recovery, and attorney fees, places no cap on these costs. Application of well-established law and economic principals clearly identifies the $250,000 cap as a barrier to access to justice and, therefore, an infringement on, and defacto denial of, due process.

The Shepherd study

A recent legal research paper, by Joanna Shepherd Ph.D, Associate Professor of Law and Economics, Analytical Methods for Lawyers, Statistics for Lawyers, Economics and Public Policy, etc., at Emory University School of Law, entitled *Justice in Crisis; Victim Access to the American Medical Liability System, Legal Research Paper Series, Research Paper No. 12-222*, provides an objective analysis demonstrating that non-economic damage caps, such as California's, result in a denial of due process to an identifiable class of victims who do not have substantial economic loss.

Dr. Shepherd's paper presents the first national survey of attorneys aimed at exploring the ability of medical malpractice victims to gain representation and, therefore, access to the civil justice system. The summary conclusion of Dr. Shepherd's study is that the economic reality of litigation forces many otherwise qualified attorneys to reject legitimate cases and, as a result, many legitimate victims of medical malpractice are left with no legal representation and no meaningful access to the civil justice system. Dr. Shepherd stated the obvious when saying "[b]ecause of the high cost of medical malpractice investigation and litigation, plaintiffs' attorneys cannot economically justify taking cases that lack sufficient damages to warrant the litigation expense." (*Id.* at 14.)

In addition to the research which Shepherd herself did, she cites other empirical studies (including the Rand Institute, an insurance backed conservative "think tank") which evaluated the effect of non-economic damages caps and attorney's fees limitations on access to justice. Consistent with her own empirical research, the results of these studies "confirmed that both non economic damages caps and limits on attorney's fees substantially discouraged attorneys from representing clients." (Justice in Crisis, supra, at pp. 16-17, citing Stephen Daniels and Joanne Martin, "The Juice Simply isn't Worth the Squeeze in Those Cases Anymore," Damage Caps 'Hidden Victims,' and the Declining Interest in Medical Malpractice Cases, American Bar Foundation Research Paper Series 09-01, 28 (2009).)

> Hence, the limited empirical work on the subject confirms that high litigation costs and tort reforms that lower damages have restricted access to the legal system for many legitimate victims of medical malpractice. The factors have made it impossible for many plaintiffs' attorneys to economically justify taking cases that lack sufficient damages to warrant the litigation expense.

(*Id.* at p.17.)

> As litigation costs and tort reforms make it economically infeasible for attorneys to accept many medical malpractice cases, many legitimate victims of medical malpractice are left without legal representation.

(*Ibid*.)

> Non-economic damage caps "induce attorneys to prefer cases with higher economic damages, which are rarely limited by tort reform, and reject cases where the majority of the harm is non economic." (*Id.* at pp.17-18.) "Because the costs are especially high in a malpractice action, and because the likelihood of prevailing is especially low, the typical malpractice action will involve a significant level of risk. (TIPS at 23.)

Most cases rejected

The malpractice lawyers Shepherd surveyed were asked what their rejection rate was for malpractice cases screened. Of those surveyed, 76.8 percent indicated that they rejected more than 90 percent of the cases screened. The primary reason given for rejection was insufficient damages expected from trial or settlement (insufficient to justify the time, expense and risk). Given that 48.37 percent of the overall number of rejected cases were rejected for lack of evidence of negligence and/or causation, 51.63 percent were cases which were deemed to have evidence of merit but were rejected for other reasons. Of this 51.6 percent, 50.47 percent (or 90 percent of the cases with potential merit) were rejected because of economic barriers to litigating the case (costs when considered against the potential recovery). (Shepherd, at p. 32, Table 12.)

Shepherd's study of medical malpractice attorneys (nationwide) also analyzed the average litigation costs associated with handling malpractice actions at three different stages – dismissal without payment ($18,062.76), settlement with payment made to the plaintiff ($58,275.89), and jury verdict for the plaintiff ($97,369.79). (Given that the probability of success through verdict, nationwide, is only 22-25 percent, this can be looked at as the national average cost of obtaining a verdict.) This empirical study is entirely consistent with the expenditures in our case of $103,187.82. Not only are these the riskiest cases, the U.S. Dept of Justice, Bureau of Justice Statistics, Civil Justice Survey of State Courts (hereinafter "DOJ Survey" NCJ 206240 at p.6.) showed that malpractice cases had the longest median time, 30 months, from filing to disposition. Therefore these cases have the highest quotient of risk with their costs stretched out over the longest period of time.

Dr. Shepherd's study concluded that, "unless expected [recoverable] damages are large, contingent fee attorneys simply cannot justify accepting many cases because the expected fee will not offset the high litigation costs." (We filed over 35 declarations from lawyers throughout the State saying they could not handle malpractice cases.) This limitation, on a particular class of damages, "disproportionately reduces both compensation and access to justice for specific segments of the population" such as females, children, the elderly and the poor because a much greater proportion of their damage awards are in the form of noneconomic damages." (*Id*. Citing Lucinda M. Findley, *The Hidden Victims of Tort reform: Women, Children and the Elderly*, 53 Emory L.J. 1263 (2004); Nicholas M. Pace, Laura Zakaras, & Daniela Golinelli, *Capping Non-Economic Awards in Medical Malpractice Trials: California Jury Verdicts Under MICRA 30-33* (2004).)

Other empirical studies have confirmed this disproportionate denial of representation. (*Id*. at p. 19 citing Rachael Zimmerman & Joseph T. Hallinan, *As Malpractice Caps Spread, Lawyers Turn Away Some Cases*, Wall St. Journal Oct. 8, 2004 at A1 [Caps on damages for pain and suffering ... [are] turning out to have the unpublicized effect of creating two tiers of malpractice victims … Lawyers are turning away cases involving victims that don't represent big economic losses – most notably retired people, children and housewives . . . ."].)

The Rand Study found that death cases are capped more frequently than injury cases (58 percent versus 41 percent), and when they are capped, death cases have much higher percentage reductions in total awards than injury cases, with a median drop of 49 percent versus a 28 percent drop for injury cases. (Rand Study at 77.)

The "rational actor" plaintiff's attorney

Dr. Shepherd developed a "rational actor," a contingency-attorney decision making model, confirmed by a national-survey, which looked at the costs of

prosecution, factored against the risk of loss, and potential outcome. As with any type of civil litigation in which contingency-fee agreements are extensively used, plaintiffs' attorneys in medical malpractice litigation must perceive that the expected revenues from representing a client exceed the costs the attorney is likely to incur in litigation, given the risk that there may not be any recovery whatsoever. (Rand Study at p. 8.) Given that national statistics demonstrate that plaintiffs prevailed in approximately 22 to 25 percent of medical negligence cases, it is possible to construct a rational decision matrix for accepting contingent fee medical negligence cases.

The model demonstrates that a rational actor would reject a contingent fee medical negligence case (with a 33 percent contingency fee, and no attorney's fees restrictions) where the costs were $50,000, unless the risk was 0 and the potential damages were at least $150,000 (otherwise it would cost the attorney more to litigate the case than the expected fee).

In California, because of Business & Professions Code section 6146 and its effects on application of both costs and attorney's fees, that amount would have to be $206,000 ($206,000 - $50,000 in costs = $156,000 which, after the declining sliding scale attorneys fee in section 6146, results in a $50,000 fee.) Since the statistics show that malpractice plaintiffs have only a 22 to 25 percent chance of winning any verdict at trial, given section 6146's attorney fee restrictions and the mandatory deduction of costs before calculating fees, the expected net value of any case taken by a rational actor, in which he would invest $50,000 would have to be at least $824,000, ($824,000 x .25 = 206,000).

To recover a $93,657 fee (equal to the costs in this case), in a case with zero risk of loss, a verdict of $421,618.36 would have to be achieved. ($421,618.36 - $93,657= $327,961.36 which, under section 6146, yields a fee of 93,656.) Given the statistical 75 percent loss ratio, the rational expected minimal return would be approximately $1,686,473.44 ($1,686,473.44 x .25 = $421,618.31.) This clearly is not, and was not, a possible, much less rational expectation given the $250,000 cap. Knowing the case was out there, and the economic damages involved, Plaintiffs' counsel knew that, with a 75 percent chance of losing, the case had an expected attorney's fee of $1,219.48. 386,684 x .25 = 96,671 - 93,657.29 = $3,013.71 net expected recovery after accounting for risk. This, times 40 percent equals net expected attorney fee of $1,205.48. There is no economic justification for spending $93,657.29 to achieve an expected value of 1.3 percent of total costs as attorneys' fees.

The market distortion which MICRA creates in obtaining representational due process is amplified by the fact that the defendants have *no constraints* on what their lawyer gets paid. Indeed, the doctor is encouraged not to be a rational actor based on the fact that she/he is fully indemnified and can force his insurance company, through the withholding of consent, to spend hundreds of thousands of dollars in fees and costs and hundreds of thousands more on a plaintiff's award. This is not the case in any other context where there is insurance. In most all other cases an insurance company can make a rational economic decision and settle a case. Therefore, it is clear that the economic impacts of MICRA decrease, if not completely eliminate, the likelihood that a potential plaintiff will be able to obtain due process through legal representation. (Rand Study at 8.)

Economics of our case

Our case was an example of how the $250,000 non-economic cap compels a rational actor (attorney acting on a contingency fee) not to represent a wrongful death plaintiff (or catastrophically injured party) where significant non-economic damages are not present.

When the MICRA $250,000 cap was applied, the $1,136,648 verdict was reduced by $750,000.00 to $386,648. Under Business & Professions Code section 6146, the attorney fee was calculated as 40 percent of the first $50,000 [$20,000], plus 33 1/3 of the next $50,000 [$16,666.66], and 25 percent of the next $500,000, in this case 25% of $192,990.71 [$48,247.68]. The attorney fee then is $20,000 +$16,666.66 + $48,247.68 for a total of $84,914.34.

A rational actor will not spend $103,187.82 in costs, and several hundred thousands of dollars in time, (in the instant action over $224,000 for the trial alone, not including the years of pre-trial litigation) to recover $84,914.34. No business can survive by consistently engaging in a business model where the expenses of the enterprise are three times greater than the return (i.e., loss). The result of the economic impact is that the "MICRA squeeze" has led to an elimination of resources (lawyers, with their time and money) which are absolutely essential to gain access to justice and the constitutional right to due process.

Conclusion

The fixed ceiling of MICRA, in the dynamic environment of medical malpractice litigation, with its rising tide of cost and risk, leads to the inevitable suffocation of plaintiffs' rights to due process just as if they were trapped in a room with a rising flood water. The economic realities create barriers to access to justice leaving victims of egregious malpractice nowhere to go. Without due process of law, the State's monopoly over techniques for binding conflict resolution can hardly be said to be acceptable under our scheme of things. MICRA must be held constitutionally invalid, as applied in economic reality, when it operates to deprive a class of individuals (those injured by well-heeled and politically powerful negligent doctors) of their protected right even though it had, at one time, general validity as a measure enacted in the legitimate exercise of state power. (See, *Boddie v. Connecticut*, 401 U.S. at 374-375 & 379.)

The courts should not allow themselves to become an agent for perpetuation of an obvious injustice being

executed with judicial imprimatur. Permitting the judicial branch of government to be used as a broom to clean up damage done by negligent doctors and therein to sweep away the rights of children, minorities, women, the elderly, the poor and the families of the deceased, those most in need of judicial protection, perverts the concept of justice and due process.

The time has come, and has been long since waiting in despair, for the courts to put an end to this travesty. In the same way, just as the courts acted in the 1960s to prevent the inequity of racism, and just as they have acted with pride in case after case to protect not only individual rights, but fundamental freedoms and access to justice, the courts cannot sit idly by and become a monolithic monument beneath which the trampled rights of malpractice victims lay buried. Instead, the courts must strike a crippling blow to this "law" which, as stated by Dr. Curran himself, acts not as a shield but, instead as a sword to "deter" victims from seeking redress.


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