

Healthcare Reform Should Not Follow MICRA's Example

THIRTY-FIVE YEARS AGO, in response to rising medical malpractice premiums, the California Legislature declared the existence of a healthcare crisis. To address it, the Medical Injury Compensation Reform Act (MICRA) was created.

MICRA limits the ability of victims of medical malpractice to obtain justice by reducing the damages that victims can recover. The amount of recovery for noneconomic losses (pain, suffering, inconvenience, impairment, disfigurement, etc.) was capped at \$250,000, and no adjustment for inflation has been made since. MICRA also gives doctors the right to introduce evidence of collateral sources of income for victims, such as disability payments or benefits received under group health plans, so that the victims' recovery amount may be reduced. The act further allows doctors to make periodic payments to satisfy any judgment that exceeds \$50,000, without necessarily requiring the payment of interest. Further, MICRA authorizes compulsory arbitration agreements in medical service contracts, depriving patients of the right to a jury trial. Finally, in order to reduce the incentive for lawyers to take medical malpractice cases, MICRA reduces the amount of the contingency fee that victims can pay.

As a result of MICRA's provisions, unless a victim of medical malpractice has very serious economic damages (or, like Dennis Quaid, ready access to the media), it can be hard to find a lawyer and even more difficult to convince a doctor's insurance company to make a reasonable pretrial settlement offer. MICRA stacks the cards in favor of doctors and their insurers. It does not give victims any new rights or remedies to level the scales for the rights that it takes away. Justice Stanley Mosk said it best in his dissent in *American Bank & Trust Company v. Community Hospital*, one of the cases rejecting a constitutional challenge to MICRA: "This imprudent legislation provides benefits to the wrongdoer at the expense of his victim."¹

Only a few years after MICRA was enacted, statistics showed at best a negligible overall effect on healthcare cost containment. Malpractice premiums declined, but the cost of hospitalization continued to rise. If MICRA had solved the healthcare crisis that California was experiencing in 1975, it would be unlikely that so many Californians would have seen the need for the recent federal healthcare reform.

Whether or not MICRA has significantly reduced healthcare costs in California, the last 35 years offer many examples of the heavy price that has been paid by malpractice victims. Put simply, the law is unjust. For example, James Van Buren's doctors diagnosed him with a perianal abscess and recommended surgery, during which Van Buren's doctor negligently severed one of Van Buren's muscles, causing Van Buren to suffer permanent fecal incontinence. At trial, the jury determined his damages for a lifetime of incontinence to be \$2.5 million. Following MICRA, the judge reduced the amount to the cap, \$250,000, a reduction that was later upheld on appeal.²

Other examples include the plaintiff in *American Bank & Trust*,³ who had to live with painful physical disfigurement and scars, and several women I know who lost a fetus late in pregnancy due to medical negligence. These are primarily emotional, not economic, injuries, but they are injuries nonetheless. Like it or not, we are emotional beings, and traumatic memories can be more painful than a broken leg, even if they cannot be found on an x-ray.

Moreover, medical providers should not be shielded from the consequences of causing injuries any more than any other group. People deserve to experience the consequences of their mistakes,

Medical providers should not be shielded from the consequences of causing injuries any more than any other group.

and negligent doctors are not excepted, especially considering the gravity of the injuries they can cause. By what right did the legislature determine that it is more important to have negligent doctors earning a good living than it is to ensure that there is justice for those they injure?

Tort reform advocates also like to deflect attention from the plight of medical malpractice victims by attacking the victims and their lawyers. Personal injury lawyers are demonized as money-grubbing charlatans, and noneconomic damages are treated with derision and skepticism. When a jury finds liability, the justice system is called a failure. This caricature is wrong. Personal injury specialists are entitled to be paid for their expertise, just like anyone else, and victims would gladly part with a percentage of something rather than get nothing. The bargain between a lawyer and a client deserves as much respect as any other contract. As for noneconomic damages, they are real. And as for the jury system, medical malpractice cases are no more complex than many other cases that go to trial. An expert and a lawyer should be able to explain medical facts to jurors. If not, shame on the lawyer and expert, not the jurors.

Doctors compelled to follow the latest federal healthcare reform guidelines will want some form of immunity from suits stemming from cost-cutting measures. If MICRA is any harbinger of things to come, the victims of medical negligence will still be bearing the brunt of reform in 2045. ■

¹ *American Bank & Trust Co. v. Community Hosp.*, 36 Cal. 3d 359 (1984) (Mosk, J., dissenting).

² *Van Buren v. Evans*, No. 146178 (5th Dist. May 20, 2009) (unpublished).

³ *American Bank & Trust Co.*, 36 Cal. 3d 359.

Heather E. Stern is a partner with Kralik & Jacobs LLP, where she specializes in real estate and banking litigation