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Does MICRA apply to that fall in the doctor's office?

FLORES AND ITS PROGENY AND THEIR IMPACT ON WHETHER MICRA CONTROLS YOUR CASE OR IT PROCEEDS AS A PREMISES-LIABILITY ACTION

"Is this a case that would fall under MICRA?"

It is a question I receive nearly every day. If a fall occurs in a hospital due to that hospital's careless conduct, is that case subject to The Medical Injury Compensation Reform Act of 1975 ("MICRA")? Is it professional negligence to allow an overhead fixture at a dentist's office to fall and harm a patient undergoing a root canal? Is it medical malpractice to misplace a severed limb, rendering reattachment impossible? What if my injured client was not a patient and just a visitor to the hospital?

To be fair, until recently, the law was muddy. This article explains the impact of *Flores v. Presbyterian Intercommunity Hospital* (2016) 63 Cal.4th 75, and the cases published since *Flores* to explain whether MICRA applies to your premises- liability case.

MICRA, in brief

Obviously, MICRA is unjust. We all know about the $250,000 limit on noneconomic damages that has been unadjusted for inflation in the past 47 years. Some plaintiff-side lawyers misinterpret the impact of the cap and view it as akin to an insurance policy limit. It is not. Because the $250,000 cap is a hard cap, there is no possibility of a bad-faith action or popping the policy, at least in relation to the noneconomic cap. Accordingly, unlike a general liability or automobile liability carrier, medical-malpractice insurance carriers have no incentive to settle, because they know the worst-case scenario of an adverse verdict at trial. Indeed, even in clear-liability cases, medical-malpractice insurance companies are known to vigorously defend cases and offer no settlement to dissuade law firms from taking such cases in the future.

But MICRA is not just the $250,000 cap. There are other unjust MICRA provisions such as the abolition of the collateral- source rule in relation to health insurance (Civ. Code, § 3333.1, subd. (a)), the defendant's right to periodize payments even if you do win (Code Civ. Proc., § 667.7), the one-year statute of limitations (Code Civ. Proc. § 340.5), and the limitation on attorney fees (Bus. Prof. Code, § 6146).

These MICRA provisions can absolutely gut the value and/or viability of your premises-liability case. The insurance company will not assign any value to the *Howell* medical expenses as the defense lawyer will be able to parade in front of the jury that your client carried health insurance. Not only is MICRA's attorney fee provision a decreasing scale, but the litigation costs must be deducted from the recovery before the fee schedule is applied. This makes it economically

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
March 2022

impossible to spend significant costs unless the injuries are catastrophic.

Accordingly, it is essential to understand the law and whether your case falls under MICRA. This is not just crucial as to case selection and ascertaining settlement value, but to make sure that you correctly plead the facts in the complaint to ensure that it is not subject to MICRA in those borderline cases.

The mixed bag impact of *Flores*

In the years leading up to *Flores*, appellate courts took an increasingly broad view of what constituted professional negligence subject to MICRA's provisions. MICRA covered a nonemployee phlebotomist who was injured when she drew blood from a violent patient even though the hospital knew but concealed the patient's dangerous propensities. (*Williams v. Superior Court* (1994) 30 Cal.App.4th 318, 321.)

Allegations that a doctor forcefully and violently injured a patient were held to be covered by MICRA. (*Larson v. UHS of Rancho Springs, Inc*. (2014) 230 Cal.App.4th 336.) MICRA somehow even applied when a non-patient police officer was injured due to poor driving by an EMT while accompanying an arrestee patient in the back of an ambulance. (*Canister v. Emergency Ambulance Service, Inc.* (2008) 160 Cal.App.4th 388.)

At first blush, *Flores* appears to have continued this trend when the Supreme Court found against the plaintiff in holding that MICRA applies. In *Flores*, a hospital patient fell out of her bed when the latch on a bedrail failed and the rail collapsed. After suing for premises liability and general negligence more than a year after the fall, the trial court sustained a demurrer and dismissed the lawsuit as being untimely pursuant to MICRA's one-year statute of limitations under section 340.5.

The Court of Appeal reversed the trial court, finding that MICRA did not apply given that the hospital's responsibility for equipment failure constituted ordinary, not professional, negligence. The Court of Appeal astutely found that the hospital's failure to use reasonable care in maintaining its premises "did not occur in the rendering of professional services."

The California Supreme Court disagreed and found that the case was subject to MICRA. In doing so, the Court rejected the plaintiff's argument that "professional services" as defined in the MICRA statutes only involves those that required a high degree of professional skill. Likewise, the Court also rejected the Court of Appeal's view that MICRA only applied when there was an active rendering of professional services.

Indeed, the Supreme Court specifically stated that the test is *not* whether the situation calls for a high or low level of skill, or even whether a high or low level of skill was actually employed. The Court explained that "[a] medical professional or other hospital staff member may commit a negligent act in rendering medical care, thereby causing a patient's injury, even where no particular medical skills were required to complete the task at hand."

As examples, the Court noted that if a patient's medical needs required a special diet, and the patient is injured because a low-level employee provides the wrong food, the hospital would be covered under MICRA. *Flores* even adopted the terrible dicta from the 9th Circuit in *Taylor v. U.S.* (9th Cir. 1987) 821 F.2d 1428, 1432, in finding that an action is covered by MICRA even if an oxygen ventilator became disconnected due to an "accidental bump of a janitor's broom."

However, in doing so, the Supreme Court also rejected the hospital's argument that MICRA automatically covered every conceivable injury that occurs under the hospital's roof. This would be contrary to the intent of the legislature as MICRA would become "an all-purpose rule covering essentially every form of ordinary negligence that happens to occur on hospital property."

By way of example, if the same janitor left his broom on the hallway floor causing injury to a visitor, that action would not be covered by MICRA. The Court went on to explain:

Even those parts of a hospital dedicated primarily to patient care typically contain numerous items of furniture and equipment – tables, televisions, toilets, and so on – that are provided primarily for the comfort and convenience of patients and visitors, but generally play no part in the patient's medical diagnosis or treatment. Although a defect in such equipment may injure patients as well as visitors or staff, a hospital's general duty to keep such items in good repair generally overlaps with the obligations that all persons subject to California's laws have, and thus will not give rise to a claim for professional negligence. If, for example, a chair in a waiting room collapses, injuring the person sitting in it, the hospital's duty with respect to that chair is no different from that of any other home or business with chairs in which visitors may sit. [MICRA] does not apply to a suit arising out of such an injury.

The *Flores* Court summed up its holding as follows: "[W]e conclude that whether negligence in maintaining hospital equipment or premises qualifies as professional negligence depends on the nature of the relationship between the equipment or premises in question and the provision of medical care to the plaintiff."

But seriously, does my slip-and-fall case fall under MICRA?

Let's say a hospital patient falls in a hospital and seeks legal representation. Given *Flores*, would that case be subject to MICRA? It depends!

For example, if a patient falls unaccompanied because that patient's medical condition rendered her a high fall risk when she should have been accompanied when walking, that case would certainly fall under MICRA's provision. In the recent case of *Mitchell v. Los Robles Regional Medical Center* (2021) 71 Cal.App.5th 291, 294, a depressed patient took 60 prescription NSAID pills.

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
March 2022

After being taken to the hospital, the patient was allowed to walk unassisted to the bathroom even though the hospital was aware of her tremors and other side effects from taking the medication. On the way to the bathroom, the patient fell and seriously injured her knee. The floor was not slippery or wet, but the patient contended that she should not have been allowed to walk unassisted given her condition. The patient filed a premises liability claim after the one-year MICRA statute.

The appellate court affirmed the trial court's decision that the case was untimely. The court noted that "accompanying someone to the restroom is not a sophisticated procedure." That being said, as established by *Flores*, the level of skill is simply not the test and allowing the patient to walk unassisted was a claim of professional negligence."

But not every fall case in a hospital falls under MICRA. If the fall occurs due to failure to put a warning sign next to a wet floor or carelessly left equipment, then that case would not be subject to MICRA. In *Johnson v. Open Door Community Health Centers* (2017) 15 Cal. App.5th 153, 160, a patient was at a medical clinic to review her test results with a nurse practitioner. Before the consult, and before she entered the treatment room, the patient had her vital signs taken and was weighed on a scale without incident. After the consultation and examination was over, the patient left the treatment room and tripped on the same scale. However, the scale was moved during the consult and was partially obstructing the path from the room to the hall. The patient suffered serious injuries but waited over a year to file her premises-liability lawsuit. The trial court granted summary judgment, finding the patient's case untimely under MICRA.

The appellate court reversed, finding that MICRA did not apply and thus the patient's case was timely. The Court of Appeal explained that, although the patient tripped on medical equipment coincidentally used as part of her earlier medical treatment, the wrongful obstruction of the hallway by equipment constituted ordinary, not professional, negligence. As the court explained:

> Had [the patient] alleged the improper placement of the scale caused her to fall off the scale and injure herself, MICRA might apply. Had she alleged that Open Door's failure to properly calibrate the scale resulted in inaccurate information and inappropriate medical care, any resulting claim would almost certainly be subject to MICRA. However, she alleges that Open Door's placement of the scale posed a tripping hazard, implicating Open Door's duty to *all users* of its facility, including patients, employees, and other invitees, to maintain safe premises.

(Emphasis in the opinion.)

Notably, the Court of Appeal explained that under these facts, the nature of the object did not matter – "the scale could have just as easily been a broom or a box of medical supplies." Rather, what was important was that the medical clinic "left a hazardous object in her path." Under those facts, MICRA did *not* apply.

What exactly is the rule to establish whether MICRA applies?

While *Flores* provided some clarity, it is still difficult to exactly draw the line between medical malpractice and general negligence. As the *Johnson* court recognized: "The precise boundary between the duties owed by a health care provider to the general public and those it owes to its patients, i.e., whether negligence occurs in the course of 'rendering professional services,' can be difficult to ascertain."

Nevertheless, the best way to determine whether MICRA applies in your case is to do as follows: Substitute the word "hospital" or "medical clinic" with the word "restaurant" or "hotel." If the facts simply do not make sense, MICRA applies. If the facts still make sense, MICRA does not apply.

In *Mitchell*, the allegations would be nonsensical if instead of a hospital, the unaccompanied patient fell while walking to the bathroom at an Applebee's. By contrast, in *Johnson*, the allegations would still make sense if a Holiday Inn carelessly left a tripping hazard that partially obstructed the lobby hallway.

If a patient suffered injuries after falling while being transported to an X-ray room table because a hospital's low-level employees allowed the gurney to tip, that would fall under MICRA. These are the facts and holding of *Nava v. Saddleback Memorial Medical Center* (2016) 4 Cal.App.5th 285, 292. As the court recognized, "the alleged negligence in the use or maintenance of a gurney from which [the patient] fell was integrally related to his medical diagnosis or treatment."

On the other hand, if a driver is injured by the negligent driving of a paramedic supervisor who was en route to an injured victim in his employer's pickup truck in order to supervise EMTs and potentially provide emergency assistance, that would not fall under MICRA. Such are the facts and holding of *Aldana v. Stillwagon* (2016) 2 Cal.App.5th 1, 4.

In *Aldana*, the appellate court found that even though the driver was a medical professional who was responding to a call about an injured person, "the automobile collision remains a 'garden-variety' accident not resulting from the violation of a professional obligation but from a failure to exercise reasonable care in the operation of a motor vehicle." The pickup truck was not an emergency vehicle. Therefore, "[d]riving to an accident victim is not the same as providing medical care to the victim," especially when the patient is not in the vehicle. As the facts would still make sense if the defendant driver was commuting to a non-professional place of employment, MICRA did not apply.

So, what should I do to ensure that my case is not subject to MICRA?

There will still be premises-liability cases that are borderline as to whether MICRA applies. Whether MICRA applies when a non-patient visitor is injured due to malfunctioning medical

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
March 2022

equipment will be highly fact specific. Similarly, it is still difficult to determine whether MICRA controls when injuries in a hospital to a patient occur only tangentially related to the provision of medical services.

First, in such close cases, I would highly suggest using the Judicial Council Form Complaint PLD-PI-001 along with the form attachments for causes of action for Premises Liability (PLD-PI-001(4)) and General Negligence (PLD-PI-001(2)). Obviously, such forms are appropriate for use under Code of Civil Procedure section 425.12. Such forms greatly reduce the risk of the defense using some stray comment in a long-form complaint to support a demurrer or summary judgment motion on the basis that the lawsuit is MICRA-covered.

In addition, in my experience, insurance brokers or agencies who help secure a hospital or clinic's all-encompassing liability coverage are more likely to send such form complaints to their general liability insurance companies rather than professional liability carriers. Not only does this result in defense counsel who are not specialists in medical malpractice defense and are less likely to raise MICRA-related defenses, but will result in the insurance companies setting higher reserves, increasing both the likelihood and size of potential settlement.

Regardless of whether you use the Judicial Council Form Complaint or draft your own, plead the claims generally without specifying any particular breach or particular manner. (See *Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 4.)

As discussed above, ensure that if the name of the healthcare defendant is substituted with a hotel or a restaurant, that the facts alleged still make sense. Avoid identifying even the titles of any wrongdoers and use words such as "employees" or "agents" instead of "nurses" or "doctors."

Similarly, for your client, do not use the word "patient." If the injury is completely unrelated to the provision of medical care but your client was there as a patient, exclude the unnecessary and extraneous facts such as the medical reasons your client was presenting to the provider. Indeed, instead of a patient, identify your client as a "visitor" to the premises.

Critically, *do not* send Code of Civil Procedure section 364 letters. Even if you are attempting to do so out of an abundance of caution, section 364 is a part of MICRA and sending one is a strong admission that MICRA applies. Even if the action is later deemed to be subject to MICRA, failure to comply with section 364 in no way invalidates a lawsuit and can only be used to enact potential discipline on the offending attorney. (See Code Civ. Proc., § 365.) Yet, in the 47 years since MICRA passed, not a single attorney has been disciplined for failure to comply with section 364.

Lastly, if MICRA is pleaded as an affirmative defense in the healthcare defendant's answer, consider filing a demurrer and/or Motion for Summary Adjudication to that affirmative defense. Particularly through demurrer, such an early determination that MICRA does not apply would be helpful in sending a message that the defense carrier and attorney should value the case appropriately.

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