Bruce G. Fagel, M.D., J.D.
THE LAW OFFICES OF DR. BRUCE G. FAGEL & ASSOCIATES

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
February 2023

Why the changes in the MICRA law will allow greater access to attorneys

A LOOK AT LEGAL STRATEGIES IN LIGHT OF THE CHANGES TO MICRA COMING IN 2023

The recent changes in the MICRA statutes took effect on Jan. 1, 2023, will do much to improve the prior inequities that made medical malpractice cases unique in civil litigation. The increases, over 10 years, of the amount in the limitation on non-economic damages, and the increase in attorney fees are fairly self explanatory on the face of the legislation. But one further change in the new MICRA statutes may have more impact in allowing the victims of medical malpractice to obtain some more appropriate measure of damages by having more attorneys take and pursue currently thought to be un-economic cases specifically: the wrongful death of a child and the wrongful death of an adult with no economic damages.

Before, the wrongful death of either, regardless of the number of liable defendants, wss limited to a maximum of $250,000 for noneconomic damages, and with the current attorney fees of $74,166 (29.6%) the net to the parents or family would be $174,834. These amounts do not consider the costs advanced on the case by the attorney, and thus the net amount of fees would likely be less than 29.6%. Since Jan. 1, 2023, the percentage of attorney fees increase to 33% after costs. At the same time, the limitation on recovery of noneconomic damages increases to $500,000 and over the next 10 years, increase to $1,000,000. Also, separate liability by doctors and hospitals (healthcare institutions) allows for two caps, which increases the amount to $1,000,000 starting in Jan. 2023, pursuant to Civil Code section 3333.1, subdivision (c).

Thus, if the case settles against a single health care provider for $500,000 after filing in Jan. 2023, the attorney fees after costs, will be $165,000 and the net to the parents or family will be $335,000. Obviously, the amount of costs will reduce both of these amounts. If the case settles for $1,000,000 after filing in Jan. 2023, the attorney fee after costs, will be $330,000 and the parents would get $670,000. The net client recovery going from $174,834 to either $335,000 with one defendant or $670,000 with two defendants, represents an increase of either $187,166 or $495,166. Both of these increases are a substantial increase from the current net recovery and represent some measure of improved justice for the families of victims of medical negligence.

At the same time the attorney fees, after Jan. 2023, will increase from $74,166 to either $165,000 or $330,000. This represents an increase of $90,834 or $255,834 and will certainly make such cases "economically worthwhile." This change will allow many more victims of medical malpractice who have lost a loved one, either a baby or a parent to have access to an attorney to assist them in obtaining some level of justice. However, attorneys need to be aware that while these cases will seem economically more worthwhile, and the fees comparable to other types of personal injury cases, medical malpractice cases are not like other kinds of personal injuries because of the requirement of expert testimony to prove a breach of the standard of care.

Evaluating death cases

This puts attorneys who evaluate death cases for filing after Jan. 1, 2023, in a position that requires evaluation of a valid case or one "with merit," be made before filing such a case. Most elderly individuals that die, especially if they die in a hospital, have multiple co-morbidities that led to their death. (Otherwise, they would likely not be in a hospital when they died). The key to liability is understanding both what caused the death and what did not, which is not the way physicians look at cause of death. In either an autopsy report or a death certificate, a physician will list what caused the death, and not what did not cause the death. But in a medical malpractice case, the plaintiff must be able to prove that pre-existing co-morbidities did not cause the death, and that the alleged negligence of the doctor and/or nurse caused the death. The fact of a death, even one reported to the coroner, is not sufficient evidence of negligence.

Death of a baby

In the case of a baby's death, a baby has no co-morbidities (unless there is a genetic issue that caused the death) and there is less concern about any co-morbidities of the mother, unless the mother was negligent in her own care, but there is still the same level of proof needed to show that the baby's death was preventable. What is different about cases where a baby dies shortly after birth, is that the plaintiff needs to prove the mechanism of death but does not need to prove that the baby would have survived uninjured, only that he/she would have survived. Evidence in the records or the opinion of defense experts that the baby would have suffered some level of long-term brain injury is not a relevant defense in a baby- death case.

In a case where the baby survives, with long-term brain injury, the plaintiff must still prove that but for the defendant health case provider's negligence, the baby would have been born normally and without injury. But in such cases, the amount of economic damages is usually of such a sufficient amount that parents of such children can more easily find attorneys, even with a 15% attorney fee. Often, the only difference between a child born alive but with long-term brain injury and a baby who dies shortly after birth is the fact that the parents were encouraged to withdraw life support on a newborn baby who shows evidence of significant brain injury. If those children survive, the medical malpractice cases that they generate are vigorously defended in part due to high damages exposure based on the high cost of medical care and the increase in earnings losses. While non-economic damages have been held to $250,000 for over 40 years, during that same time economic damages have increased more than five-fold due to both inflation and wage growth – $1,000,000 in economic damages in 1975 was worth over $5,000,000 in 2022.

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
February 2023

Stillborn vs. wrongful death

One birth situation still creates an injustice. The difference between a baby-death case and a stillborn is often just minutes after birth. If a baby lives for a few hours or days, and then dies, the parents have a wrongful death claim. But if the baby is stillborn or is born requiring resuscitation but the resuscitation is withdrawn and the baby dies, it is a stillborn. The difference is that a stillborn allows only a personal-injury claim for the mother, now increased to $350,000, but if the baby survives and then dies, the parents have a wrongful death claim with a maximum value of $500,000. In reality, there is little difference to the grief and loss by the parents whether the baby dies in the few minutes before birth or the few minutes after birth to justify such a difference in the value of the noneconomic damages.

How many defendants?

One important difference in the evaluation of any medical malpractice case to be filed after Jan. 1, 2023, other than the merit of the negligence involved is whether the negligence involves just one health care provider or more than one. In a hospital setting, where most deaths occur, whether at or shortly after birth, or in the elderly, there are usually multiple health care providers involved in the care, and if negligence can be shown for both a doctor and a nurse, then the limitations on non-economic damages would be doubled.

As of Jan. 1, 2023, it will be $500,000 each for a doctor and a nurse. Since the nurse is usually employed by the health care institution and the doctor is not so employed but considered as an independent contractor, then the new MICRA law allows one $500,000 cap against the health care provider (doctor) (Civ. Code, § 3333.2 subd. (c) (1)), and one cap against a health care institution (nurse) (Civ. Code, § 3333.2 subd. (c) (2)). It does not matter if more than one doctor and/or more than one nurse is negligent as a cause of the death, it only matters that each doctor or nurse can be proven separately negligent/liable.

This can be as simple as a nurse not providing critical information about the patient to the doctor, and the doctor, when given such information, not acting on it. However, the doctor and health care institution must be unaffiliated with each other for a separate cap to apply to each. The definition of affiliated under Corporations Code section 150 requires that one corporation controls the other. Since hospitals have for years claimed that all medical staff physicians are not the agents of the hospitals because they do not control their actions, it will be difficult for hospitals to now claim that doctors are no longer independent contractors but now are suddenly affiliated with each other.

Kaiser health care system

In the Kaiser health care system, the physicians are either partners or employees of the Permanente Medical Group, and the nurses are employees of the Kaiser Foundation Hospitals, so it will be difficult, if not impossible for Kaiser to claim that the Medical Group and the Hospital are now affiliated because they both are part of the Kaiser health system.

The UC Hospitals

The more complicated health care system is the UC Hospitals, which are all owned and operated by the Regents of the University of California. As an exception to the prohibition on the corporate practice of medicine, UC Hospitals are allowed to directly employ the physicians in addition to nurses. Up to now the Regents were liable for the negligent acts of any doctor(s) or nurse(s) at any of the UC Hospitals and their defense counsel would routinely request dismissal of any named doctors in exchange for a stipulation that the Regents would be liable for any acts of negligence.

But starting next year, there is no reason to accept such a stipulation because even if the Regents employ both the doctors and the nurses who may be negligent in a case, the Regents cannot show that the Hospital has control over the doctors' actions simply because the Regents employ the doctors. Thus, in any wrongful death medical malpractice case involving a UC Hospital, the negligent doctors need to be individually named. As long as one doctor is still a named defendant at the end of the case, that should be sufficient to claim two caps on non-economic damages. Private hospitals and medical groups that have spent years setting up contractual relations to be able to claim that any negligent physician is an independent contractor will find it difficult to now claim that they are actually affiliated agents for the purpose of applying the new caps for noneconomic damages.

Multiple MICRA caps for non-economic damages

Although the new MICRA will allow two caps for non-economic damages, one against a health care provider (physician) and one against a health care institution (hospital), and rare cases against a second health care institution, it does not go all the way to allow separate caps for each health care provider who may be liable for the death. But as a compromise, it at least allows for two caps for a death or injury case and, as such, directly overturns the holding in *Gilman v. Beverly Hospital* (1991) 231 Cal.App.3d 121, which held that a plaintiff cannot recover more than $250,000 in non-economic damages for all health care providers for one injury. The combined effect of doubling the limitation on recovery in a wrongful death case to $500,000 and allowing for two caps, effectively increases the limit on recovery four-fold from $250,000 to $1,000,000.

Currently, wrongful death cases with only noneconomic damages are the best type of case for the defense, especially with multiple defendants, because the defense can share the risk, but ultimately their client/carrier has limited risk or exposure in terms of monetary loss at trial. But since January 2023, where the value of such cases has increased to $1,000,000, defense counsel has to be more selective about which cases they will want to settle and which may go to trial. If the expected increase in medical malpractice case filings

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
February 2023

that occurred in January are based on a careful evaluation of merit, the victims of medical malpractice who have lost a loved one but without any economic loss will at least be able to find the assistance of an attorney and can achieve a more appropriate level of justice.

Bruce G. Fagel, M.D., J.D., graduated from the Univ. Of Ill. (1972), and was licensed to practice medicine: Illinois, 1973; California 1975. He received his JD at Whittier College (1982). Dr. Fagel is a regularly invited speaker before organizations of attorney, physicians, and hospitals internationally, and has been interviewed by CBS, ABC, NBC and various media affiliates. He has been an eight-time nominee by Consumer Attorneys Association for Trial Lawyer of the Year and recently featured in the National Law Journal as "The 10 Best Trial Attorneys in the Nation." Dr. Fagel has authored various articles on medical malpractice issues and served as a consultant on medical malpractice law to the California Judicial Counsel Committee, which wrote the new CACI jury instructions (California Approved Civil Instructions).