

MEDICAL MALPRACTICE NON-ECONOMIC DAMAGES CAPS

The medical malpractice debate has been presented to Americans through contrasting images of children crippled by physician error and mothers forced to deliver their babies in bathrooms because of physician flight. While the issues involved in what has been called the medical malpractice crisis are much more nuanced than these images convey, many agree that drastic increases in the cost of medical malpractice insurance have tested the wherewithal of parties on both sides of the stethoscope. In order to temper what some view as a concerning exodus of medical care providers from the industry,¹ about half of the states have passed medical malpractice tort reform legislation.² Recently, federal malpractice reform efforts have emerged as well.³

Federal and state medical malpractice reform bills vary greatly, but they widely share one common element—a \$250,000 cap on non-economic damages. The question addressed by this Recent Development is, why is \$250,000 the going rate? The impact of the \$250,000 non-economic damages cap has been documented, but the origin of the cap has largely remained a mystery. As Congress considers adopting new legislation, it must cut through the common rhetoric of the medical malpractice tort reform debate to find an equitable solution. An examination of the impact of the \$250,000 cap and an understanding of its genesis should inform Congress's efforts.

I. FEDERAL REFORM

For the past few years, Congress has unsuccessfully attempted to address growing concerns surrounding medical malpractice litigation, insurance rates, and the retention of physicians.⁴ In March 2005, Senate Majority Leader Bill Frist proclaimed that he would seek medical malprac-

¹ Some argue that no support exists for the alleged mass exodus of doctors from the medical profession. The Government Accountability Office recently reported that “[t]he number of physicians in the United States increased about 26 percent from 1991 to 2001, twice as much as the nation’s population.” U.S. GOV. ACCOUNTABILITY OFFICE, PHYSICIAN WORKFORCE 2 (2003), available at <http://www.gao.gov/new.items/d04124.pdf>. See also Thomas O. McGarity et al., *The Truth about Torts: An Insurance Crisis, Not A Lawsuit Crisis* 13 (2005) (A Center for Progressive Reform White Paper).

² Cf. *Assembly Third Reading on AB 1380, California Assembly* (May 24, 1999) at 7; CONGRESSIONAL BUDGET OFFICE, THE CONGRESS OF THE UNITED STATES, THE EFFECTS OF TORT REFORM: EVIDENCE FROM THE STATES 6 (2004), available at <http://www.cbo.gov/ftpdocs/55xx/doc5549/Report.pdf>.

³ See, e.g., S. 354, 109th Cong. (2005); H.R. 534, 109th Cong. (2005).

⁴ The HEALTH Act of 2004, modeled after MICRA, limits non-economic damages. H.R. 4280, 108th Cong. (2004). Although it passed in the House of Representatives, it failed to become law because its counterpart, “The Patients First Act of 2003,” failed to pass in the Senate. William Gunnar, *Is There an Acceptable Answer to Rising Medical Malpractice Premiums?*, 13 ANN. HEALTH L. 465, 492 (2004).

tice tort reform with a cap on non-economic damages, but he highlighted that the biggest challenge is “getting people to the table” to discuss such federal reform.⁵

In 2005, members of the House and Senate followed state medical malpractice tort reform efforts by proposing House Bill 534 and Senate Bill 354 to address the ever-increasing insurance premiums confronting physicians.⁶ These bills seek to shorten the statute of limitations for filing a claim, place limitations on access to punitive damages, repeal the collateral source rule, restructure settlement by requiring periodic payment for future damages, cap contingency fees, abolish joint liability, and cap non-economic damages at \$250,000.⁷ In addition, House Bill 534 limits the liability of manufacturers, distributors, suppliers, and providers of medical products that comply with FDA standards,⁸ while Senate Bill 354 prohibits a health care provider from being named as a party in product liability or class action lawsuits pertaining to any FDA-approved drugs or devices he prescribes.⁹

One recent federal reform effort that has already been passed by the House is House Bill 5, the “Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2005,”¹⁰ a replica of House Bill 534. Representative Phil Gingrey (R-Ga.) introduced the bill on July 21, 2005, and only a week later the House of Representatives approved the measure, which would cap non-economic damages in medical malpractice cases to \$250,000, restrict contingency fees, require periodic payment of future medical damages, and set a statute of limitations relating to discovery and manifestation of injury.¹¹ While similar measures have previously passed in the House of Representatives, the true test has been and will continue to be the Senate.¹² House Bill 5’s Senate counterpart, Senate Bill 4, the “Healthy America Act of 2005,” is now pending in the Senate Committee on Finance.¹³ Introduced by Senator Frist, the act closely mirrors the reform scheme of House Bill 5.¹⁴

⁵ *Frist Signals Areas of Concession*, CAPP News (Californians Allied for Patient Protection, Sacramento, Cal.), Mar. 14, 2005, at 1, available at <http://www.micra.org/CAPPnews031405.pdf> [hereinafter *Areas of Concession*].

⁶ H.R. 534; S. 354. Senate Bill 354 is sponsored by Sen. John Ensign (R-Nev.), and House Bill 534 is sponsored by former Rep. Christopher Cox (R-Cal.).

⁷ H.R. 534; S. 354.

⁸ H.R. 534 § 7.

⁹ S. 354 § 8.

¹⁰ H.R. 5, 109th Cong. (2005) (sponsored by Representative Phil Gingrey).

¹¹ *Id.*; *Federal Update*, CAPP NEWS (Californians Allied for Patient Protection, Sacramento, Cal.), Aug. 8, 2005, at 2, available at <http://www.micra.org/augustnews.pdf> [hereinafter *Federal Update*].

¹² Past HEALTH Acts have failed in the Senate despite passage in the House of Representatives. *See, e.g.*, HEALTH Act of 2004, H.R. 4280, 108th Congress (2004); HEALTH ACT of 2002, S. 2793, 107th Cong. (2002).

¹³ S. 4, 109th Cong. (2005).

¹⁴ *Federal Update*, *supra* note 11, at 2.

Past medical malpractice tort reform bills have included a wide range of damage-related provisions, from elimination of the collateral source rule¹⁵ to caps on all damages awarded. It is important to understand where non-economic damages fit within the palette of damage options in order to understand the impact of caps on this type of award. Economic damages include but are not limited to costs already incurred or likely to be incurred by the claimants, such as medical care expenses, past wage loss, and estimated losses in future earnings.¹⁶ Non-economic damages include past and future pain, suffering, emotional distress, mental anguish, disfigurement, physical impairment, loss of consortium, loss of companionship, loss of parental guidance, loss of enjoyment of life, humiliation, embarrassment, inconvenience, and loss of society.¹⁷ Though non-economic damages may be regarded as lacking a standard, they serve as a measure of juries' "conscience" by allowing juries to select a monetary figure they consider to be fair.¹⁸

While lumping non-economic damages into the same pot as punitive damages is tempting to many, punitive damages remain a separate and distinct form of payment. Punitive damages punish and deter wrongdoers. They also prompt juries to focus on the defendant's wealth and the reprehensibility of the conduct rather than on fairly compensating for a wrong, as is the focus of non-economic damages.¹⁹ Punitive damages, however, remain on the shelf for most medical malpractice cases in California, awarded only when a claimant can prove by clear and convincing evidence that the health care provider was guilty of oppression, fraud, or malice.²⁰

¹⁵ See H.R. 4280 § 6. The collateral source rule is a common law rule that prohibits defendants from introducing evidence at trial to show that the plaintiff has received injury compensation from other sources. See also Brandon Van Grack, *The Medical Malpractice Liability Limitation Bill*, 42 HARV. J. ON LEGIS. 299, 305 (2005) (discussing the elimination of the collateral source rule in the HEALTH Act of 2004).

¹⁶ NICHOLAS PACE ET AL., *CAPPING NON-ECONOMIC AWARDS IN MEDICAL MALPRACTICE TRIALS* 7 (RAND Institute for Civil Justice 2004).

¹⁷ See *id.*

¹⁸ OFFICE OF DISABILITY, AGING AND LONG-TERM CARE POLICY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *CONFRONTING THE NEW HEALTH CARE CRISIS: IMPROVING HEALTH CARE QUALITY AND LOWERING COSTS BY FIXING OUR MEDICAL LIABILITY SYSTEM—THE INCREASINGLY UNPREDICTABLE, COSTLY, AND SLOW LITIGATION SYSTEM IS RESPONSIBLE* 8 (2002) [hereinafter *CONFRONTING THE NEW HEALTH CARE CRISIS*]. ("The perceived problem of pain and suffering awards is not simply the amount of money expended, but also the erratic nature of the process by which the size of awards is determined. Juries are simply told to apply their 'conscience' in selecting a monetary figure they consider to be fair.")

¹⁹ Joseph C. Chambers, *In re Exxon Valdez: Application of Due Process Constraints on Punitive Damages Awards*, 20 ALASKA L. REV. 195, 200 (2003).

²⁰ *Medical Injury Compensation Reform Act of 1975: Hearing on A.B. 1380 Before the Cal. Assemb. Comm. on the Judiciary*, 1999-2000 Leg. 10 (May 25, 1999), available at http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_1351-1400/ab_1380_cfa_19990525_133157_asm_comm.html.

II. THE ORIGIN OF THE \$250,000 CAP

Congressional efforts to reform medical malpractice tort litigation are not unique. Past bills and those currently pending in the House and Senate resemble several state reform efforts, including California's Medical Injury Compensation Reform Act of 1975 (MICRA), which set the precedent for medical malpractice tort reform.²¹

In that year, two of California's largest insurers, Travelers and Argonaut Insurance, proffered rate hikes as steep as 342%²² and 350%,²³ respectively, for medical malpractice insurance coverage. Nearly half of the doctors in Northern California failed to show up to work on May 1, 1975, and the empty clinics and hospitals were the result of Argonaut Insurance's refusal to provide group coverage to Northern Californian doctors.²⁴ That refusal effectively quadrupled doctors' insurance costs by forcing them to buy individual policies.²⁵ Meanwhile, in Southern California, Traveler's Indemnity Company warned Los Angeles physicians of

²¹ The California Civil Code states:

In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover non-economic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other non-pecuniary damage. (b) In no action shall the amount of damages for non-economic losses exceed two hundred fifty thousand dollars (\$250,000).

CAL. CIV. CODE § 3333.2(a) (West 1975). The cap applies in cases of injury or death, and it allows only one \$250,000 recovery in a wrongful death case. *See Yates v. Pollock*, 194 Cal. App. 3d 195, 200 (Cal. Ct. App. 1987). Authority exists, however, for allowing separate caps for the patient and for a spouse claiming loss of consortium. *Atkins v. Strayhorn*, 223 Cal. App. 3d 1380, 1394 (Cal. Ct. App. 1990). The cap on non-economic damages has been upheld as constitutional. *Fein v. Permanente Med. Group*, 695 P.2d 665, 680 (Cal. 1985).

²² *Medical Injury Compensation Reform Act of 1975: Hearing on A.B. 1 as Amended in the Second Extraordinary Sess. Before the Cal. S. Comm. on Insurance and Financial Institutions.*, 1975-1976 Leg. 1 (Aug. 6, 1975) (on file with Cal. Assemb. B. Author A.B. 1xx 1975 files) [hereinafter *Aug. 6 Hearing on A.B. 1 Before the Cal. S. Comm. on Insurance and Financial Institutions*] ("Effective November 1, 1975, approximately 5,600 Northern California physicians insured by Travelers Insurance Company will face a 342% rate increase.").

²³ Barry Keene, *California's Medical Malpractice Crisis*, in A LEGISLATOR'S GUIDE TO THE MEDICAL MALPRACTICE ISSUE 29 (David G. Warren & Richard Merritt eds., 1976).

²⁴ Lacey Fosburgh, *Doctors Limit Care in Protest on Coast*, N.Y. TIMES, May 2, 1975, at A1 [hereinafter *Doctors Limit Care*]. *See also* Lacey Fosburgh, *Physician Strike May Be Widened*, N.Y. TIMES, May 26, 1975, at A56; ALBERT J. LIPSON, MEDICAL MALPRACTICE: THE RESPONSE OF PHYSICIANS TO PREMIUM INCREASES IN CALIFORNIA 1 (RAND Corporation 1976); PACE ET AL., *supra* note 17, at 5; *cf.* Letter from Elmer Low, President, California Trial Lawyers Association, to John Miller, Chairman, Judiciary Committee (June 16, 1975) (on file with Cal. Comm. on the Judiciary A.B. 1xx 1975 files) ("The former president of Argonaut Insurance Company has admitted that a disastrous loss in the market was a major factor in that company's decision to impose a 382% increase.").

²⁵ *Doctors Limit Care*, *supra* note 24, at A1.

a proposed five-fold increase in insurance rates.²⁶ During that same period, CNA Insurance announced a 190% increase.²⁷

California lawmakers faced a time crunch in their quest to address the insurance premium crisis. In an effort to provide short- and long-term solutions, Governor Jerry Brown called a second special session, also known as a second extraordinary session, of the legislature on Saturday, May 17, 1975. Governor Brown explained, "The inability of doctors to obtain insurance at reasonable rates is endangering the health of the people of this state and threatens the closing of many hospitals. The longer-term consequences of such closings could seriously limit the healthcare provided to hundreds of thousands of our citizens."²⁸

During the special session, Assembly Health and Human Services Committee Chairman Barry Keene proposed Assembly Bill 1xx²⁹ to contain sharply rising premiums. Assembly Bill 1xx became the series of statutes known as MICRA that emerged from the special session to solve the insurance premium crisis.³⁰ MICRA permitted future damages awards in excess of \$50,000 to be paid in periodic payments, limited attorney fees in medical malpractice litigation, eliminated the collateral source rule, and imposed a non-indexed³¹ \$250,000 cap on non-economic damages.³² With such a cap, the court automatically limits jury awards of non-economic damages that exceed \$250,000 without informing the jury of the cap prior to its imposition. Despite efforts to reform the non-indexed cap on non-economic damages, the \$250,000 cap has existed in California since the 1975 enactment of MICRA.³³

In a 2005 interview, Barry Keene, MICRA's author, recounted the 1975 legislative special session from which MICRA was born.³⁴ He noted

²⁶ *Hearing on AB 1380 Before the Assembly Committee on the Judiciary, supra* note 20, at 6.

²⁷ *Id.*

²⁸ CALIFORNIANS ALLIED FOR PATIENT PROTECTION, MICRA: CALIFORNIA'S LANDMARK HEALTHCARE LIABILITY LAW: A NATIONAL MODEL FOR ASSURING ACCESS TO AFFORDABLE HEALTHCARE 4 (2005), available at <http://www.micra.org/MICRAHandbook.pdf> [hereinafter LANDMARK HEALTHCARE LIABILITY LAW].

²⁹ AB 926 was the progenitor of AB 1xx. Keene, *supra* note 23, at 30.

³⁰ MICRA had strong bipartisan support when it was passed. The legislation passed the 80-member Assembly by a vote of 67-8 and passed the 40-member Senate by a vote of 34-4. Landmark Healthcare Liability Law, *supra* note 28, at 4.

³¹ Indexing a monetary cap would allow the adjustment of the monetary amount so that it reflects changes in the cost of living consistent with the Consumer Price Index.

³² Gunnar, *supra* note 4, at 484.

³³ *Cf. Medical Injury Compensation Reform Act of 1975: Hearing on A.B. 1380 Before the Cal. S. Comm. on the Judiciary*, 1999-2000 Leg. 2 (July 13, 1999), available at http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_1351-1400/ab_1380_cfa_19990714_123743_sen_comm.html [hereinafter *July 13 Hearing on A.B. 1380 Before the Cal. S. Comm. on the Judiciary*] (demonstrating that if AB 1380 had passed in the California Assembly, it would have adjusted the cap each year to reflect the cumulative percentage change in the Consumer Price Index).

³⁴ *Perspectives: An Interview With MICRA Author Barry Keene*, CAPP NEWS (Californians Allied for Patient Protection, Sacramento, Cal.), Apr. 26, 2005, at 1, available at

some alarming circumstances, including the fact that some physicians had chosen to “go bare” instead of paying higher premiums.³⁵ As tension grew in 1975 over what would be the legislative solution, Keene hoped that his grab bag of various malpractice reform mechanisms would have a reasonable chance of avoiding sabotage by any single interest group.³⁶ During the legislative battle, Keene asserted, “The malpractice crisis can only be solved by comprehensive reforms requiring equal sacrifices on the part of the insurance companies, the doctors, the hospitals, and the attorneys.”³⁷

Both a strength and a weakness of Keene’s bill was its inclusion of a wide array of measures to remedy the insurance premium crisis. But it was, and still is, unclear which measures were necessary to freeze the rise in insurance premiums. Leaders of the tort reform movement champion MICRA as the model for medical malpractice reform, crediting it as the stabilizing force in the California malpractice insurance market.³⁸ The popularity of the cap is reflected in the fact that it has been embedded in the federal government’s compensation fund for victims of September 11³⁹ and served as the staple amount for compensation payable under insurance for military personnel killed in action and public safety officers killed on duty.⁴⁰ However, detractors point to other legislative measures that could just as likely have slowed rate increases in California⁴¹ and lament

<http://www.micra.org/CAPPNews42605.pdf> [hereinafter *Perspectives I*] (the first installment of an interview run over three issues). On December 12, 1975, the cap went into effect and has remained unchanged. See *July 13 Hearing on A.B. 1380 Before the Cal. S. Comm. on the Judiciary*, *supra* note 33, at 1.

³⁵ *Perspectives*, *supra* note 34, at 3.

³⁶ *Id.* at 3; see JULIANNE D’ANGELO FELLMETH & THOMAS A. PAPAGEORGE, INITIAL REPORT MEDICAL BOARD OF CALIFORNIA ENFORCEMENT PROGRAM MONITOR 20 (Center for Public Interest Law University of San Diego School of Law 2004); Keene, *supra* note 23, at 30.

³⁷ Press Release, Office of Assemblyman Barry Keene (May 19, 1975), at 5.

³⁸ A 2003 Department of Health and Human Services report endorsed the success of MICRA, illustrating that since 1975, premiums in California have risen 167% while premiums in the rest of the country have increased 505%. OFFICE OF DISABILITY, AGING AND LONG-TERM CARE POLICY, U.S. DEP’T OF HEALTH AND HUMAN SERVICES, ADDRESSING THE NEW HEALTH CARE CRISIS: REFORMING THE MEDICAL LITIGATION SYSTEM TO IMPROVE THE QUALITY OF HEALTH CARE, at 24 (2003), available at <http://aspe.hhs.gov/daltcp/reports/medliab.htm>.

³⁹ See Sept. 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11, 239 (Mar. 13, 2002).

⁴⁰ CALIFORNIANS ALLIED FOR PATIENT PROTECTION, THE CALIFORNIA STORY: MICRA: A SUCCESSFUL MODEL FOR AFFORDABLE AND ACCESSIBLE HEALTH CARE 6 (2002), available at <http://www.micra.org/CASStory.pdf>.

⁴¹ Twelve years after MICRA’s passage, California premiums reached an all-time high, 190% higher than when the statutes were enacted. In another attempt to contain the premium rate hikes, California passed the Insurance Rate Reduction and Reform Act, known as Proposition 103. Among other things, Proposition 103 mandated 20% insurance rate reductions and granted the insurance commissioner the ability to reject or alter rate increase requests. Since the passage of Proposition 103 in 1988, malpractice premium rates in California have fallen below national levels. Gunnar, *supra* note 4, at 489–91. See also *The Medical Insurance Crisis: A Review of the Situation in Pennsylvania: Hearing Before*

that MICRA represents a marginalizing ambush of groups who feel the strongest negative impacts of non-indexed non-economic damages caps.⁴² Without definitive support for its effectiveness and positive impact, MICRA remains open to criticism on substantive grounds.

III. WHOM DOES MICRA TRULY AFFECT?

MICRA's non-indexed non-economic damages cap has proven detrimental to some Californians injured by medical malpractice. Proponents of non-economic damages caps pay little attention to how caps affect access to the civil justice system or to how they may harm discrete groups of people.⁴³ Because of such caps, claimants who experience low economic loss but suffer high non-economic loss have claims that are no longer attractive to many lawyers, who will not incur the costs of litigation without the prospect of profiting from damage awards.⁴⁴ Moreover, the impact on select groups, namely minorities and women, has been gravely disproportionate.⁴⁵

Lucinda Finley of the State University of New York at Buffalo examined how juries in medical malpractice tort suits allocate their awards between economic and non-economic damages.⁴⁶ She found that caps on non-economic damages can discriminate against women because women face unique injuries such as pregnancy loss, sexual or reproductive harm, and sexual assault that can lead to impaired fertility or sexual functioning, miscarriage, incontinence, trauma associated with sexual relationships, and scarring or disfigurement in sensitive, intimate areas.⁴⁷ Non-economic damages are the principle means by which juries can demonstrate their sense of the gravity of, and compensate women for, these unique harms.⁴⁸ These injuries and their consequences, however, do not significantly impact a woman's wage-earning capability, which is the ranking consideration in the tabulation of economic damages. Consequently, many damage awards to female claimants are based mostly on non-economic loss,

the Subcomm. On Oversight and Investigations of the H. Comm. On Energy and Commerce, 109th Cong. 130 (2003) (testimony of Harvey Rosenfield, President, Foundation for Consumer Taxpayer Rights). *But see* WILLIAM HAMM ET AL., MICRA, NOT PROPOSITION 103, ACCOUNTS FOR THE RELATIVELY LOW-GROWTH IN MEDICAL MALPRACTICE INSURANCE COSTS IN CALIFORNIA 2 (2005), available at <http://www.micra.org/Proposition103Report.pdf>.

⁴² The MICRA cap would have to be raised to \$916,025 to keep up with inflation since 1976. CONSUMER ATTORNEYS OF CALIFORNIA, CAOC INFORMATION BRIEF: "BEHIND THOSE MEDICAL MALPRACTICE RATES" 1 (2005), <http://www.caoc.com/CA/index.cfm?event=showPage&pg=MICRABrief02-22-05>.

⁴³ Lucinda Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1264–65 (2004).

⁴⁴ *See id.* at 1265; *see also* PACE ET AL., *supra* note 16, at xxi.

⁴⁵ *See* CONSUMER ATTORNEYS OF CALIFORNIA, *supra* note 42; Finley, *supra* note 43, at 1266.

⁴⁶ Finley, *supra* note 43, at 1266.

⁴⁷ *Id.*

⁴⁸ *Id.* at 1266, 1281.

which means that these claimants lose a significant portion of their awards as a result of non-economic damage caps. For example, in a sample of 28 gynecological malpractice cases in California, 83% of damages awarded by juries were non-economic.⁴⁹ Those claimants experienced a 64% reduction in average recoveries as a result of the damage cap.⁵⁰ Because proponents of non-economic caps have succeeded in convincing legislators that non-economic damages are “parasitic,”⁵¹ women who face harms that are unique to their sex and that are only compensated for by non-economic damages are subject to drastically reduced damage awards.

Just as the types of harms women experience expose them to disproportionately adverse outcomes with respect to jury awards, the tendencies of juries in “gender-neutral” medical malpractice cases also adversely affect women. In those cases, the damage packages awarded to women are composed of a higher percentage of non-economic damages than those awarded to men.⁵² That fact exacerbates the harm caused to women by non-economic damage caps. Finley’s study of 131 “gender-neutral adult plaintiff” California cases, with sixty-seven female plaintiffs and sixty-four male,⁵³ revealed that MICRA damage caps depressed women’s awards even further below men’s awards than they already tended to be.

In addition, common methods of calculating economic damages deny minorities and women the ability to obtain gender- and race-neutral jury awards. The work-life expectancy of the claimant and the average wage the claimant would have earned absent the malpractice are the factors used to tabulate economic damages.⁵⁴ However, race- and gender-specific data frequently used in tabulating economic damages projects that white men are worth more economically than women or minorities.⁵⁵ For instance, race- and gender-specific work-life tables indicate that racial minorities and women will spend fewer years in the labor force.⁵⁶ Higher rates of incarceration and a shorter average life span for minorities and absence from the work force due to childbearing for women all amount to shorter work-life expectancies for individuals in these categories, which amounts to lower economic damages for the same harms.⁵⁷ According to the U.S. Bureau of Labor Statistics, the work-life expectancy for a white man injured at age thirty was estimated to be 4.7 years longer than that of a mi-

⁴⁹ *Id.* at 1296.

⁵⁰ *Id.*

⁵¹ Martha Chamallas, *Vanished from the First Year: Lost Torts and Deep Structures in Tort Law*, in *LEGAL CANONS* 114 (J. M. Balkin & Sanford Levinson eds., 2000).

⁵² Finley, *supra* note 43, at 1284.

⁵³ *Id.* at 1284–85 (“Before applying the MICRA cap, women’s average jury awards were 52% of men’s average awards. After the MICRA reduction, the women on average recovered only 45% of men’s average recoveries.”).

⁵⁴ Chamallas, *supra* note 51, at 109.

⁵⁵ *Id.* at 112.

⁵⁶ *Id.*

⁵⁷ *Id.* at 110.

minority man, 8.7 years longer than that of a white woman, and 9.2 years longer than that of a minority woman.⁵⁸ Moreover, disparities in criminal sentencing and a lack of job opportunities in minority communities further corrupt the objectivity of such tables.⁵⁹

In sum, because of unique harms that affect women and minorities, jury tendencies, and reliance upon flawed economic tables, non-economic damages caps silently plague these groups.

IV. THE EMPTY SEARCH: WHY \$250,000

Although the \$250,000 non-economic damages cap reigns as the popular reform solution for many states and pending federal reform, the question still remains: Why \$250,000?⁶⁰ Since those presently carrying the medical malpractice tort reform banner have failed to provide an explanation as to why \$250,000 is the optimal cap, an examination of the origins of that number may shed light on this question.

A. Legislative History

Legislative records charting California's early tort reform bill, eventually known as MICRA,⁶¹ revealed that the highly publicized cap on non-economic damages was not even a part of the initial bill—it was a last-minute addition.⁶² As originally introduced, the bill limited compensation for certain non-economic losses, including pain and suffering, to \$800 a month and provided that a claimant would not be entitled to non-economic losses if his earnings exceeded \$1,500 a month.⁶³ At the request of the Assembly Judiciary Committee, the monthly restriction on non-economic losses was deleted,⁶⁴ prompting the California Physicians Crisis Committee to call the Judiciary Committee “no more than a lawyers’ lobby.”⁶⁵ Assembly Bill 1xx was passed by the Assembly on June 20, 1975, without any limit on the amount of damages that an injured party

⁵⁸ *Id.* at 110.

⁵⁹ *Id.* at 112.

⁶⁰ *See supra* note 2

⁶¹ Files relating to A.B. 1xx from the Judiciary Committee, Governor Brown, and the bill's author (retained by the California Assembly) constitute the 1500+ pages of legislative records searched. The Senate Insurance and Financial Institutions Committee files from the California State Archives were unobtainable.

⁶² *See infra* notes 63–69 and accompanying text.

⁶³ S. COMM. ON INSURANCE AND FINANCIAL INSTITUTIONS, ANALYSIS OF ASSEMB. B. NO. 1 AS AMENDED JUNE 27 1 (1975) (on file with Cal. Assemb. B. Author A.B. 1xx 1975 files).

⁶⁴ *Id.* (“At the request of the Assembly Judiciary Committee, this restriction on non-economic losses was deleted. Therefore A.B. 1, as passed by the Assembly, did not limit the amount of damages that an injured party may recover.”).

⁶⁵ Press Release, Cal. Physicians Crisis Comm. (June 26, 1975) (on file with Herbert M. Baus).

could recover.⁶⁶ As of June 27, 1975, however, the Senate Insurance and Financial Institutions Committee had adopted significant amendments to the bill, which included the provision limiting non-economic damages to \$250,000.⁶⁷ Assembly members did not abide by the Assembly Speaker's request to "non-concur" with the Senate version of the bill, which would have sent it back to the Assembly Judiciary Committee, where it had previously been gutted of its damages provision.⁶⁸ Instead, Assembly members accepted the Senate version of the bill, which included the non-economic damages cap.⁶⁹

B. Casualties of the Special Session

Although Assembly Bill 1xx stole the spotlight during the special session, it did not stand alone as the only attempt at capping damages in medical malpractice tort reform. In addition to many amendments to Assembly Bill 1xx that were abandoned in the special session, a series of medical malpractice tort reform bills were also laid to rest. Senator Omer L. Rains's Senate Bill 7xx contained a measure that was identical to the original version of Assembly Bill 1xx.⁷⁰ It proposed an \$800 to \$1,500 per month limitation for pain and suffering and no limit on loss of earnings or necessary medical treatment costs.⁷¹ A different bill, Senate Bill 1, allowed for the recovery of up to \$250,000 in non-economic damages when the injury consisted of the loss of a body part, serious impairment of a bodily function, or serious and permanent disfigurement, whether as a direct result of negligent medical intervention or negligent intervention combined with the original injury necessitating medical care.⁷²

Not all of the bills proposed during the special session resembled Assembly Bill 1xx. Senate Bill 13, presented by Senator Alfred Song, sought

⁶⁶ See *supra* note 30 and accompanying text.

⁶⁷ Aug. 6 Hearing on A.B. 1 Before the Cal. S. Comm. on Insurance and Financial Institutions, *supra* note 22, at 3 ("AB 1xx does not place limitations on the amount of damages that a claimant may recover for necessary medical treatment, loss of earnings, and expenses for obtaining a substitute to perform necessary services that would have been performed by the patient. 'Pain and suffering' would be limited to \$250,000."). By August 11, the \$250,000 limitation had been re-inserted onto the bill. S. COMM. ON INSURANCE AND FINANCIAL INSTITUTIONS, ANALYSIS OF ASSEMB. B. NO. 1 AS AMENDED AUG. 11 1 (1975) (on file with Cal. Assemb. B. Author A.B. 1xx 1975 files).

⁶⁸ *Perspectives: An Interview With MICRA Author Barry Keene*, CAPP NEWS (Californians Allied for Patient Protection, Sacramento, Cal.), Aug. 8, 2005, at 1, available at <http://www.micra.org/augustnews.pdf> [hereinafter *Perspectives 3*] (the last installment of an interview run over three issues).

⁶⁹ *Federal Update*, *supra* note 11, at 1.

⁷⁰ *Medical Injury Compensation Reform Act of 1975: Hearing on A.B. 1 as Amended in the Second Extraordinary Sess. Before the Cal. S. Comm. on Insurance and Financial Institutions*, 1975-1976 Leg. 2 (June 26, 1975) (on file with Cal. Assemb. B. Author A.B. 1xx 1975 files).

⁷¹ *Id.*

⁷² S. COMM. ON INSURANCE AND FINANCIAL INSTITUTIONS, 1975-1976 Leg., MALPRACTICE BILLS INTRODUCED JUNE 2 (Cal. 1975).

to limit total damages to \$500,000.⁷³ After going to the Senate Judiciary Committee, it failed to emerge as a front-runner in reform. In addition, Senator Alan Robbins's Senate Bill 521 sought to create a board that would be the sole recourse for patients seeking compensation for medical injuries and awards and to limit damages to loss of wages, medical expenses, and loss of bodily function.⁷⁴ This bill also died during the special session,⁷⁵ as did Senator Dennis E. Carpenter's Senate Bill 397, which provided a \$500,000 maximum for the death of a minor or adult without dependents.⁷⁶

In addition to those failed bills, two significant amendments to Assembly Bill 1xx also died during the special session. The first, proposed on August 11, 1975, sought to limit the provision of non-economic damages to ten percent of the economic losses.⁷⁷ The second, the extraordinary hardship exception, originally slated to coincide with the initial bill proposal, did not gain the support necessary for inclusion in MICRA.⁷⁸ For no apparent reason, these two amendments, which would have moderated the harsh effects of a pure damages cap, were not included in the final bill. The question remains: Why did these ideas fail while the hard \$250,000 cap succeeded?

C. Discussion Inside the Assembly

In Chairman Keene's statement before the Senate Insurance and Financial Institutions Committee, he did not mention the \$250,000 cap. In fact, in his synopsis of his "lower-cost, fairer resolution" to the insurance premium crisis, he mentioned only the proposal to allow "periodic payments to spread compensation amounts over a period of time, to preclude costly windfalls to heirs when an injured party dies before completing his actuarially expected life."⁷⁹

On September 3, 1975, Alister McAlister, chairman of the Assembly Committee on Finance, Insurance, and Commerce, sent Chairman Keene suggested amendments to his bill. McAlister proposed the creation of a joint

⁷³ ASSEMB. COMM. ON HEALTH, 2d Spec. Sess., MEDICAL MALPRACTICE LEGISLATIVE REFERENCE CHART: LEGISLATION PRESENTLY BEFORE THE CAL. S. ON JULY 15 (Cal. 1975).

⁷⁴ ASSEMB. COMM. ON HEALTH, 2d Spec. Sess., MEDICAL MALPRACTICE LEGISLATIVE REFERENCE CHART: LEGISLATION PRESENTLY BEFORE THE CAL. S ON MAY 8 3 (Cal. 1975).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ CAL. ASSEMB., AMENDMENTS TO ASSEMB. B. NO. 1 AS AMENDED IN SENATE AUG. 11, 1975, 1975-1976 Leg., 2d Spec. Sess. (1975) (on file with Cal. Assemb. B. Author A.B. 1xx 1975 files).

⁷⁸ The extraordinary hardship exception would have applied when "non-economic loss substantially outweighs actual economic loss." Req. #12856, Interoffice Memorandum, Office of Assemblyman Barry Keene (date unknown) (on file with Cal. Assemb. B. Author A.B. 1xx 1975 files).

⁷⁹ Aug. 6 Hearing on A.B. 1 Before the Cal. S. Comm. on Insurance and Financial Institutions, *supra* note 22, at 4.

underwriting association and the establishment of three actuaries to assist California's Insurance Commissioner; he also did not mention the cap on non-economic damages.⁸⁰

As the bill progressed through the State Senate, Senate Judiciary Committee consultant and later legislative counsel Bion Gregory suggested indexing the non-economic damages cap.⁸¹ However, this suggestion was disregarded because the plaintiff lawyers' lobby would not support the idea.⁸² Ironically, some of the representatives of the trial bar thought indexing the cap would improve the bill's overall chance for passage and increase the likelihood of the Governor signing it.⁸³ As a result, they withheld their support of the indexed cap in order to try to kill the bill altogether.⁸⁴ But their move backfired—the final bill included the non-indexed cap that adversely affects a number of their potential clients today. Still, their tactical error gives no indication as to why \$250,000 was chosen as the magic number.

Nor did such an indication emerge from the records. There was, however, an actuarial appraisal of the potential effect of the \$250,000 non-economic damages cap, which indicated the following:

A limitation of damages for non-economic losses to \$250,000 will probably result in approximately a 5% reduction in total premium. This item has been difficult to measure since the awards are not normally categorized by economic and non-economic losses. It should have a tendency to reduce some of the very large emotional awards.⁸⁵

There was also an Insurance Commissioner's estimate, which projected that the damages cap would yield estimated premium savings of six to ten percent.⁸⁶ However, the Insurance Commissioner offered little explanation of those projected savings. Nevertheless, they were also employed by the Department of Consumer Affairs in its analysis of the bill.⁸⁷ In that analysis the Department acknowledged that the insurance industry had

⁸⁰ Memorandum from Carlyle R. Brakensiek, Chief Counsel, Cal. Assemb. Comm. on Finance, Insurance, and Commerce to Barry Keene, Chairman, Cal. Assemb. Comm. on Health (Sept. 3, 1975) (on file with Cal. Assemb. B. Author A.B. 1xx 1975 files).

⁸¹ *Perspectives 3*, *supra* note 68, at 3.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ COATES AND CRAWFORD, INC., ACTUARIAL APPRAISAL OF ASSEMBLY BILL 1 AS AMENDED ON JUNE 27, 1975 (1975) (on file with Cal. Assemb. B. Author A.B. 1xx 1975 files).

⁸⁶ THE INSURANCE COMMISSIONER, A.B. 1XX PREMIUM SAVINGS ESTIMATED BY THE INSURANCE COMMISSIONER (1975) (on file with the Cal. Assemb. B. Author A.B. 1xx 1975 files).

⁸⁷ See DEP'T OF CONSUMER AFFAIRS, ENROLLED BILL REPORT ON AB 1xx, at 15 (Sept. 22, 1975) (on file with Cal. Governor A.B. 1xx 1975 files).

failed to provide an estimate of how much the bill would reduce premiums.⁸⁸ Moreover, it even noted that it had relied upon the Insurance Commissioner's estimates.⁸⁹ However, no hard analysis beyond the Insurance Commissioner's projections indicated that a non-economic damages cap would translate into premium savings.

The lack of any clear reason for the value of the \$250,000 cap is indicated by an exchange between Senator Newton R. Russell and Travelers Insurance. Senator Russell and Terry Miller, Consultant to the Senate Committee on Insurance and Financial Institutions, requested estimates from California's insurance companies of the effects the proposed legislation would have on 1976 medical malpractice insurance premiums.⁹⁰ Travelers Insurance responded by proposing that more stringent measures be incorporated into the bill.⁹¹ However, far from providing rate estimates that would substantiate even their new proposal, Travelers stated that they could not be "responsive to [the committee's] requests for pricing information" because they did "not have the necessary data to make intelligent estimates" about the effect the bill would have on rates.⁹² The insurance industry thus had no better estimate of the bill's potential effects than did the Department of Consumer Affairs.

Despite the espoused inability of insurers themselves to make such estimates, Chairman Keene urged Governor Brown to sign the bill because he projected that its provisions would reduce premiums by 18% to 24%.⁹³ The basis of those projections was absent from the letter.⁹⁴ Further, while Keene also failed to proffer an explanation as to why a \$250,000 cap would be effective, he did state during his opening remarks to the Joint Health-Judiciary Committee Meeting on Medical Malpractice that "[trial lawyers] do not like limitations on pain and suffering even though there may be sound reasons of social policy for imposing them."⁹⁵ His statement suggests that he hoped to convince his peers that the cap might be worthwhile to adopt only because there might, theoretically, be sound policy

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ See Letter from Roger J. Fisher, Second Vice President, The Travelers, to Newton R. Russell, Cal. S. (July 29, 1975) (on file with the Cal. Assemb. B. Author A.B. 1xx 1975 files) [hereinafter Letter to Newton R. Russell]; Letter from Roger J. Fisher, Second Vice President, The Travelers, to Terry J. Miller, Consultant, S. Comm. on Insurance and Financial Institutions (July 29, 1975) (on file with Cal. Assemb. B. Author A.B. 1xx 1975 files) [hereinafter Letter to Terry J. Miller].

⁹¹ Letter to Newton R. Russell, *supra* note 90.

⁹² See Letter to Terry J. Miller, *supra* note 90.

⁹³ Letter from Barry Keene, Chairman, Cal. Assemb. Comm. on Health, to Edmund G. Brown, Jr., Governor, State of California (Sept. 12, 1975) (on file with Cal. Governor 1975 A.B. 1xx files).

⁹⁴ See *id.*

⁹⁵ Barry Keene, Chairman, Cal. Assemb. Comm. on Health, Opening Remarks to the Cal. Assemb. Joint Comm. on Health & Judiciary Comm. Hearing on Medical Malpractice 2 (June 5, 1975) (on file with Cal. Assemb. B. Author A.B. 1xx 1975 files).

reasons to do so. However, Keene declined to specify precisely what those reasons were.

In exchanges since MICRA's adoption, Keene and other supporters of the non-economic damages cap have still failed to provide empirical support for the \$250,000 limit. The bill author himself, when pressed about the number, said that the "selection of a quarter million dollars was subjective."⁹⁶ He went on to explain:

The theory was that you could never really and adequately compensate for pain and suffering, no matter how much money you provided. Money just doesn't do it. But \$250,000 (in addition to meeting the medical and other needs of the patient), properly invested to the extent that it elevated the quality of life over and above the post-injury status, was thought to be enough to do that job.⁹⁷

Finally, a Department of Consumer Affairs report discussed whether \$250,000 of non-economic damages would be an equitable amount for claimants.⁹⁸ In its analysis, the Department stated, "[t]he limit of \$250,000 may be acceptable for consumers" because the limit "would not change the amount awarded to most claimants."⁹⁹ However, this analysis did not recognize the concentrated effect that this amount would have on those specific groups of claimants who would be especially affected, such as women and minorities.¹⁰⁰ Moreover, even the bill's author has explained that the damage cap constituted a "moral dilemma" between "denying patients access to reasonably-priced health care in California" or "under-compensating" some injured patients.¹⁰¹

That idea is confirmed by a suggested veto message that was sealed in Governor Brown's files. The message noted that the bill "did not deal effectively with the problem of the negligent practitioner, without whom there would be no malpractice crisis. . . . [The bill] fail[ed] to provide added disciplinary powers which are needed to protect the consumers of California from malpractice."¹⁰² The suggested remarks may reflect Governor Brown's concern that the bill's primary harmful effects would be felt by patients first.

⁹⁶ E-mail from Barry Keene, Author of MICRA (A.B. 1xx), to Amanda Edwards, Author (Aug. 22, 2005, 16:43:23 EST) (on file with author).

⁹⁷ *Id.*

⁹⁸ DEP'T OF CONSUMER AFFAIRS, *supra* note 87, at 15

⁹⁹ *Id.*

¹⁰⁰ *Supra* notes 43–58 and accompanying text.

¹⁰¹ Keene, *supra* note 23, at 31.

¹⁰² Edmund G. Brown, Jr., Governor, State of Cal., Suggested Veto Message to the Members of the Cal. Assemb.: A.B. 1xx (on file with Cal. Governor A.B. 1xx 1975 files).

Governor Brown's predictions were correct. In fact, despite the controversy, lack of precedent, and uncertainty about the bill's efficacy,¹⁰³ health care providers,¹⁰⁴ officials throughout the state,¹⁰⁵ and insurance companies¹⁰⁶ pledged support for its passage. Still, the bill's supporters were concerned about the bill's fate. Consequently, they made several procedural maneuvers to avoid the Assembly Judiciary Committee, whose Chairman, they feared, might "amend [A.B. 1xx] into ineffectiveness."¹⁰⁷ Health Committee Chairman Keene, coordinating with the Senate Rules Committee, avoided referring the bill to the Judiciary Committee, where it would have been certain to face an uphill battle due to its unpopularity with committee members.¹⁰⁸ Instead, the bill was sent to the Senate Financial Institutions and Insurance Committee, which molded it into a form that included the \$250,000 cap on non-economic damages for which the legislation has received so much attention over the past 30 years.¹⁰⁹ Ultimately, the bill passed in the California legislature because of procedural maneuvering rather than the logical or empirical force of its provisions.¹¹⁰

The non-economic damages cap thus quietly made its way into California's MICRA, hardly discussed by legislators, constituents, or even lob-

¹⁰³ Letter from Elmer Low, President, Cal. Trial Lawyers Ass'n., to John Miller, Chairman, Cal. Assemb. Comm. on the Judiciary (June 13, 1975) (on file with Cal. Comm. on the Judiciary A.B. 1xx 1975 files) ("Our committee believes this bill is unfair to injured patients and seriously hinders the fair administration of justice.").

¹⁰⁴ William M. Whelan, Executive Vice President, Cal. Hosp. Ass'n, Statement of Cal. Hosp. Ass'n (June 5, 1975) (on file with Cal. Comm. on the Judiciary A.B. 1xx 1975 files) ("I am here to express the California Hospital Association's general support for AB1.").

¹⁰⁵ See Letter from Marvin Freedman, Chief Admin. Officer, County of Los Angeles, to Barry Keene, Chairman, Cal. Assemb. Comm. on Health (July 28, 1975) (on file with Cal. Assemb. B. Author A.B. 1xx 1975 files).

¹⁰⁶ See Letter from Larry Harvey, Senior Vice President, Signal Ins. Co., to Members of the Assemb. Judiciary Comm. (June 2, 1975) (on file with Cal. Assemb. B. Author A.B. 1xx 1975 files) ("We can state unequivocally that we will as soon as this package is enacted, start to lower our rates."). However, in a June 11, 1975, letter to the Judiciary Committee, Signal Insurance Company stated that the sliding scale contingent fee, the collateral source component, the structured settlement payment provision, and the lack of a res ipsa component would not amount to sufficient enough changes to lower the cost of malpractice insurance but potentially could cause increases. Letter from Larry Harvey, Senior Vice President, Signal Ins. Co., to Members of the Assemb. Judiciary Comm. (June 11, 1975) (on file with Cal. Assemb. B. Author A.B. 1xx 1975 files).

¹⁰⁷ *Perspectives: An Interview With MICRA Author Barry Keene*, CAPP News (Californians Allied for Patient Protection, Sacramento, Cal.), May 26, 2005, at 1, available at <http://www.micra.org/CAPPNews52605.pdf> [hereinafter *Perspectives 2*] (the second installment of an interview run over three issues).

¹⁰⁸ E-mail from Barry Keene, Bill Author of MICRA (A.B. 1xx), to Author (Aug. 23, 2005, 11:48:10 EST) (on file with author).

¹⁰⁹ *Perspectives 2*, *supra* note 107, at 2.

¹¹⁰ See Letter from Richard F. Mills, Law Corporation, to John J. Miller, Member, Cal. Assemb. (June 9, 1975) (on file with author) ("In the flurry of legislation presently pending, many people have lost sight of the fact that the so-called crisis was caused by a unilateral increase of malpractice insurance by the insurance industry, and as yet, no one has really found out why."); see also Letter from William J. O'Connell, Harrison & Watson Attorneys at Law, to John J. Miller, Member, Cal. Assemb. (July 2, 1975) (on file with author); *Perspectives 2*, *supra* note 107, at 2.

bying groups. The historical records reveal the behind-the-scenes priorities of lawyers' groups, legislators, health care providers, and active constituents; for all of them, the non-economic damages cap was hardly on the radar. The cap's low-profile enactment in 1975 seems surprising considering how it has become the centerpiece of current reform efforts.

V. AN ALTERNATIVE TO THE \$250,000 CAP

Since the \$250,000 cap on non-economic damages is not supported by a strong evidentiary foundation, alternative solutions should be examined for inclusion in federal legislation. A simple solution already exists to remedy the blockbuster cases that medical malpractice reform supporters continue to caricature and thrust into the spotlight. Federal Rule of Civil Procedure 59,¹¹¹ which governs motions for partial new trials, provides a solution without the heartache that the cap on non-economic damages presently imposes. A judge may engage the process of *nisi remittitur damna*,¹¹² by which a judge may reduce the jury award. In the *remittitur* process, the judge conditions the grant of a new trial on the plaintiff's refusal to consent to a reduction of damages.¹¹³ Plaintiffs may elect to reduce damages through *remittitur* instead of undergoing a new trial, during which they may incur significant expenses and after which they may be left entirely without compensation.

The media rarely reports the regular practice of award reductions; although fairly common, these reductions are not sexy enough to garner public attention. Instead, huge pre-reduction jury awards are used as fodder in the depiction of a tort system gone mad. For example, the well-known McDonald's coffee case has long been used to characterize the American tort system as a three-ring circus.¹¹⁴ In that case, an eighty-one-year-old woman was severely burned by hot coffee after McDonald's failed to explicitly warn customers of the dangers of its coffee.¹¹⁵ After the trial judge reduced the \$2.7 million punitive damage award to \$480,000, the \$2.86 million total award was reduced to \$640,000.¹¹⁶ However, those details were left lying on the editing room floor when the case was publicized nationwide.¹¹⁷ One examination of 198 jury awards of \$1 million or more revealed

¹¹¹ Fed. R. Civ. P. 59.

¹¹² This is the process by which parties negotiate for reduced jury awards after the trial's conclusion. *See id.*; see also Suja A. Thomas, *Re-examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731 (2003).

¹¹³ 65 A.L.R.2d. 1331 ("When jury is found to have erred in awarding excessive damages by reason of passion, prejudice, or sympathy, court may require winner of excessive verdict to chose between new trial and acceptance of reduced award.").

¹¹⁴ *Liebeck v. McDonald's Restaurants, P.T.S., Inc.*, No. CV-93-02419, 1995 WL 360309 (D.N.M. Aug. 18, 1994).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ See Neil Vidmar et al., *Jury Awards for Medical Malpractice and Post-Verdict Adjustments of Those Awards*, 48 DEPAUL L. REV. 265, 266 (1998).

that plaintiffs received the original jury award in just over a quarter of cases.¹¹⁸ On average, the plaintiffs' final disbursements were fifty-seven percent lower than their original awards.¹¹⁹ Another study of jury awards in California revealed that one in four jury verdicts was subject to post-verdict adjustment.¹²⁰ Those facts indicate that policy-makers are avoiding the real issue involved when they cite large jury awards as the cause of high premiums. Because judges readily exercise tools like *remittitur* and Rule 59 to mitigate outlier jury verdicts, those verdicts are not a significant cause of high premiums.¹²¹

The process of finding a solution to insurance premium rate instability should entail determining how to compensate currently injured patients while ensuring that adequate funds remain available for future claimants. However, the most important piece of this puzzle is to ensure that recoveries do not become too small to serve their purpose. As the Center for Public Interest Law has noted, "[A] person whose life is changed forever because of a provider's misconduct deserves fair compensation—and the current cap has been ravaged by inflation over the past 24 years, rendering it wholly inadequate."¹²² Medical malpractice tort reform advocates often paint a portrait of claimants hitting the "jackpot" with meritless suits. However, given the odds of reduced awards and the severe price paid by valid claimants, signing up for this lottery hardly seems like a ticket to the good life.

VI. CONCLUSION

Despite the negative impact of the \$250,000 non-economic damages cap on minorities and women, supporters in state and federal government seek to impose the cap on the entire nation through federal legislation. But for what reason? Instead of revealing sources of substantive support for the \$250,000 cap, an examination of the origin of the cap only reveals a lack of legislative deliberation on the issue.

Determining non-economic damages in a medical malpractice case entails subjectively deriving just compensation based on less-than-concrete notions of fairness and magnitude of pain and suffering. Injuries compensated by non-economic damages, however, are very palpable. Whether it is lifelong trauma caused by a miscarriage or the loss of a body part, each injury is unique and affects not only a victim's body but also the intangi-

¹¹⁸ See Ivy E. Broder, *Characteristics of Million Dollar Awards: Jury Verdicts and Final Disbursements*, 11 JUST. SYS. J. 349, 349–50, 353 (1986).

¹¹⁹ See Broder, *supra* note 118, at 350, 353; Vidmar et al., *supra* note 117, at 279.

¹²⁰ See Vidmar et al., *supra* note 117, at 294 (citing a 1998 study).

¹²¹ Vidmar et al., *supra* note 117, at 298.

¹²² *Hearing on A.B. 1380 Before the Assemb. Comm. on the Judiciary*, *supra* note 20, at 10.

ble elements that make a person whole. In the case of non-economic damages, one size does not fit all.

Although the rationale underlying the \$250,000 non-economic damages cap in California may appear flimsy because of scant records showing in-depth deliberation over the value, it is possible that particular number is far from arbitrary. Still, it seems unwise for proponents to fight to preserve the non-indexed \$250,000 cap while the reason that this number was selected remains a mystery—especially since its effects on certain groups of Californians are stark.

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