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### **What Are Possible Solutions to Limitations of MICRA?**

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Medical Injury Compensation Reform Act of 1975 (“MICRA”) imposes limitations on the amount of non-economic damages recoverable against a health care provider for medical negligence. MICRA also imposes procedural requirement for punitive damages. In this article, we briefly introduce the limitations of MICRA and then explore some other causes of actions that might provide some relief from the limitations imposed by MICRA in some specific circumstances.

#### **Limitations On MICRA**

California Civil Code Section 3333.2 provides:

“a) In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic 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 noneconomic losses exceed two hundred fifty thousand dollars (\$250,000).

(c) For the purposes of this section:

(1) Health care provider means any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code; and any clinic, health dispensary,

or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code. Health care provider includes the legal representatives of a health care provider;

(2) Professional negligence means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital. [Amended by Stats. 1975, 2nd Ex. Sess., Ch. 2].”

As the statute articulates, an injured plaintiff suing a health care provider for professional negligence is limited to a maximum of \$250,000 in damages for noneconomic losses such as pain, suffering, inconvenience, physical impairment, disfigurement, and other non-pecuniary damage.

### **Exempt Causes of Action from \$250,000 Ceiling**

It is important to note and remember that the non-economic damages limitations imposed by MICRA are only applicable to negligence by health care providers. Hence, MICRA does not apply to medical battery, intentional infliction of distress and elder abuse.

#### **1. Medical Battery**

Generally, medical battery is committed when a health care provider (e.g. a doctor) performs a different operation than the patient consented to or the operation is (substantially) different from what the treatment the patient consented to.

The doctor is liable for any injury or disability that results from the unauthorized treatment even though it was skillfully performed. *Berkey v Anderson* (1969) 1 CA3d 790, 803 (myelogram with spinal puncture not within tacit consent to electromyogram).

The patient’s general consent does not, however, authorize a substantially different treatment or surgery. *Valdez v Percy* (1939) 35 CA2d 485, 491 (breast removed following biopsy on axillary gland). *Perry v Shaw* (2001) 88 CA4th 658 (surgeon’s conduct was both battery and negligence, but injury from both was same; no ceiling on noneconomic damages; ceiling could apply to situations in which plaintiff’s consent to procedure given absent disclosure of potential complications).

#### **2. Elder Abuse**

Specific provisions of the Elder Abuse and Dependent Adult Civil Protection Act (Welf & I C §§15600–15675) provide relief beyond what MICRA would authorize. For example, Welf & I C §15657 permits a plaintiff who demonstrates by clear and convincing evidence that the defendant is guilty of something more than negligence—*i.e.*, of reckless, oppressive,

fraudulent, or malicious conduct—is entitled to attorney fees and, in a wrongful death suit, to damages for the decedent’s pain and suffering. See *Delaney v Baker* (1999) 20 C4th 23.

### 3. Intentional Infliction of Emotional Distress

Doctors and other health care providers can become liable for the torts of negligent, and intentional, infliction of emotional distress. See, e.g., *Molien v Kaiser Found. Hosps.* (1980) 27 C3d 916 (doctors negligently and incorrectly told patient that she had syphilis and should tell her husband). But see *Bird v Saenz* (2002) 28 C4th 910, 917 (plaintiffs not contemporaneously aware of error in diagnosis and treatment of mother’s artery); *Morton v Thousand Oaks Surgical Hosp.* (2010) 187 CA4th 926 (no liability based on deterioration of mother’s health during postsurgery recovery due to inattention of staff).

#### Salient Point

This article NEITHER supplants NOR supplements the breadth or depth of such rarefied topic. In fact, this article ONLY provides a rudimentary analysis of such esoteric subject matter.

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