



## DEFINING THE TERMS: MEDICAL LIABILITY REFORM PROVISIONS

### ***Non-economic damages***

Non-economic damages are paid to compensate an individual for physical and emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other intangible, non-monetary losses. The United States is the only country in the world that provides unlimited compensation for non-economic damages. Non-economic damages are separate from, and do not include, compensation for medical costs, lost wages, or other out-of-pocket expenses (these are economic damages), and they do not include punitive damages. Therefore, a cap on non-economic damages would not in any way limit the amount of money that an injured plaintiff could receive to cover his or her hospital costs, doctor bills, other medical expenses, or lost wages.

HCLA's model provision: \$250,000 ceiling on non-economic damages. No limits on any economic damages.

### ***Collateral source rule***

Under the collateral source rule, a defendant is prohibited from introducing in court any evidence of payments received by the plaintiff from sources other than the defendant which might remedy some of the plaintiff's economic loss. These sources could include health insurance reimbursement, workers' compensation, and disability insurance payments.

The result: double recovery of damages by plaintiffs since both the defendant and another party, such as an insurance company, pay the plaintiff for the same loss. Eliminating the rule and allowing offsets for collateral sources would mean that the amount of collateral source payments made to the plaintiff would be subtracted from the amount of damages awarded by the court. The plaintiff would still be fully compensated for his injuries but would not receive a windfall; neither would his attorney.

HCLA's model provision: make juries aware of collateral sources payments and allow offsets for those payments.

### ***Joint and Several Liability***

This rule allows any defendant in a lawsuit to be held liable for the entire amount of a claimant's damages, regardless of that defendant's proportion of fault for the damage done. Courts have held defendants who have been judged to be responsible for only 1% of the cause of an injury responsible for 100% of the damages paid. Joint and several liability, then, encourages trial lawyers to ignore defendants who are truly responsible and focus on any deep pocket party that is tangentially related to a case. It separates responsibility for causing an injury from the responsibility to compensate for that injury.

HCLA's model provision: defendants remain jointly liable for all economic losses, such as medical bills and lost wages, but should be held liable only for their own portion of the non-economic and punitive damages.

### ***Periodic payment of future damages***

Future damages are the plaintiff's losses that are projected to occur in the future resulting from the injury at issue. They include future medical expenses and lost earnings.

HCLA's model provision: allows the defendant to make periodic payments of future damages over \$50,000, if the court deems appropriate, instead of a single lump sum payment. The plaintiff still would receive full and immediate compensation for all out-of-pocket expenses, non-economic damages, punitive damages, if awarded, and future damages of \$50,000 or less. This provision would allow the defendant to pay for future losses with annuities or other financial instruments that have a lower "present value." It also would ensure that funds continue to be available to the plaintiff to cover these future damages as they do occur by avoiding the possibility of mismanagement of a lump sum payment. In short, periodic payment vehicles are generally better for patients and save the health care system money.

### ***Attorney contingency fees***

When a plaintiff's attorney agrees to take a case on a contingency fee basis, he or she agrees to charge the client a fixed percentage of the plaintiff's award or settlement, usually between 33 and 1/3% and 50%. If the plaintiff wins the case (or receives a settlement), the attorney's fee would be the agreed upon percentage of the award or settlement. If the plaintiff loses the case (receives no award), the plaintiff's attorney does not receive a fee. Defense attorneys are not paid on a contingency fee basis. They charge their clients by the hour.

HCLA's model provision: establishes a sliding scale for attorneys' fees. This provisions prohibits lawyers from collecting a contingent fee in excess of 40% of the first \$50,000; 33 1/3% of the next \$50,000; 25% of the next \$500,000; and 15% of any amount over \$600,000.

### ***Punitive damages***

Punitive damages are awarded on top of economic or non-economic awards. They are aimed at punishing the defendant for egregious, malicious, or intentional misconduct. Every state has its own standard for determining when punitive damages are appropriate. A plaintiff who proves that his injuries were caused by the defendant's negligence will receive full compensation for his injuries regardless of whether punitive damages are limited or not awarded at all.

Although punitive damages are rarely awarded in medical liability cases, plaintiffs' attorneys routinely include punitive damage claims in their complaints. This hampers settlements. Where there are no reasonable guidelines to aid juries in determining the appropriate level of punitive damages, such awards could be limitless. This "lottery" atmosphere makes settlement negotiations difficult, since the parties are unable to make an accurate assessment of the value of a particular case.

HCLA's model provision: punitive damages should be awarded only if there is "clear and convincing" evidence that the injury meets the standard set by each jurisdiction. In those cases, damages should be limited to \$250,000, or twice compensatory damages (the total of economic plus non-economic losses), whichever is greater. Additionally, manufacturers or distributors of medical products should not be held liable for punitive damages if their product received federal government approval or met FDA's "safe and effective" product requirements and there was not fraud in the approval process.

### ***Alternative dispute resolution (ADR)***

The principal objective of ADR is to promote quicker and less costly resolution of claims. Because our civil justice system has exceptionally high administrative costs (lawyer fees, expert witness fees, insurance company overhead), most of the business community has aggressively adopted ADR. Health care and personal injury litigation has lagged behind.

ADR can take many forms, such as mediation, arbitration, mini-trials, summary jury trials, moderated settlement conferences, and hybrid forms of the above categories. Some ADR programs are voluntary (both parties voluntarily agree to try to resolve their dispute within a particular ADR system), while others are mandatory (the parties have no choice; they are required by statute or contract to participate in the ADR process). If participation is voluntary, the ADR decision is more likely to be binding on the parties. If participation is mandatory, the ADR decision is often, but not always, non-binding.

HCLA's model provision: the Secretary of Health and Human Services would be authorized to make grants to states for the development and implementation of ADR programs. States would have flexibility in devising their ADR programs as long as federal standards were met. Federal standards should require ADR systems to incorporate some sort of disincentive to proceeding through the court system so that ADR would be a cost-effective and faster way of resolving claims rather than a costly "add-on." At a minimum, the ADR decision should be admissible in court if the parties proceed to litigation.