



## Medical Liability Reform Provisions: Defining the Terms

### ***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 (economic damages), and they do not include punitive damages. Therefore, reasonable limits on non-economic damages would not in any way limit the amount of money that an injured patient could receive to cover his or her medical or rehabilitation expenses, lost wages, or domestic service needs.

HCLA's model provision: *Reasonable \$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 losses. 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 evidence of collateral source payments to be offered in court would allow the jury to decide the extent to which collateral source benefits should be factored into an award. The plaintiff would still be fully compensated for his injuries but would be less likely to receive a windfall; as 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. Courts have held defendants who have been judged to be responsible for only one percent of the cause of an injury responsible for 100 percent of the damages paid, solely because that defendant could pay. Joint and several liability encourages trial lawyers to ignore defendants who are truly responsible and focus on any "deep pocket" that is even 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 should be held liable for only their portion of the damages awarded to a victim, in direct proportion to their percentage of liability for the claim.*

### ***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, among other things, future medical and rehabilitative expenses, domestic services, 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 would continue to receive full and immediate compensation for all out-of-pocket expenses, non-economic damages, 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 occur by avoiding the possibility of mismanagement of a lump sum payment. In short, periodic payment vehicles are generally better for patients and keep health care costs affordable.*

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

When a personal injury lawyer agrees to take a case on a contingency fee basis, he or she agrees to charge the client a fixed percentage of the award or settlement, usually between 33 1/3 and 50 percent. 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. Thus, substantial portions of a victim's award or settlement could be redirected to pay attorney fees rather than meet the victim's medical needs and other expenses.

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

#### ***Procedural reforms***

Reforms to the process through which medical liability claims are brought and adjudicated are also necessary to reduce costs and meritless lawsuits, and to ensure physicians are not sued for using their skills and knowledge in determining the best course of treatment for a patient.

*HCLA's model provision:* 1) Any medical liability lawsuit must be accompanied by a certificate of merit declaring that a qualified expert has reviewed the claim and found the allegations therein to be legitimate and the absence of such will subject the case to dismissal; and 2) Expert witnesses must demonstrate an appropriate level of knowledge about the specific matter in question and a sufficient level of expertise in the applicable field of medicine.

#### ***Apology protections***

When a medical injury occurs, it is only natural for the patient's health care professional to want to communicate with the patient to explain what happened and to express sympathy for the circumstances. In many states, however, such communications can be used against the health professional as an admission of guilt, even if no actual admission was ever made.

*HCLA's model provision:* Prevents expressions of sympathy, condolence, apology, etc. from being introduced as evidence that a health professional admitted that negligence occurred.

#### ***Cooling-off period***

Nearly two-thirds of all medical liability claims are dropped/withdrawn/dismissed because there is no evidence that the medical care received was negligent. These cases needlessly clog our courts and consume time that health professionals would otherwise spend treating their patients. In addition, the filing of a lawsuit frequently reduces communication between a patient and a health professional, making it more difficult to resolve the patient's issues.

*HCLA's model provision:* Requires the filing of a "notice of intent" 182 days prior to the filing of a medical liability lawsuit. This 182-day period provides time for both the patient and the health professional to discuss the patient's situation, and determine what, if anything, went wrong with the patient's care before burdensome and expensive litigation is pursued.