



## AB-35 Civil damages: medical malpractice. (2021-2022)

### As Amends the Law Today

**SECTION 1.** *The Legislature finds and declares that the purpose and intent of the Medical Injury Compensation Reform Act (MICRA) will be served by updating key provisions. Nothing contained herein shall be interpreted in a manner to alter or nullify existing case law interpreting MICRA and its statutory provisions.*

*The Legislature further finds and declares that establishing an environment in the health care delivery setting that encourages transparency and open communication will protect California patients and improve health care provider well-being.*

**SEC. 2.** Section 6146 of the Business and Professions Code is amended to read:

**6146.** (a) An attorney shall not contract for or collect a contingency fee for representing any person seeking damages in connection with an action for injury or damage against a health care provider based upon such person's alleged professional negligence in excess of the following limits:

(1) ~~Forty~~ *Twenty-five* percent of the ~~first fifty thousand dollars (\$50,000) recovered.~~ *dollar amount recovered if the recovery is pursuant to settlement agreement and release of all claims executed by all parties thereto prior to a civil complaint or demand for arbitration being filed.*

(2) Thirty-three ~~and one-third~~ percent of the ~~next fifty thousand dollars (\$50,000) recovered.~~ *dollar amount recovered if the recovery is pursuant to settlement, arbitration, or judgment after a civil complaint or demand for arbitration is filed.*

(3) ~~Twenty-five percent of the next five hundred thousand dollars (\$500,000) recovered.~~ *If an action is tried in a civil court or arbitrated, the attorney representing the plaintiff or claimant may file a motion with the court or arbitrator for a contingency fee in excess of the percentage stated in paragraph (2), which motion shall be filed and served on all parties to the action and decided in the court's discretion based on evidence establishing good cause for the higher contingency fee.*

~~(4) Fifteen percent of any amount on which the recovery exceeds six hundred thousand dollars (\$600,000):~~

The limitations shall apply regardless of whether the recovery is by settlement, arbitration, or judgment, or whether the person for whom the recovery is made is a responsible adult, an infant, or a person of unsound mind.

(b) If periodic payments are awarded to the plaintiff pursuant to Section 667.7 of the Code of Civil Procedure, the court shall place a total value on these payments based upon the projected life expectancy of the plaintiff and include this amount in computing the total award from which attorney's fees are calculated under this section.

(c) For purposes of this section:

(1) "Recovered" means the net sum recovered after deducting any disbursements or costs incurred in connection with prosecution or settlement of the claim. Costs of medical care incurred by the plaintiff and the attorney's office-overhead costs or charges are not deductible disbursements or costs for such purpose.

(2) "Health care provider" means any person licensed or certified pursuant to Division 2 (commencing with Section 500), 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.

(3) "Professional negligence" is 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 the 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.

**SEC. 3.** Section 3333.2 of the Civil Code is amended to read:

**3333.2.** (a) In any action for injury against a health care provider *or health care institution* 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 nonpecuniary ~~damage~~: *damage, subject to the limitations in this section.*

*(b) In any action for injury that does not involve wrongful death against one or more health care providers or health care institutions based on professional negligence, the following limitations shall apply:*

*(1) Civil liability for damages for noneconomic losses against one or more health care providers, collectively, shall not exceed three hundred fifty thousand dollars (\$350,000), regardless of the number of health care providers, which does not include any unaffiliated health care providers that are responsible for noneconomic losses pursuant to paragraph (3).*

*(2) Civil liability for damages for noneconomic losses against one or more health care institutions, collectively, shall not exceed three hundred fifty thousand dollars (\$350,000), regardless of the number of health care institutions, which does not include any unaffiliated health care institutions that are responsible for noneconomic losses pursuant to paragraph (3).*

*(3) Civil liability for damages for noneconomic losses against one or more health care providers or health care institutions that are unaffiliated with a defendant described in paragraph (1) or (2) based on acts of professional negligence separate and independent from the acts of professional negligence of a defendant described in paragraph (1) or (2) and that occurred at, or in relation to medical transport to, a health care institution unaffiliated with a health care institution described in paragraph (2), collectively, shall not exceed three hundred fifty thousand dollars (\$350,000), regardless of the number of defendants described in this paragraph, which does not include any unaffiliated health care providers or unaffiliated health care institutions that are responsible for noneconomic losses pursuant to paragraph (1) or (2).*

*(c) In any action for wrongful death against one or more health care providers or health care institutions based on professional negligence, the following limitations shall apply:*

*(1) Civil liability for damages for noneconomic losses against one or more health care providers, collectively, shall not exceed five hundred thousand dollars (\$500,000), regardless of the number of health care providers, which does not include any unaffiliated health care providers that are responsible for noneconomic losses pursuant to paragraph (3).*

*(2) Civil liability for damages for noneconomic losses against one or more health care institutions, collectively, shall not exceed five hundred thousand dollars (\$500,000), regardless of the number of health care institutions, which does not include any unaffiliated health care institutions that are responsible for noneconomic losses pursuant to paragraph (3).*

*(3) Civil liability for damages for noneconomic losses against one or more health care providers or health care institutions that are unaffiliated with a defendant described in paragraph (1) or (2) based on acts of professional negligence separate and independent from the acts of professional negligence of a defendant described in paragraph (1) or (2) that occurred at, or in relation to medical transport to, a health care institution unaffiliated with a health care institution described in paragraph (2), collectively, shall not exceed five hundred thousand dollars (\$500,000), regardless of the number of defendants described in this paragraph, which does not include any unaffiliated health care providers or unaffiliated health care institutions that are responsible for noneconomic losses pursuant to paragraph (1) or (2).*

*(d) No health care provider defendant shall be liable for damages for noneconomic losses in more than one of the categories set forth in this section, regardless of the application or combined application thereof.*

(e) No health care institution defendant shall be liable for damages for noneconomic losses in more than one of the categories set forth in this section, regardless of the application or combined application thereof.

(f) The applicable dollar amounts set forth in this section apply regardless of the number of defendant health care providers or health care institutions against whom the claim is asserted or the number of separate causes of actions on which the claim is based. For a claim subject to subdivision (b), the applicable dollar amounts set forth in subdivisions (b), (g), and (h) provide three separate limits of liability that may apply. For a claim subject to subdivision (c), the applicable dollar amounts set forth in subdivisions (c), (g), and (h) provide three separate limits of liability that may apply.

(g) This section shall be deemed effective as of, and shall apply to all cases filed or arbitrations demanded on or after, January 1, 2023. Thereafter, the dollar amounts set forth in subdivision (b) shall increase by forty thousand dollars (\$40,000) each January 1st for 10 years up to seven hundred fifty thousand dollars (\$750,000), and the dollar amounts set forth in subdivision (c) shall increase each January 1st by fifty thousand dollars (\$50,000) for 10 years up to one million dollars (\$1,000,000). The dollar amount in effect at the time of judgment, arbitration award, or settlement shall apply to an action, subject to subdivision (h).

(h) The applicable amounts for noneconomic damages for personal injury of \$750,000, and for wrongful death of \$1,000,000, as set forth in subdivision (g), shall be adjusted for inflation on January 1 of each year by 2 percent beginning on January 1, 2034.

~~(b)~~ (i) In no action shall the amount of damages for noneconomic losses exceed ~~two hundred fifty thousand dollars (\$250,000)~~; the applicable dollar amounts set forth in subdivisions (b), (c), (g), or (h).

~~(e)~~ (j) 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 Chapter 1~~ (commencing with Section 1200) ~~of~~ ~~or Chapter 1.3 (commencing with Section 1248) of Division 2 of the Health and Safety Code.~~ Code, and does not include health care institutions that are defined in paragraph (2). "Health care provider" includes the legal representatives of a health care ~~provider~~; ~~provider and the health care provider's employer, professional corporation, partnership, or other form of legally recognized professional practice organization.~~

(2) "Health care institution" means one or more health care facilities licensed pursuant to Chapter 2 (commencing with Section 1250) of Division 2 of the Health and Safety Code owned or operated by the same entity or its affiliates and includes all persons and entities for which vicarious liability theories, including, but not limited to, the doctrines of respondeat superior, actual agency, and ostensible agency, may apply.

(3) "Unaffiliated" means a specified health care provider, health care institution, or other entity not covered by the definition of affiliated, or affiliated with, as defined in Section 150 of the Corporations Code, or that is not employed by, performing under a contract with, an owner of, or in a joint venture with another specified entity, health care institution, health care provider, organized medical group, professional corporation, or partnership, or that is otherwise not in the same health system with that health care provider, health care institution, or other entity. Whether a health care provider, health care institution, or other entity is unaffiliated is determined at the time of the professional negligence.

~~(2)~~ (4) "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.

**SEC. 4.** Section 667.7 of the Code of Civil Procedure is amended to read:

**667.7.** (a) In any action for injury or damages against a provider of health care services, a superior court shall, at the request of either party, enter a judgment ordering that money damages or its equivalent for future damages of the judgment creditor be paid in whole or in part by periodic payments rather than by a lump-sum payment if the award equals or exceeds ~~two hundred~~ fifty thousand dollars ~~(\$50,000)~~ (\$250,000) in future damages. In entering a judgment ordering the payment of future damages by periodic payments, the court shall make a specific finding as to the dollar amount of periodic payments which will compensate the judgment creditor for such future damages. As a condition to authorizing periodic payments of future damages, the court shall require

the judgment debtor who is not adequately insured to post security adequate to assure full payment of such damages awarded by the judgment. Upon termination of periodic payments of future damages, the court shall order the return of this security, or so much as remains, to the judgment debtor.

(b) (1) The judgment ordering the payment of future damages by periodic payments shall specify the recipient or recipients of the payments, the dollar amount of the payments, the interval between payments, and the number of payments or the period of time over which payments shall be made. Such payments shall only be subject to modification in the event of the death of the judgment creditor.

(2) In the event that the court finds that the judgment debtor has exhibited a continuing pattern of failing to make the payments, as specified in paragraph (1), the court shall find the judgment debtor in contempt of court and, in addition to the required periodic payments, shall order the judgment debtor to pay the judgment creditor all damages caused by the failure to make such periodic payments, including court costs and attorney's fees.

(c) However, money damages awarded for loss of future earnings shall not be reduced or payments terminated by reason of the death of the judgment creditor, but shall be paid to persons to whom the judgment creditor owed a duty of support, as provided by law, immediately prior to **his their** death. In such cases the court which rendered the original judgment, may, upon petition of any party in interest, modify the judgment to award and apportion the unpaid future damages in accordance with this subdivision.

(d) Following the occurrence or expiration of all obligations specified in the periodic payment judgment, any obligation of the judgment debtor to make further payments shall cease and any security given, pursuant to subdivision (a) shall revert to the judgment debtor.

(e) As used in this section:

(1) "Future damages" includes damages for future medical treatment, care or custody, loss of future earnings, loss of bodily function, or future pain and suffering of the judgment creditor.

(2) "Periodic payments" means the payment of money or delivery of other property to the judgment creditor at regular intervals.

(3) "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.

(4) "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.

(f) It is the intent of the Legislature in enacting this section to authorize the entry of judgments in malpractice actions against health care providers which provide for the payment of future damages through periodic payments rather than lump-sum payments. By authorizing periodic payment judgments, it is the further intent of the Legislature that the courts will utilize such judgments to provide compensation sufficient to meet the needs of an injured plaintiff and those persons who are dependent on the plaintiff for whatever period is necessary while eliminating the potential windfall from a lump-sum recovery which was intended to provide for the care of an injured plaintiff over an extended period who then dies shortly after the judgment is paid, leaving the balance of the judgment award to persons and purposes for which it was not intended. It is also the intent of the Legislature that all elements of the periodic payment program be specified with certainty in the judgment ordering such payments and that the judgment not be subject to modification at some future time which might alter the specifications of the original judgment.

**SEC. 5.** *Chapter 3 (commencing with Section 104340) is added to Part 2 of Division 103 of the Health and Safety Code, to read:*

**CHAPTER 3. Expressions of Sympathy, Benevolence, or Fault in Health Care**

**104340.** *(a) Statements, writings, or benevolent gestures expressing sympathy, regret, a general sense of benevolence, or suggesting, reflecting, or accepting fault relating to the pain, suffering, or death of a person, or to an adverse patient safety event or unexpected health care outcome, in relation to an act or omission to act in*

*the provision of or failure to provide health care, and made to that person or the family or representative of that person prior to the filing of a lawsuit or demand for arbitration, shall be confidential, privileged, protected, not subject to subpoena, discovery, or disclosure, and shall not be used or admitted into evidence in any civil, administrative, regulatory, licensing, or disciplinary board, agency, or body action or proceeding, and shall not be used or admitted in relation to any sanction, penalty, or other liability, as evidence of an admission of liability or for any other purpose, and all such communications, whether verbal, electronic, in writing, or in any other form, shall also be entitled to the privileges and protections set forth in Sections 1119, 1152, 1157, and 1160 of the Evidence Code.*

*(b) For purposes of this section:*

*(1) "Adverse patient safety event or unexpected health care outcome" means any event or condition identified in Section 2216.3 of the Business and Professions Code, Section 1279.1, and any act or omission to act by a health care provider in the rendering of professional services resulting in, alleged to have resulted in, or with the potential to result in injury or death to one or more persons and that is not the result of knowingly or purposefully harmful action.*

*(2) "Benevolent gestures" means any action that conveys a sense of compassion or commiseration emanating from humane impulses.*

*(3) "Family" means the spouse, domestic partner, parent, grandparent, stepparent, child, guardian, stepchild, grandchild, sibling, half-sibling, adopted children of a parent, a spouse's parent, and in-laws of an injured party.*

**SEC. 6.** *If any provision of this act, or any part of this act, or the application of any provision or part to any person or circumstances, is for any reason held to be invalid, the remaining provisions and parts, and application of the remaining provisions and parts, shall not be affected, but shall remain in full force and effect, and to this end, the provisions and parts of this act are severable. It is the intent of the Legislature that this act would have been enacted regardless of whether any invalid provision or part had been included or any invalid application had been made.*