

## **BACKGROUND:**

### **CAPS ON DAMAGES AND WHO'S HURT MOST**

#### **WHAT KINDS OF DAMAGES (OR COMPENSATION) MIGHT A JUDGE OR JURY AWARD TO AN INJURED PERSON?**

Judges and juries award compensatory damages for injuries. Compensatory damages consist of economic damages, non-economic damages or both. Another type of damages – punitive damages – are extremely rare and only awarded in cases of egregious misconduct. This Backgrounder focuses on compensatory damages.

#### **WHAT ARE ECONOMIC DAMAGES?**

There are two types of economic damages: lost earnings and medical costs. In most cases, lost earnings make up the largest part of economic damages that goes directly to the injured victim. That's because when a jury awards compensation to cover a victim's medical expenses, the money does not go to the victim at all. Instead, it goes to health care providers to pay for the medical care the patient did not need until they were injured. In other words, paying for all medical care means compensating the medical industry for the treatment of injuries that sometimes, as in the case of medical malpractice, the industry itself has inflicted.

#### **WHAT ARE NON-ECONOMIC DAMAGES?**

Like lost earnings, non-economic damages go directly to the injured victim. Non-economic damages compensate for intangible but real "quality-of-life" injuries, like permanent disability, disfigurement, trauma, loss of a limb, harm to a reproductive system, blindness, suffering or pain. Underlying the purpose of non-economic damages is the understanding that there is more to a human being than the amount of a weekly paycheck.

#### **WHY ARE NON-ECONOMIC DAMAGES IMPORTANT?**

When a person is seriously injured, the greatest loss is the loss of the enjoyment of life, the pleasure, the satisfaction or the utility that human beings derive from life, separate and apart from earnings. These are non-economic injuries.

Put another way, non-economic damages compensate for losing what is truly valuable to us as human beings: our ability to live life on a daily basis free of any debilitating physical problems, pain or trauma. Those problems diminish our capacity to enjoy life and compromise our sense of self-worth, dignity and integrity. The pleasure of living lies in our ability to participate fully in the give and take of life. It lies in our experience of the ordinary day: waking up without pain;

drinking a cup of coffee without someone's help; dressing a child in mismatched clothes that she insists on wearing, rather than have that child dress you; walking to a bus stop rather than being wheeled to a lift van.

In addition to physical pain and suffering, seriously injured victims can suffer great mental anguish, anxiety and often shame at being transposed from an able-bodied working person to an individual who is dependent on others. These are sufferings which seriously injured people may encounter each time they attempt to perform any of the myriad tasks of daily life that the rest of us take for granted. This is the loss that the law describes as “non-economic” and which goes to the very essence of our quality of life.

## **WHAT IS A “CAP” ON DAMAGES?**

A “cap” on damages is law that puts an arbitrary “one-size-fits-all” limit on the amount an injured person can receive in compensation irrespective of what a judge or jury decides compensation should be. Therefore, caps not only hurt victims, they undermine our jury system. They take away the authority of judges and juries, who listen to evidence in a case, to decide compensation based on each specific fact situation. Instead, cap laws place these decisions in the hands of politicians. A cap is usually defined by a dollar figure (\$100,000, \$500,000, etc.). Caps only come into play after someone has already been found liable for causing harm. They have nothing to do with “frivolous” lawsuits. They apply no matter how much merit a case has, or the extent of misconduct or injury.

## **WHAT ARE CAPS ON NON-ECONOMIC DAMAGES?**

The most common type of law capping damages limits *non-economic* damages only. Economic damages, such as lost wages, are typically not capped. As a result, capping non-economic damages results in valuing the destruction of an individual's life based on what that person would have earned in the marketplace but for the injury. Therefore, they have a disproportionate impact on low wage earners, children, seniors and women who do not work outside the home. In addition, some data show that “while the [Texas medical malpractice] cap had a disparate impact across all demographic groups, the hardest hit appear to be unemployed patients and the elderly.” And because these two groups “are disproportionately female,” this disparate effect likely extends to women as well.<sup>1</sup>

## **HOW DO NON-ECONOMIC CAPS DISCRIMINATE AGAINST WOMEN?**

In a seminal study, Professor Lucinda Finley found “certain injuries that happen primarily to women are compensated predominantly or almost exclusively through non-economic loss damages. These injuries include sexual or reproductive harm, pregnancy loss, and sexual assault injuries.” She wrote, “[J]uries consistently award women more in non-economic loss damages than men...[A]ny cap on non-economic loss damages will deprive women of a much greater proportion and amount of a jury award than men. Non-economic loss damage caps therefore amount to a form of discrimination against women and contribute to unequal access to justice or fair compensation for women.”<sup>2</sup>

## HOW DO NON-ECONOMIC CAPS DISCRIMINATE AGAINST SENIORS?

Basing the value of someone's life on what they can currently earn in the marketplace says to seniors that despite having spent their lives paying their dues and playing by the rules, now, due to the negligence of a wrongdoer, they have lost what their years have earned them: the prospect of an enjoyable, vigorous and happy old age. Data show that elderly patients "are more strongly affected by the [Texas] non-economic damages cap" as "only 25 percent of elderly payouts are attributable to economic damages, compared to 57 percent for the adult nonelderly."<sup>3</sup>

## HOW DO NON-ECONOMIC CAPS DISCRIMINATE AGAINST CHILDREN?

Basing the value of a child's life on what they can earn in the marketplace utterly cheapens their existence. Caps can also destroy an important safety net for vulnerable children and their families. In addition, caps only affect the most severely hurt, like a catastrophically-injured newborn, because only the most seriously injured child has damages that rise to the level of a cap. For example, in California – a state with a non-economic damages cap – plaintiffs less than one year of age had awards capped 71 percent of the time, compared with 41 percent for other plaintiffs. Injury cases with reductions of \$2.5 million or more usually involved newborns and young children with very critical injuries.<sup>4</sup>

## HOW DO NON-ECONOMIC CAPS MAKE IT DIFFICULT TO BRING CASES?

Caps on non-economic damages make cases economically impossible for contingency-fee attorneys to bring cases if there are significant non-economic injuries. That's because under a contingency fee arrangement, a lawyer must fund the case up front and in return is entitled to a percentage of the award if the case is successful – usually one-third. If the award is arbitrarily slashed by a cap law, the case becomes too expensive for them to bring. Insurance defense attorney Robert Baker, who defended malpractice suits for more than 20 years, told Congress in 1994, "As a result of [California's] caps on damages...[t]here are entire categories of cases that have been eliminated."

## ARE CAPS CONSTITUTIONAL?

It depends on the state. However, many states have found them unconstitutional, including Alabama, Florida, Illinois, Kansas, New Hampshire, Oklahoma, Oregon and Washington State.<sup>5</sup>

## NOTES

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<sup>1</sup> Bernard S. Black et al., *Medical Malpractice Litigation: How It Works, Why Tort Reform Hasn't Helped*, Cato Institute (2021).

<sup>2</sup> Lucinda M. Finley, "The Hidden Victims of Tort Reform: Women, Children, and the Elderly," 53 *Emory L.J.* 1263 (2004), [https://digitalcommons.law.buffalo.edu/journal\\_articles/198](https://digitalcommons.law.buffalo.edu/journal_articles/198)

<sup>3</sup> Bernard S. Black et al., *Medical Malpractice Litigation: How It Works, Why Tort Reform Hasn't Helped*, Cato Institute (2021).

<sup>4</sup> Nicholas M. Pace, Laura Zakaras and Daniela Golinelli "Capping Non-Economic Awards in Medical Malpractice Trials, California Jury Verdicts Under MICRA," RAND Institute for Civil Justice (2004), <https://www.rand.org/pubs/monographs/MG234.html>

<sup>5</sup> See Center for Justice & Democracy Fact Sheet, "Caps On Compensatory Damages: A State Law Summary" (August 2020), <https://centerjd.org/content/fact-sheet-caps-compensatory-damages-state-law-summary>