



## State's medical malpractice law faces more challenges

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The family of a San Francisco man who died after a 2008 surgery filed an [appeal](#) last week over their malpractice award – the latest in a round of legal challenges to a state law that has long pitted medical providers against consumer advocates and attorneys who represent patients.

The Medical Injury Compensation Reform Act, enacted in 1975, limits financial awards in malpractice cases.

“We’ve had a series of cases recently and some that are in the hopper that challenges the constitutionality of the MICRA statutes,” said Alicia Wagon, legal counsel for the California Medical Association, which supports the law.

The law was enacted to protect health care providers from escalating malpractice insurance premiums and costly lawsuits. The most controversial portion of the law limits all damages related to pain and suffering or the emotional loss from the death of a loved one to \$250,000. Economic and punitive damages in medical malpractice cases remain unlimited in California.

Advocates of the law say it helps medical providers contain costs and increases accessibility to health care; opponents say it curtails justice for medical malpractice victims.

In the San Francisco case, an anesthesiologist was found partially liable for the death of 63-year-old attorney Gary Gavello. After the operation, Bernard Millman, the anesthesiologist, ordered post-operation drugs and left Gavello with a nurse and nursing assistant before he awoke from the medication. At some point after that, Gavello stopped breathing. The case also involved a cosmetic surgeon who performed an eight-hour surgery in a surgical suite in his medical office and a nurse who was found to have responded improperly to Gavello’s respiratory condition.

In a jury verdict following a 14-day trial, Gavello’s wife and three children were awarded about \$2.9 million in economic damages related to his lost wages, plus an additional \$1 million for their emotional loss.

Because Gavello signed an arbitration agreement for the surgeon and the nurse before the surgery, the current case involves only Millman. The jury found him 20 percent liable for Gavello's death, and the court subsequently adjusted the \$1 million award to \$50,000, or 20 percent of the \$250,000 cap.

"The harm to severely injured medical malpractice plaintiffs from MICRA is illustrated by the pending Gavello case," said Dan Smith, the attorney representing the family. "There, a mother and three sons suffered the death of their husband and father due to medical malpractice and under the statute as it was applied by the trial judge, these four individuals received ... \$12,500 each for the (emotional) loss of their husband or father."

Millman's attorney declined to comment on a pending case. Attorneys for the nurse and surgeon did not return requests for comment.

The California medical injury law has served as a model for other states, including Texas and Illinois. A federal version of the law has been introduced numerous times but has never passed.

In California, the statute continues to prompt sharp debate. Proponents say the act makes it financially feasible for providers to practice in California because it helps control costs related to malpractice claims and liability insurance. The act requires patients to notify providers before they file a lawsuit, and it limits attorneys' fees, among other provisions.

"MICRA is a critical component of California's health care infrastructure, and it makes sure that injured patients receive fair compensation while preserving access to health care services for all Californians," said Lisa Maas, the executive director of Californians Allied for Patient Protection, which supports MICRA. "It also prevents out-of-control liability claims."

But some consumer advocates and trial attorneys say that basing a medical malpractice award on lost wages is unfair to victims who either don't earn much money or who don't have income because of their age.

"By limiting damages in a medical malpractice lawsuit to provable economic damages – like salary or actual medical bills – and limiting any sort of additional punishment to \$250,000 for noneconomic damages, it impacts most severely seniors because they have no income and are retired, or children because they are not wage earners," said Carmen Balber of Consumer Watchdog.

Bruce Brusavich, a past president of the Consumer Attorneys of California, added that scarred and disfigured plaintiffs who are able to return to work are also disadvantaged by the damages cap in medical malpractice cases.

Some health care economists have also cautioned against limiting jury awards in medical malpractice cases. The caps will "reduce the resources allocated to medical professional liability underwriting and oversight and make many patients worse off," Shirley Svorney, a CSU Northridge economist and an adjunct scholar at the Cato Institute, wrote in a [policy brief](#). "Legislators who see mandatory liability caps as a cost-containment tool should look elsewhere."

The Gavello appeal challenges the California law by claiming that it is unconstitutional. The case includes claims that the financial caps deny the family the full right to a jury trial and violate equal protection laws since medical malpractice victims are being treated differently than victims of automobile accidents or medical device malfunctions.

"The issue in this case is whether the amount of that award should be limited for one class of plaintiffs," said Smith, the attorney representing the Gavellos.

But the California Medical Association's Wagnon said that the cap on medical malpractice cases is a public policy necessity because the state needs to "preserve and maximize access to (health) care for California," she said. "The mechanism is by keeping cost in medical malpractice cases down."

Previous attempts to challenge the constitutionality of the cap in California [have been unsuccessful](#), although these arguments have prevailed in Georgia and Illinois state courts.

Smith said that previous California decisions have failed to fully consider that the act is no longer necessary since a 1988 law enables the state Department of Insurance to regulate medical malpractice insurance. The lawsuit cites six 2012 decisions by the insurance commissioner reducing medical malpractice insurance rates by as much as 19 percent.

Health providers said that the act will become even more relevant following the U.S. Supreme Court ruling on the Affordable Care Act last week.

Kathy Kneer of Planned Parenthood Affiliates of California said the liability caps need to remain at their current levels because community clinics "live on a thin line of financial stability."

"With the Affordable Care Act being upheld, more people will be entering the medical system and safety net clinics will be picking up more patients," she said. "If they raise the MICRA caps, that means it will increase our costs."