

Medical Malpractice Litigation in 2023

What To Know About Navigating
Common Pitfalls

Dominique Pollara, Esq.

Program Agenda

- ▶ Analyzing Potential Malpractice Claims
- ▶ Recent Changes in the Law in Medical Malpractice
- ▶ Common Pitfalls

Basics: Anatomy of a Lawsuit

▶ Liability

- ▶ Duty - physician patient relationship. A duty to use same skill, knowledge, and care as a reasonable anesthesiologist would in similar circumstances.
- ▶ Breach—failure to use that level of care.
- ▶ Causation—that failure was a non-trivial or substantial factor in causing the person's harm.
- ▶ Injuries

Basics: Anatomy of a Lawsuit

► Damages

- Economic damages: past/future wage loss, past/future medical expenses, past/future household services, all reduced to present value.
- Non-economic damages

CACI 501 Standard of Care for Health Care Professionals

- ▶ A physician is negligent if she fails to use the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful physicians would use in the same or similar circumstances. This level of skill, knowledge, and care is sometimes referred to as “the standard of care.”
- ▶ You must determine the level of skill, knowledge, and care that other reasonably careful physicians would use in the same or similar circumstances, based only on the testimony of the expert witnesses who have testified in this case.

CACI 502 Standard of Care for Medical Specialists

- ▶ A general surgeon is negligent if she fails to use the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful general surgeons would use in similar circumstances. This level of skill, knowledge, and care is sometimes referred to as “the standard of care.”
- ▶ You must determine the level of skill, knowledge, and care that other reasonably careful general surgeons would use in similar circumstances based only on the testimony of the expert witnesses who have testified in this case.

CACI 504 Standard of Care for Nurses

- ▶ A medical surgical nurse is negligent if he fails to use the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful medical surgical nurses would use in similar circumstances. This level of skill, knowledge, and care is sometimes referred to as “the standard of care.”
- ▶ You must determine the level of skill, knowledge, and care that other reasonably careful medical surgical nurses would use in similar circumstances based only on the testimony of the expert witnesses who have testified in this case.

CACI 505 Success Not Required

- ▶ A general surgeon is not necessarily negligent just because her efforts are unsuccessful or she makes an error that was reasonable under the circumstances. A general surgeon is negligent only if she was not as skillful, knowledgeable, or careful as other reasonable general surgeons would have been in similar circumstances.

CACI 506 Alternative Methods of Care

- ▶ A general surgeon is not necessarily negligent just because she chooses one medically accepted method of treatment or diagnosis and it turns out that another medically accepted method would have been a better choice.

CACI 430 Causation: Substantial Factor

- ▶ A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.
- ▶ Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.

CACI 200 Obligation to Prove - More Likely True Than Not True

- ▶ The parties must persuade you, by the evidence presented in court, that what they are required to prove is more likely to be true than not true. This is referred to as “the burden of proof.”
- ▶ **After weighing all of the evidence, if you cannot decide that something is more likely to be true than not true, you must conclude that the party did not prove it.** You should consider all the evidence, no matter which party produced the evidence.
- ▶ In criminal trials, the prosecution must prove that the defendant is guilty beyond a reasonable doubt. But in civil trials, such as this one, the party who is required to prove something need prove only that it is more likely to be true than not true.

Statute of Limitations: C.C.P. section 340.5

- ▶ Three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first.

Statute of Limitations: C.C.P. section 340.5

► Minors:

- Within three years from the date of the alleged wrongful act
- If the minor is under the full age of six years, the action shall be commenced within three years or prior to his eighth birthday whichever provides a longer period.

Statute of Limitations: C.C.P. section 340.5

- ▶ Tolling provisions:
 - ▶ Proof of fraud
 - ▶ Intentional concealment
 - ▶ Presence of a foreign body with no therapeutic or diagnostic purpose

Notice of Intent: C.C.P. section 364

- ▶ (a) No action based upon the health care provider's professional negligence may be commenced unless the defendant has been given at least 90 days' prior notice of the intention to commence the action.
- ▶ (b) No particular form of notice is required, but it shall notify the defendant of the legal basis of the claim and the type of loss sustained, including with specificity the nature of the injuries suffered.
- ▶ (c) The notice may be served in the manner prescribed in Chapter 5 (commencing with [Section 1010](#)) of Title 14 of Part 2.
- ▶ (d) If the notice is served within 90 days of the expiration of the applicable statute of limitations, the time for the commencement of the action shall be extended 90 days from the service of the notice.

MICRA Pre-January 1, 2023

- ▶ \$250k cap on noneconomic damages (Civ. Code § 3333.2)
- ▶ Sliding scale for contingency fees
- ▶ Elimination of collateral source rule (Civ. Code § 3333.1)
- ▶ Approval of periodic payments of damage awards

MICRA Post January 1, 2023

- ▶ Effective January 1, 2023.
- ▶ Not retroactive; applies to cases filed on or after 1/1/23.

MICRA Post January 1, 2023

- ▶ Contingency fees, non-economic damages caps, and evidentiary privilege.
- ▶ Changes to contingency fees: now based on *when* case ends, not the *amount* awarded.
 - ▶ 25% - global settlement pre-complaint/arbitration demand
 - ▶ 33% - global settlement *after* complaint filed or arbitration demanded but before trial
 - ▶ 33%+ (on motion showing good cause) - award at trial.

MICRA Post January 1, 2023

- ▶ New non-economic damage caps bifurcated based on claims for wrongful death or just professional negligence.
 - ▶ Then, there are 3 caps in play based on who the defendants are: Health care providers, health care institutions, or “unaffiliated” providers or institutions.

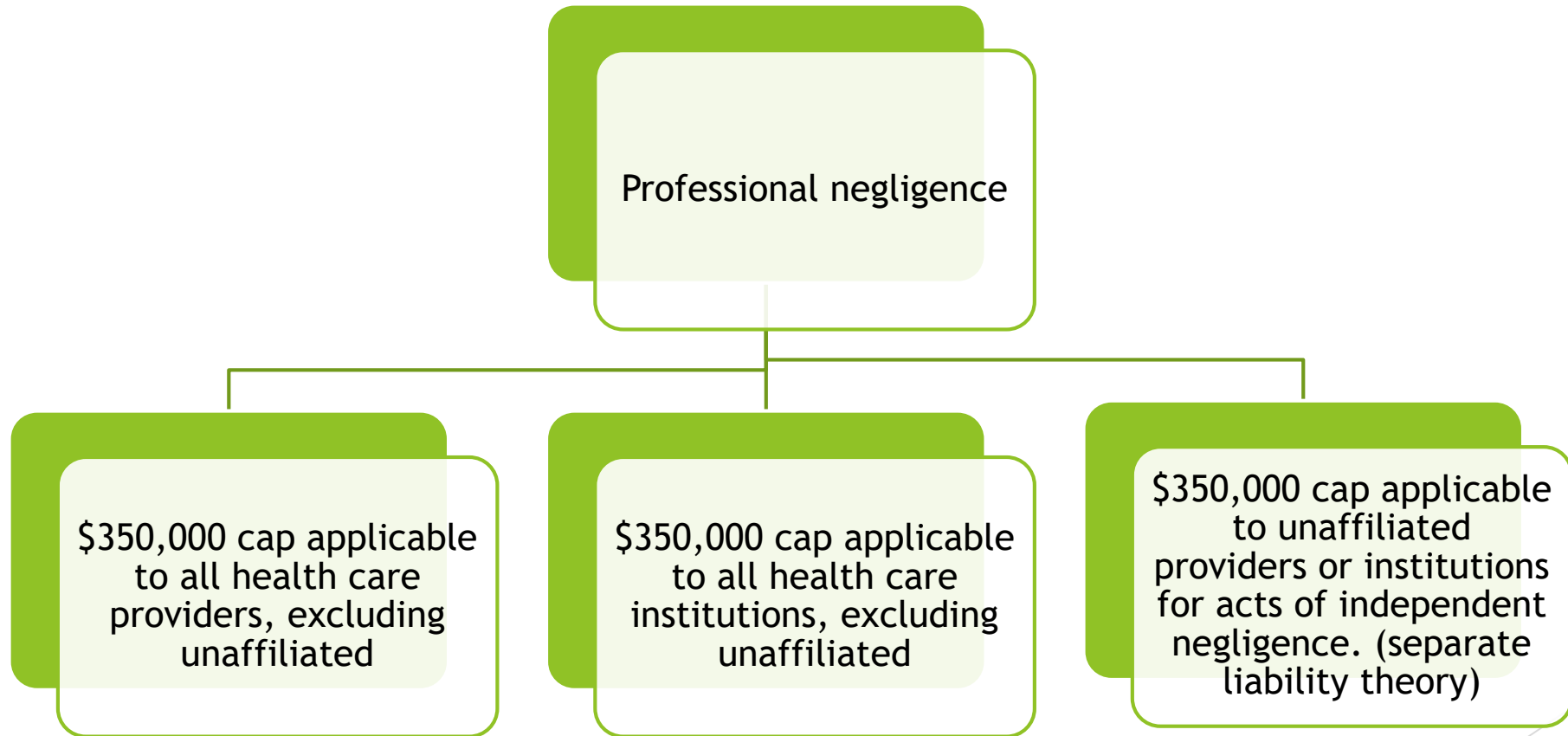
MICRA Post January 1, 2023

- ▶ The caps on each category are determined by the claim:
 - ▶ Professional negligence (\$350K) per category
 - ▶ Wrongful death (\$500k) per category
- ▶ 3 defendant categories
 - ▶ 1. Health care providers
 - ▶ 2. Health care institutions
 - ▶ 3. Unaffiliated providers and institutions but only for independent acts of professional negligence that occurred at, or in relation to medical transport, to a health care institution unaffiliated with a defendant institution.

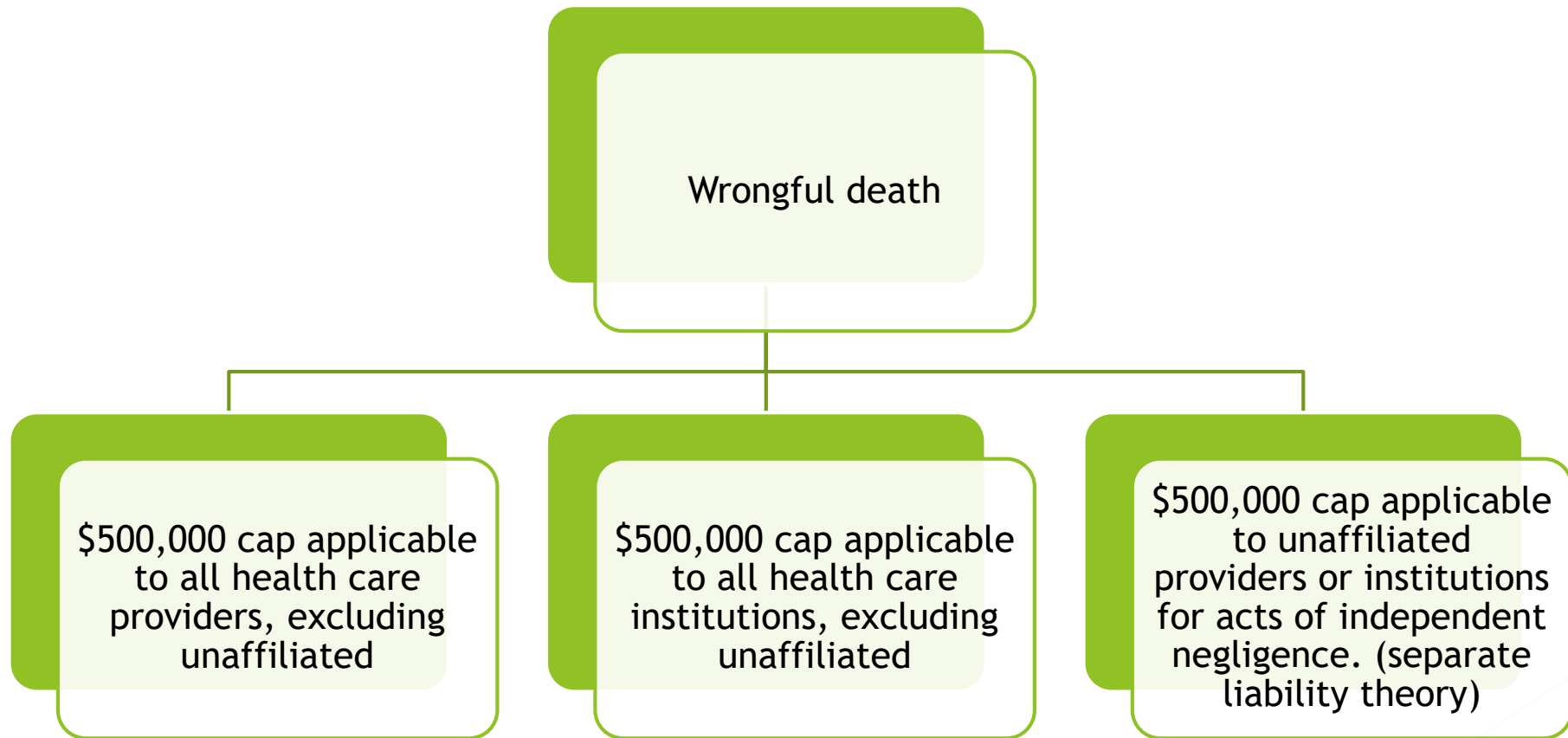
MICRA Post January 1, 2023

- ▶ This means that, under the right set of facts, this legislation permits plaintiff to invoke all 3 category caps.
- ▶ Max non-economic damages in a wrongful death case could be \$1.5M for a WD case resolved in 2023. (\$500k from each category)

MICRA Post January 1, 2023 - Professional Negligence



MICRA Post January 1, 2023 - Wrongful Death



MICRA- Healthcare Providers

(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 Chapter 1 (commencing with Section 1200) of or Chapter 1.3 (commencing with Section 1248) of Division 2 of the Health and Safety 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.

MICRA - Healthcare Institution

- ▶ 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.**

MICRA - Unaffiliated Providers and Institutions

- ▶ (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.
- ▶ A corporation is an “affiliate” of, or a corporation is “affiliated” with, another specified corporation if it directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with the other specified corporation. Corp. Code § 150.

MICRA Post January 1, 2023

- ▶ Cannot stack caps for each defendant. Cannot be subject to multiple caps.
- ▶ The caps apply to each group regardless of the number of defendants in the group, or the number of causes of action.
- ▶ A case may invoke all three caps (dependent on the defendants).
- ▶ (g) The dollar amount in effect at the time of judgment, arbitration award, or settlement shall apply to an action.

MICRA Post January 1, 2023



Professional Negligence

\$350k per defendant category

Increase by \$40k per year up to \$750k (10 years)

Starting Jan 1, 2034, 2% annual increase

Wrongful Death

\$500k per defendant category

Increase by \$50k per year up to \$1M (10 years)

Starting Jan 1, 2034, 2% annual increase

MICRA Post January 1, 2023

Periodicizing the Verdict

- ▶ CCP § 667.7 amended to \$250k
- ▶ If the future damages award equals or exceeds \$250k, then the court shall order, upon request of either party, the debtor to pay in periodic payments.

MICRA - Practical Takeaways (CCAT)

- ▶ 1. C -- cause of action: professional negligence vs. wrongful death.
- ▶ 2. C -- category: provider or institution as defined in Civ Code § 3333.2.
- ▶ 3. A - Affiliation: Is there employment? Contract? Partnership? Co-ownership? Joint venture?
 - ▶ If not, was there an independent act of negligence? Did the independent act occur at a place unaffiliated with any other defendant?
 - ▶ If yes to both, then congratulations; you get your own cap (\$350 or \$500).
- ▶ 4. T -- Consider the time of the claim because the caps are dynamic. (e.g. 2024, ~~\$350~~-\$390). The cap in effect at the time of resolution/verdict is the applicable cap.

MICRA - Some of the Unresolved Questions

- ▶ What entities fall within the definitions of “health care provider” and “health care institutions?”
- ▶ Ostensible agency claims against health care institutions where there is no direct theory of liability
- ▶ The number of Caps applicable to separate causes of action

Analyzing the Potential Claim: Investigate The Facts

- ▶ When Did the alleged event occur?
- ▶ What is the alleged injury
- ▶ Obtain the pertinent medical records
- ▶ Retain an appropriate expert to review the records and provide an opinion

Common Mistakes from One Defense Perspective (Plaintiffs)

- ▶ Failing to Critically Analyze the Records
- ▶ Failing to Retain an Appropriate Expert Early
- ▶ Failing to Understand Physicians Hold Consent to Settle
- ▶ Failing to Understand Prosecuting Medical Malpractice Claims is Expensive
- ▶ Failing to Discuss the Realities and Economics of Malpractice Litigation with the Client

Common Mistakes from One Defense Perspective (Defense)

- ▶ Failing to Fully Analyze Causation Issues
- ▶ In Multi-Defendant Cases - Failing to Assess the Practical Impact of Trial Dynamics and How that Can Impact Liability Exposure
- ▶ In Multi-Defendant Cases - Failing to Work with Other Defense Counsel

QUESTIONS