

**THE ILLINOIS HOSPITAL ASSOCIATION  
SUPPORTS A REASONABLE RANGE FOR  
AWARDING NON-ECONOMIC DAMAGES**

**April 7, 2005**

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**I. Introduction:**

The Illinois Hospital Association and its member hospitals are grateful for the opportunity to address the House Judiciary Committee on the subject of reforming our medical liability system. Addressing the problems caused by skyrocketing medical liability costs in Illinois is a top priority of the IHA.

The medical liability crisis in Illinois is causing an unprecedented health care access crisis throughout this state. While some areas of Illinois may be suffering more than others, the systemic problems driving these crises exist all over Illinois and show no signs of abating. In the areas hardest hit by the access crisis, we are finding the absence of obstetricians willing to treat “high risk” babies, emergency care physicians unwilling to provide trauma care, and neurosurgeons refusing to do certain complex and high-risk procedures.

Medical liability costs are starting to devour the bottom lines of Illinois hospitals – turning black ink into red and threatening the ability of hospitals – even some of the largest hospitals in the state – to carry out their mission to serve their communities.

Hospitals suffer the excessive costs of coverage directly because most hospitals in this state are self-insured. The commercial insurance market has abandoned hospitals – leaving them to pay the astronomical costs of verdicts and settlements out of their own pockets – money that should be spent on caregivers and new technology and in dozens of other ways that would benefit patients and communities. This crisis is growing. If nothing is done, the health care access barriers may become insurmountable.

This document summarizes why the IHA asks this Committee to support the passage of a reasonable range within which juries may award non-economic damages in medical liability cases.

## II. Why limit non-economic damage awards?

There are two kinds of damages available in medical liability cases. One kind (economic damages) must be proven; the other kind (non-economic damages) must be imagined. Economic damages are proven through out-of-pocket expenses, lost wages and the cost of medical care. Paid bills and expert witnesses are used to establish an actual dollar value for the plaintiff's economic losses. Economic damages, such as medical expenses and lost wages, are ...

- Provable in dollars and cents.
- Predictable.
- Fairly uniform from state-to-state.

The IHA supports complete and total payment for economic damages.

Non-economic damages present an entirely different challenge for juries. There is no way to prove a dollar value for pain and suffering. There is no economist who can testify about the dollar value of physical pain or an emotional loss. Juries have absolutely no objective standards or guides in determining how much to award for non-economic damages. They are forced to guess about or imagine what such losses are worth.

Accordingly, non-economic damages, are ...

- Not measurable at all in dollars and cents – that's why they're called *non-economic* damages.
- Not predictable. Because there are no standards, the growth in non-economic damages is nearly impossible to predict.
- Volatile due to their subjectivity.

Non-economic damages are the single greatest factor in the unpredictable and unsustainable explosion in the cost of medical liability awards.

No one is saying that injured parties should get nothing for their physical pain or emotional harm. But the difficulty of assessing, predicting and paying for tremendously high non-economic losses places health care delivery and access in peril. If this element of medical liability damages is not controlled by a reasonable range for such awards, the health care system will be irreparably damaged and in some areas destroyed.

In the 20 years from its founding in 1979 through 1999 the Illinois Provider Trust (IPT), which is a risk pooling trust that is owned and controlled by the hospitals it covers (i.e., collective self-insurance) paid out 4 claims in excess of \$1,000,000. In the last 5 years (2000-2004), it has paid 15 claims in excess of \$1,000,000. In terms of dollars, those 4 claims between 1979 and 1999 totaled \$10 million. The 15 claims since 2000 totaled \$50 million. Same hospitals. Roughly the same number of claims per year. Same kinds of injuries. Cases are simply settling for double, triple, and quadruple the amount they were

reserved for. Cases that were budgeted to be worth \$500,000 are settling for \$3 – 4 million.

The Chicago Hospital Risk Retention Pool, which covers hospitals in Cook County has been seeing the same trends. The average settlement for CHRRP hospitals has risen from \$180,000 in 1994 to \$470,000 in 1999 to \$1,010,000 in 2004. This represents an increased cost of 461% over ten years and 115% over five years. CPI has increased by roughly 2.5% annually since 2000. The rate of increase for CHRRP's losses has been 17% annually, 14.5% percentage points more than the CPI annually.

In terms of large malpractice settlements/verdicts, the largest claim at the end of 1994 was \$5,000,000, at the end of 1999 \$12,000,000 and at the end of 2004 the largest claim was \$22,400,000. This represents an increase of 348% over ten years and 87% over five years. Assuming the trend in the last 5 years continues, the largest medical malpractice claim will be \$47,000,000 in 2010 and \$88,000,000 in 2015.

Every new record verdict raises the floor and pulls settlements up at an unpredictable and unsustainable rate. This is the situation confronting IPT and CHRRP and the actuaries of all those self-insured hospitals. They're not trying to *make up* for losses in the stock market. They're trying to *keep up* with unpredictable verdicts and settlements.

And those verdicts and settlements are largely driven by non-economic damages--monetary awards for injuries that *cannot be measured* objectively in dollars and cents. IPT and CHRRP estimate that roughly 70% of verdicts consist of non-economic damages. The chart below shows the breakdown for medical malpractice jury verdicts in excess of \$5 million in Cook County for the years from 2001 – 2004. Based on these five years of data, non-economic damages account for 80% of the total award in such medical liability cases.

Medical Malpractice Jury Verdicts in Cook County, Illinois  
Greater than \$5 Million  
From January 1, 2001, to February 2005  
By Year

	<b>2000</b>	<b>2001</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>Cumulative</b>
<b>Total Cases</b>	<b>12</b>	<b>3</b>	<b>8</b>	<b>7</b>	<b>11</b>	<b>41</b>
<b>Total Verdicts</b>	<b>\$212 Million</b>	<b>\$45.6 Million</b>	<b>\$99.1 Million</b>	<b>\$92.6 Million</b>	<b>\$157.2 Million</b>	<b>\$606.5 Million</b>
<b>Total Non-economic Damages</b>	<b>\$193.2 Million</b>	<b>\$35 Million</b>	<b>\$79.4 Million</b>	<b>\$64.5 Million</b>	<b>\$114.4 Million</b>	<b>\$486.5 Million</b>
<b>Percent of Total Non-economic Damages</b>	<b>91%</b>	<b>77%</b>	<b>80%</b>	<b>70%</b>	<b>73%</b>	<b>80%</b>
<b>Average Non-economic Damages</b>	<b>\$16.1 Million</b>	<b>\$11.7 Million</b>	<b>\$6.2 Million</b>	<b>\$9.2 Million</b>	<b>\$10.4 Million</b>	<b>\$11.9 Million</b>

- One of the 2004 verdicts was for \$30 million .... 100% non-economic damages.

Without a legislated limit on the range for such damages, there is no predictable limit for such awards.

**What will caps accomplish?**

Caps work. The peer reviewed, scholarly health policy journal, *Health Affairs*, recently published a study showing that medical liability premiums in states with caps on non-economic damages are 17% lower than premiums in states without caps. Caps slow the cost of coverage by reducing the severity of claims. Texas provides us with the most recent example of how caps stabilize the unpredictable and excessive cost of coverage.

**Can caps be fair to plaintiffs?**

A generous range for awarding non-economic damages in medical liability cases can be both fair and reasonable to plaintiffs and still give the liability system the predictability it needs to make liability costs affordable. No one disputes the tragic losses that some plaintiffs endure. That is why providers support awarding a substantial but reasonably capped amount to be awarded for these losses. Everyone recognizes that money is a poor remedy for such losses. Providing unlimited damages in this area does not make a poor remedy better for the plaintiff. But a capped award provides a fair amount to the

individual plaintiff without damaging the capacity of health care providers to continue providing care to all Illinois residents.

### **What about plaintiffs that have little or no economic loss?**

There is no logical connection between how much a plaintiff gets for non-economic (pain and suffering) and economic (lost wages and medical costs) damages. Amounts awarded in one area should not be considered in how much is awarded in the other.

A reasonable range for awarding non-economic damages to plaintiffs does not become unreasonable when the plaintiff does not incur economic loss. If the non-economic component of damages is reasonable that amount should not be inflated because the plaintiff has low economic loss. Nor should awards for non-economic damages be reduced for individuals with large economic losses. Non-economic damages were never intended nor should they be used as some sort of economic equalizer where plaintiffs with large economic losses get the same total recovery as plaintiffs with no economic losses. If the purpose of the liability system were to ensure that everyone with the same medical injury got the same award, we should be developing the sort of damage schedules we see in the area of workers' compensation. If opponents of reasonable caps on non-economic awards believe that a workers' compensation model for medical liability makes sense, we are willing to discuss it.

The IHA, however, is also willing to assume that unemployed individuals are entitled to recover some damages as if they were employed. The IHA believes that anyone who does not incur substantial economic loss from actual lost wages because they are unemployed can be compensated fairly by paying that person the equivalent of a wage based on the average annual wage of workers in Illinois as established by the Illinois Industrial Commission.

### **How will caps affect a plaintiff's ability to afford an attorney?**

The IHA believes that if awards for non-economic damages are limited at a fair and reasonable level, defendants should also be required to pay for the plaintiff's reasonable attorneys' fees. These fees would be paid if the plaintiff prevails in the case and the amount would have to be capped at a level that is fair for the time, effort and risk the attorney undertakes in such cases. The IHA believes that a plaintiff's attorney's fees in a medical liability case should not exceed \$1 Million per case. This amount should fairly and reasonably compensate any qualified and dedicated attorney to represent a patient in these cases.

### **Can a cap on non-economic damage in medical liability cases be constitutional?**

Absolutely. The IHA's 2004 cap proposal is factually unlike any cap that the Illinois Supreme Court has ever considered. It differs in the following ways:

1. The ranges for awarding non-economic damages are substantially higher;

2. It protects plaintiffs who earn little or no wages;
3. It ensures that plaintiffs will be able to afford attorneys by requiring liable defendants to pay their attorney's fees up to One Million Dollars;
4. It shortens the time plaintiffs are likely to wait for recovery;
5. It reduces overall costs to the administration of justice in Illinois by resolving medical liability cases more expeditiously;
6. It only applies to medical malpractice cases to address the well-established medical malpractice crisis in Illinois;
7. It reduces the cost of liability coverage, which will help to alleviate the medical, and physician access crisis growing throughout Illinois; and
8. It creates "patient safety" incentives for hospitals to do all that they can to eliminate "never events" such as wrong site surgery.

In short, the IHA cap proposal provides plaintiffs, their attorneys, patients and the judicial system with a sufficient *quid pro quo* to constitutionally justify its adoption.

Moreover, the Illinois Supreme Court decisions on caps either do not apply to the cap we propose or support our conclusion. In the mid-1980's – during a medical liability crisis – the Illinois General Assembly *eliminated* punitive damages in medical malpractice cases. An entire category of damages available in other tort cases was eliminated. The Illinois Supreme Court *upheld* that law in the 1987 *Bernier* decision. Why?

Because (1) the legislature found that there was a medical liability crisis affecting access to health care by the public; and (2) the legislature tailored a solution directed only at medical liability cases. That's what we're proposing – and it's very different from the two cases where the court struck down caps.

In the mid-1970s, the legislature put a cap on *all damages* – economic and non-economic and the Illinois Supreme found it unconstitutional. No one is suggesting that sort of cap today. Therefore, this case is not applicable to the cap we propose. Twenty years later, in the mid-1990s the legislature found there was another medical liability crisis, but it placed a cap on non-economic damages in *all tort cases* – slip and fall, products liability, car accidents. The solution – caps in all cases – was broader than needed to address the medical liability problem. Therefore, the court struck it down as well.

These three cases tell us that the legislature has the authority to *limit* damages in medical liability cases only in order to address a public health crisis caused by the medical liability system.

The universal support of P.A. 93-848 by the Governor and every legislator in Springfield last spring shows that the General Assembly has great constitutional latitude in deciding what sort of tort cases get litigated in Illinois. P.A. 93-848, known as the "Illinois Commonsense Consumption Act," outlawed all civil actions against restaurants for injury resulting from weight gain. The Governor and General Assembly did not just cap damages in so-called "obesity lawsuits" against McDonald's. They outlawed ever suing restaurants for causing our obesity epidemic. If the Illinois constitution gives lawmakers

the ability to ban such claims, certainly it allows them to adopt a reasonable cap on non-economic damages in medical liability cases.

The IHA proposal to improve health care access by adopting graduated caps on non-economic damages should not be dismissed out of hand as unconstitutional. The Illinois constitution and Illinois Supreme Court decisions do not foreclose all avenues of capping non-economic damages if they are properly and carefully tailored to address our growing health care access crisis in Illinois. Surely our courts and constitution allow for reasonable solutions to a public health problem affecting all of us. There must be a way, if we only have the will.

### **Conclusion**

We all pay for the right to let one plaintiff recover an unlimited amount of damages in a single case. The price of that right is loss of access to care. Given this dynamic, the need to preserve access to hospitals and physicians outweighs the need to preserve a right to sue for an unlimited amount of non-economic damages. And a reasonable cap on such damages is the correct way to strike the balance between these competing concerns.

**Therefore, the Illinois Hospital Association asks that you support the adoption of reasonable limits on non-economic damages in medical malpractice cases.**