

Panel on Justice and the Bottom Line

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The Discriminatory Impact of Caps on Non-Economic Damages

1. Non-Economic Damages in tort cases, especially in medical malpractice, are the favorite target of the tort reform movement. A majority of states now have some version of a non-economic damage cap.
2. Empirical research demonstrates that these caps do not solve the problem they are purported to address: they have a minimal impact on insurance rates.
3. What these caps do achieve, however, is exacerbated disparities in tort recoveries and access to the civil justice system: they have a disparate impact on the most seriously injured plaintiffs, on women, and the elderly.
4. I conducted empirical study of tort verdicts in California medical malpractice cases, to examine how juries allocate awards between economic and non-economic damages. I analyzed verdicts based on age and gender of injured plaintiffs. Cite: *The Hidden Victims of Tort Reform: Women, Children and the Elderly*, 53 *Emory L. J.* 1263 (2004).
5. Key findings:

Women recover a greater proportion of their overall compensatory damages as non-economic damages than men, even in “gender-neutral” injury cases.

When type of injury is not “gender-neutral,” e.g. reproductive or sexual injury, women’s damages are overwhelmingly non-economic, and cap has particularly disparate impact.

California cap reduced women’s average and median recoveries more than men’s, and increased gender-based disparities in average and median recoveries.

Elderly, both male and female, recover a greater proportion of their overall compensatory damages as non-economic damages.

Damages in cases in which injured party dies, especially in child death cases, are overwhelmingly non-economic, and with cap in place, likely recovery may not exceed costs of suit.

6. The “Bottom Line” of Justice Under Damage Caps: These disparate impacts make it harder for certain types of injured people, with certain types of injuries, to find lawyers willing to take their cases. Injuries to our most “priceless” aspects of life and human functioning become virtually “worthless” in the tort system. Barriers of access to civil justice system are increased for women, the elderly, and the families of dead children.