

# MEMBER COMMENTARY

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## THE AFTERMATH OF PROPOSITION 12

By the narrowest of margins, a Texas legislature guided by special interest and the Texas doctors got what they wanted – a “yes” vote to Proposition 12. Ironically, what was being packaged and sold to Texas voters does not reflect the final product. Although Article III Section 66 of the Texas Constitution has now been amended, there is no language addressing frivolous suits, a reduction in physicians’ liability insurance premiums, an increase in the quality of health care or a decrease in the cost of health insurance. The amendment passed always has been, and forever will be, a cap on non-economic damages.

The \$250,000 non-economic damages cap for health care liability claims involving wrongful death was already in effect before the vote on Proposition 12. That law was firmly embedded via House Bill 4 which passed during the last legislative session. The Constitutional Amendment piggybacks House Bill 4 and applies the \$250,000 non-economic damages cap to all health care liability claims irrespective of whether the patient dies. As a result, non-economic damages for catastrophically injured victims will be limited for all of those individuals whose claims were filed on or after September 1, 2003.

The passage of Proposition 12 also authorizes the legislature to cap non-economic damages in all civil cases starting January 2, 2005. It does not matter whether the cause of action is derived from common law, a statute or other law. It does not matter whether the claim is based in tort, contract or any other theory.

The amended Constitution does not set a minimum threshold for the non-economic damages cap. The legislature can determine the limit at whatever amount it wants to, whenever it chooses, starting in 2005. If our elected officials want a \$10,000 non-economic damages cap in all civil cases, including medical malpractice, they now have the authority to set it.

It is difficult to imagine a permanently incapacitated victim only being allowed to recover \$10,000 for a life’s worth of pain, suffering, disability and disfigurement. Unfortunately, this is a possibility with our overly broad and newly amended Constitution. There will always be a class of individuals with severe injuries who do not have a claim for future medical expenses or lost earning capacity. There are those whose injuries resulted in blindness, loss of hearing, loss of bladder control, impotence, amputation, unwarranted removal of a breast or organ, who will have little, if any, expenses for future medical care. There are those stay-at-home moms, children and retired persons who will not have claims for wages or earning capacity. For these people, non-economic damages likely represent the only form of recovery.

It is quite possible many of these victims will become wards of the state because taxpayers will be funding their care as opposed to liability insurance carriers which collected more in premiums than they paid out in claims. The newly amended Constitution has shifted the financial burden of a severe injury from those who committed the harmful acts to the innocent victims who need the most help, not just in health care liability claims, but in all civil cases.

As if Proposition 12 a/k/a *The Partial Responsibility Amendment* wasn’t enough to bolster big business at the expense of the common man, we must not forget about the passage of House Bill 4 at the last legislative session. The new law consists of seventy-five, single-spaced pages of sweeping tort reformation. Areas of the law which have been re-written include but are not limited to: class actions, venue, settlement offers, proportionate responsibility, products liability, pre-judgment interest, seat-belts, medical malpractice, actual and punitive damages, governmental employees and charitable immunity.

While it is not yet impossible to represent a tort victim under the law, the statutes and cases have set the legal hurdles at a mark much higher than they ever have been before. I strongly encourage those practicing in this field to attend the advanced seminars and study the materials in detail. And, consider joining the Denton County Plaintiff’s Bar where complex issues and practical considerations are discussed extensively.

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