

# Immunity likely to protect hospital in \$23m award

The Boston Globe Thursday, October 26, 1995

By Dolores Kong  
GLOBE STAFF

A \$23 million jury award against Children's Hospital for the 1990 death of a Connecticut baby will apparently be reduced to \$20,000 under a state law that limits the liability of nonprofit organizations, according to legal analysts.

The baby's father brought the suit after his daughter died of complications following surgery at the Boston hospital for a heart defect.

By clearing cardiologist Mark Krasna and pediatric nurse Lisa Lestishok and finding only the hospital liable in the death of 10 month old Krista Testa in its decision in Suffolk Superior Court on Tuesday, the jury paved the way for the hospital to file a motion to have the amount reduced under law. The so-called charitable immunity law does not limit the liability of hospital personnel, only that of the private nonprofit institution itself.

In a statement yesterday, hospital officials said post-trial motions have been filed, but would not say whether they included a motion to reduce the award

"While the hospital is pleased the jury found Children's care givers not guilty of any negligence in the unfortunate death ... we disagree with the verdict against the hospital." according to the statement.

Boston attorney Frederic N. Halstrom called the limit on liability "a joke." Halstrom, president-elect of the Massachusetts Academy of Trial Lawyers, has worked locally to try to raise the so-called charitable immunity cap on private nonprofit hospitals.

"Here's the jury thinking they're doing the right thing." said Halstrom, who was not involved in the case against Children's but said he has seen many large jury awards against private nonprofit hospitals reduced to \$20,000 by the court.

"Because of the way the law is written ... the defendant gets a perverse result." he said.

Joseph Testa of Waterbury, Conn., the baby's father, could not be reached for comment yesterday, nor could the family's attorney, Edward M. Swartz of Swartz & Swartz in Boston.

The charitable immunity law dates from an 1876 Supreme Judicial Court case. Originally it was absolute, giving full immunity to organizations ranging from a local Boy Scout troop on a tiny budget to a Boston teaching hospital that pays its chief executive officer a six-figure salary and has malpractice insurance coverage as high as \$1 million.

But in 1971, after the SJC threatened to abolish the immunity, the Legislature set a \$20,000 cap.

Repeated efforts to raise the cap, particularly as it relates to private nonprofit hospitals, have failed. Halstrom said a bill to raise the hospital's liability limit to \$500,000 is now languishing in the Legislature. The Massachusetts Hospital Association has previously stated it would not oppose a cap on \$100,000.

Another state law limits the liability of municipal hospitals and their employees to no more the \$100,000.

Most attorneys who represent medical malpractice victims get around the \$20,000 cap on private nonprofit hospitals by naming doctors and nurses as defendants, then dropping the institution as a defendant before the case goes to the jury. While the institution does not have to be named in the lawsuit, plaintiffs' attorneys often name it in order to speed the discovery of medical records and other documents.

But hospital lawyers sometimes fight to keep their client in the suit as a defendant, in hopes that a jury will blame an institution over an individual and that a judge will refuse to tell jurors of the cap for fear of affecting their judgment of who's liable, according to plaintiffs' lawyers.