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I. INTRODUCTION

Beginning Saturday, February 21, 1976, Lawrence Fein, a California attorney, felt brief pains in his chest. Fein sought medical attention after he experienced these pains two more times in the next four days. Medical employees of the Permanente Medical Group (Permanente) examined Fein on Thursday, February 26, at 4 p.m. and the next morning, at 1 a.m. Both times they diagnosed muscle spasms as the cause of Fein's chest pains and treated him accordingly. The chest pains persisted and became more severe. A third Permanente employee examined Fein and ordered an electrocardiogram (EKG). The EKG showed that Fein had been suffering from a heart attack (acute myocardial infarction).[1]

Lawrence Fein was unable to return to full time employment until September 1977 due to his physical condition which resulted from the two misdiagnoses. In February 1977, he brought a medical malpractice action against Permanente.[2] The Superior Court of Sacramento County awarded Fein $787,733 in compensatory damages and $500,000 for "noneconomic damages."[3] Permanente requested

1. Fein v. Permanente Medical Group, 38 Cal. 3d 137, 141, 695 P.2d 665, 669, 211 Cal. Rptr. 368, 372 (1985).

2. *Id.*

3. *Id. See infra* note 84.

that the court modify the award and enter a judgment pursuant to California Civil Code section 3333.2 which places a $250,000 limit on noneconomic damages. The trial court complied with Permanente's request and reduced the noneconomic damages to $250,000.[4] On appeal, the Supreme Court of California affirmed, holding that section 3333.2 did not violate either the due process or the equal protection clauses of the fourteenth amendment.[5] The Supreme Court of the United States dismissed the appeal for want of a substantial federal question.[6] *Fein v. Permanente Medical Group*, 106 S. Ct. 214, *dismissing appeal from* 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985), *affirming* 121 Cal. App. 3d 135, 175 Cal. Rptr. 177 (1981).

II. PRIOR LAW REGARDING LIMITATIONS ON MEDICAL MALPRACTICE RECOVERIES

The principal issue in *Fein* is whether California's statutory cap on noneconomic damages in medical malpractice actions is constitutional. Opponents of this statute assert that it violates the equal protection and due process clauses of the fourteenth amendment. This statute and others like it grew out of a phenomenon known as the "medical malpractice crisis." The shortage of affordable medical malpractice insurance brought into serious question the adequacy of health care in the United States. To deal with this growing problem, every state in the union enacted legislation geared toward quelling the "crisis."[7] Plaintiffs challenging this legislation have called upon state courts to evaluate its constitutionality. These courts have responded in every imaginable form.[8]

To provide an understanding of the logic behind the Supreme Court's dismissal of the *Fein* appeal, this note will briefly survey the events giving rise to the medical malpractice crisis.[9] Second, this note

4. *Id.* at 143, 695 P.2d at 671, 211 Cal. Rptr. at 374. The court rejected the constitutional attack in a pretrial ruling.

5. The fourteenth amendment states: "No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

6. When the Supreme Court of the United States dismisses an appeal, it is a decision on the merits and is binding on all lower courts. *See* Note, *The Precedential Effect of Summary Affirmances and Dismissals for Want of a Substantial Federal Question by the Supreme Court After* Hicks v. Miranda *and* Mande v. Bradley, 64 VA. L. REV. 11 (1978). *But cf. id.* at 134-35 (warning lower courts that resolving all doubts about the meaning of a summary disposition in favor of deference to the Supreme Court would create an "unacceptable risk" that valid constitutional claims would be summarily dismissed at the level of the lower court).

7. *See, e.g., infra* note 27.

8. *See infra* notes 28-126 and accompanying text.

9. *See infra* notes 13-27 and accompanying text.

will examine the reasoning of state supreme courts that have evaluated statutes that limit recoveries in medical malpractice cases.[10] Third, this note will analyze the equal protection and due process issues raised by the varied constitutional challenges to statutes limiting medical malpractice recoveries.[11] Finally, this note will evaluate the potential impact of these challenges on the future of medical malpractice legislation and litigation.[12]

A. *Evolution of the Medical Malpractice Crisis*

By the nineteenth century the unintentional tort of negligence had developed into a cause of action for medical malpractice.[13] The oldest recorded American medical malpractice litigation occurred in 1794 in the state of Connecticut.[14] Between 1794 and 1861 various state supreme courts heard twenty-seven malpractice appeals.[15] Through their decisions, courts raised the applicable standard of care that physicians were required to use in the care of patients to a level consistent with modern medical practice.[16] This upgraded standard of care fueled an increase in malpractice claims. Many believe that the alarming threat of malpractice caused some surgeons to abandon their practices.[17]

Between 1935 and 1955, there were 605 reported malpractice cases in the United States; an average of thirty-one cases per year.[18] The number of claims rose steadily during the next fifteen years, and

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10. *See infra* notes 28-111 and accompanying text.

11. *See infra* notes 112-26 and accompanying text.

12. *See infra* notes 127-36 and accompanying text.

13. Flemma, *Medical Malpractice: A Dilemma In The Search For Justice*, 68 MARQ. L. REV. 237, 240 (1985).

14. *See* Reed, *Understanding Tort Law: The Historic Basis of Medical Legal Liability*, J. LEGAL MED., Oct. 1977, at 53 (discussing Cross v. Guthrie, 2 Root 90 (Conn. 1794)). In *Cross*, a husband sued a physician for the death of his wife who was undergoing a mastectomy. The husband alleged that the physician performed unskillful, ignorant, and cruel treatment.

15. *See* Burns, *Malpractice Suits in American Medicine Before the Civil War*, BULL. HIST. MED., Jan.-Feb. 1969, at 42. Two-thirds of these suits involved injuries relating to orthopedic problems: fractures, amputations, and dislocations. Five involved obstetrics. This review is interesting because the malpractice suits then and now reflect the predominant surgical practices of the time.

16. Flemma, *supra* note 13, at 241. Courts originally held physicians to the standards practiced among all those in the particular field, but as medicine became more scientific, the courts held all practioners to certain minimal local standards. Over the years, the prevailing standards changed from a duty of care based on local medical practices to a duty based on national medical practices. *Id.*

17. *See generally* J. ELWELL, A MEDICO-LEGAL TREATISE ON MALPRACTICE AND MEDICAL EVIDENCE, COMPRISING THE ELEMENTS OF MEDICAL JURISPRUDENCE (1860).

18. Stetler, *The History of Reported Medical Professional Liability Cases*, 30 TEMP. L.Q. 336, 337 (1957). During this period, California lead the nation with almost seventeen percent of all the cases, followed by New York, Washington, Ohio, and North Carolina. *Id.* at 368.

by the 1970's, physicians began to perceive the increase in the number and size of malpractice claims as a growing threat to their profession. In response, members of the medical community instigated job actions, strikes, and sit downs.[19] Physicians, insurance companies and state legislators referred to this phenomenon as a "medical malpractice crisis."[20] Hospital malpractice insurance premiums rose from $61 million in 1960 to $1.2 billion in 1976.[21] Additionally, insurance premiums for physicians skyrocketed.

By 1975, many questioned whether insurers would continue to offer liability insurance for medical malpractice.[22] In those states particularly affected by the rise in medical malpractice cases, insurers asserted that providing malpractice insurance was both risky and

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19. Flemma, *supra* note 13, at 242. In 1974, the Argonaut Insurance Company announced a 380% increase in the cost of physician premiums. Other insurance carriers made similar increases, and physicians threatened to strike. Aitken, *Medical Malpractice: The Alleged Crisis in Perspective*, 3 W. ST. L. REV. 15, 27-29 (1975). The 1974 crisis was the culmination of many years of a growing demand for medical services and an increase in medical malpractice litigation. By 1966, 17.8% of all physicians reported that at least one of their former patients had filed a malpractice suit against them sometime during their medical careers. In addition, between 1966 and 1971, damage awards in medical malpractice cases increased 200%. Special Project, *The Medical Malpractice Threat: A Study of Defensive Medicine*, 1971 DUKE L.J. 939, 940. While there was only one reported recovery in excess of $100,000 between 1935 and 1955, six figure recoveries are commonplace today. *See* Stetler, *supra* note 18, at 381; *see also* Special Project, *supra*, at 940.

20. T. LOMBARDI, MEDICAL MALPRACTICE INSURANCE: A LEGISLATOR'S VIEW (1978). In 1973, the Department of Health, Education, and Welfare's Malpractice Commission strongly recommended using pretrial screening panels to speed up the resolution of medical liability claims and eliminate nonmeritorious suits. *See* SECRETARY'S COMMISSION, U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE PUB. NO. (05), REPORT ON MEDICAL MALPRACTICE, 73-78 (1973) [hereinafter cited as HEW Report].

It became evident that actuaries had been unable to project the proper premiums to cover risks inherently associated with the practice of medicine. *Id.* at 5. The HEW Report attributed the actuarial failure in part to the lack of statistical data regarding medical malpractice claims. *Id.* at 13.

The insurance industry was not the only catalyst in this crisis. Numerous other factors also contributed to its emergence: (1) a breakdown in doctor-patient relationships attributable to specialization within the medical field; (2) the small number of physicians who maintain a heavy workload, thereby increasing their chance for error; (3) lack of adequate peer review; (4) the advent of consumerism; (5) the media's broadcast of the few large judgments against health care providers; and (6) some inexperienced attorneys bringing frivolous claims. *See* Roth, *The Medical Malpractice Insurance Crisis, Its Causes, The Effects and Proposed Solutions*, 44 INS. COUNS. J. 469, 471 (1977).

21. The frequency of claims has tripled since 1976; the rate has grown 10% per year. Address by Elvoy Raines, *Management of Liability—Attaching Incidents*, Seminar on Gynecologic Surgery, St. Thomas, V.I. (Feb. 16-19, 1984).

22. In 1975 the cost and availability of insurance was a serious problem in the following nine states: Alaska, California, Florida, Indiana, Maryland, Michigan, New York, North Carolina, and Ohio. *See* Witherspoon, *Constitutionality of the Texas Statute Limiting Liability for Medical Malpractice*, 10 TEX. TECH L. REV. 419 (1980).

unprofitable.[23] The sudden increase in the number and size of claims resulted in insurers raising premiums substantially.

During the two year period between 1975 and 1977, legislators in fourty-nine states, succumbing to the intensive lobbying pressures exerted by doctors and insurers,[24] passed laws to extinguish the "crisis" situation.[25] These laws also had the effect of restricting and/or modifying the rights of plaintiffs seeking redress for injuries arising from medical negligence.[26] One such provision limits the liability of a negligent health care provider and denies seriously injured plaintiffs recovery of damages that would otherwise be available under general tort law principles. At the present time ten states have statutes that limit liability for injuries resulting from medical malpractice.[27] State supreme courts that have addressed the issue have split opinions on whether these statutes are constitutional.

B. *State Supreme Court Reactions to Crisis Legislation Limiting Medical Malpractice Recoveries*

The Supreme Court of Illinois was the first court to analyze the constitutionality of a statutory limitation[28] on liability in medical mal-

23. T. LOMBARDI, *supra* note 20, at 2.

24. The medical profession claims that the plaintiff's attorney contingency fee system greatly contributed to the so-called "medical malpractice crisis" by encouraging the litigation of frivolous suits. One study indicates, however, that the contingency fee system has the exact opposite effect. "[T]he contingency fee system tends to discourage the acceptance of legally meritorious malpractice cases involving minor injury and relatively small potential recovery." HEW Report, *supra* note 20, at 33. The primary factors that caused the "crisis" and apparently caught the legislature's eye were the increasing amount of malpractice claims and the exceedingly high damage awards. *See* Learner, *Restrictive Medical Malpractice Compensation Schemes: A Constitutional "Quid Pro Quo" Analysis to Safeguard Individual Liberties*, 18 HARV. J. ON LEGIS. 143, 144-45 (1981).

25. Witherspoon, *supra* note 22, at 419.

26. Learner, *supra* note 24, at 145.

27. Such provisions are found in the following codes: CAL. CIV. CODE § 3333.2 (b) (West Supp. 1983) (placing a $250,000 limit on noneconomic damages); IND. CODE § 40:1299 (B)(2) (1978) (limiting total damages to $500,000); NEB. REV. STAT. § 44-2821 (1982) (permitting plaintiffs to elect out of a $500,000 cap on all damages), N.M. STAT. ANN. § 41-5-6 (1978) (limiting total damages, excluding punitive damages, medical care, and related benefits to $500,000); N.D. CENT. CODE § 26.1 14-11 (1983) (limiting total damages to $1 million); OHIO REV. CODE ANN. § 2307-43 (Page 1981) (placing a $200,000 limit on general damages); S.D. CODIFIED LAWS ANN. § 21-3-11 (1979) (limiting general damages to $500,000 and placing no monetary limit on special damages); TEX. REV. CIV. STAT. ANN. § 4590i (Vernon Supp. 1982) (placing a $500,000 limit on damages other than medical or custodial care); VA. CODE § 8.01-581.15 (Supp. 1983) (limiting total damages to $1 million); *cf.* FLA. STAT. § 768.54 (2) (b) (West. Supp. 1982) (limiting the liability of health care providers, other than hospitals, to a maximum of $2 million per claim plus punitive damages, and establishing a state-run fund to award damages to the extent the verdict of judgment exceeds the liability limitation).

28. ILL. REV. STAT. ch. 73, § 1013a (1975).

practice actions. In *Wright v. Central Du Page Hospital Ass'n*,[29] the court observed that actions in medical malpractice, unlike violations of the wrongful death statute,[30] the Dram Shop Act,[31] or the Workman's Compensation Act,[32] existed at common law.[33] The court reasoned that a legislature which statutorily creates a cause of action may also limit its recovery. This did not, however, preclude the legislature from substituting a statutory remedy for the common law remedy.[34] Nonetheless, the court determined that a law that permitted or denied recovery on an arbitrary basis would violate the Illinois Constitution. The court found that the statutory provision limiting recovery only in medical malpractice actions to $500,000 was arbitrary and constituted a special law in violation of the 1970 constitution.[35] In so holding, the Supreme Court of Illinois rejected the defendant's argu-

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29. 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

30. The Supreme Court of Illinois pointed out:

> [T]here was no common law cause of action for wrongful death, and the General Assembly had created the action by statute in 1853. In our opinion the constitutional question is not formidable when it is considered in the context of the situation that existed when the statute was originally enacted. At that time no action whatsoever was permitted for a wrongful death. The legislature took away no right when it enacted the statute. It created both the right and the remedy, and we think that its power to limit the maximum recovery in the action that it created cannot be questioned.

Id. at 318, 347 N.E.2d at 741-42 (quoting Hall v. Gillins, 13 Ill. 2d 26, 31, 147 N.E.2d 352, 357 (1958)).

31. In Cunningham v. Brown, the court held that no common law action existed for damages against a supplier of alcoholic liquor for injuries inflicted by an intoxicated person, or resulting from intoxication. 22 Ill. 2d 23, 30, 174 N.E.2d 153, 160 (1961). The Dram Shop Act of 1872 created such a cause of action, therefore the Illinois statute was valid even though it provided a limitation on the amount of recovery. *Wright*, 63 Ill. 2d at 320, 347 N.E.2d at 742.

32. The court stated:

> The Workmen's Compensation Act provided a *quid pro quo* in that the employer assumed a new liability without fault but was relieved of the prospect of large damage judgments, while the employee, whose monetary recovery was limited, was awarded compensation without regard to the employer's negligence. . . . By the Workmen's Compensation Act, the legislature required the employer to give up certain defenses and required the employee to give up certain recoverable elements of damage of a common-law negligence action; and this we have held many times is a reasonable exercise of the legislature's police power for the promotion of the general welfare.

Wright v. Central Du Page Hosp. Ass'n, 63 Ill. 2d at 320, 347 N.E.2d at 742 (quoting Moushon v. National Garages, Inc., 9 Ill. 407, 412, 137 N.E.2d 842, 845 (1956)).

33. *Wright*, 63 Ill. 2d at 320, 347 N.E.2d at 742 (citing Ritchey v. West, 23 Ill. 329 (1860)).

34. "Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation; . . . . " Hall v. Gillins , 13 Ill. 2d 26, 147 N.E.2d 352, 353 (1958) (quoting ILL. REV. STAT. ch. 70, § 1, 2 (1957)).

35. *Wright*, 63 Ill. 2d at 319, 347 N.E.2d at 742-43 (citing the Illinois statute which states: "The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable is a matter for judicial determination." ILL. REV. STAT. ART. IV § 13 (1975)).

ment that society would benefit from the limiting of medical malpractice recoveries by lowering malpractice insurance premiums and medical care costs. The court believed that those benefits would not extend to the seriously injured medical malpractice victim.[36]

Justice Underwood found no constitutional infirmity in imposing a limitation on damage awards. In his dissent, he noted that while the limitation bears heavily on the severely injured plaintiff, the desirability of "having adequate health care available at reasonable costs"[37] outweighs the burden on medical malpractice plaintiffs. Ironically, the fact that awards rarely exceeded the limitation, thus, affording protection to the vast majority of malpractice victims, persuaded the dissent to find the limitation constitutional.[38]

Idaho has a limitation of liability statute,[39] although the Supreme Court of Idaho has not yet definitively addressed its constitutionality. In *Jones v. State Board of Medicine*,[40] the Supreme Court of Idaho wholly rejected the same argument that the Supreme Court of Illinois considered in *Wright*.[41] Specifically, the *Jones* court rejected the argument that the statute limiting medical malpractice recoveries abrogated a formerly existing common law right while failing to provide a substitute remedy.[42]

The Supreme Court of Idaho entertained contentions that the limitation violated the due process [43] and equal protection[44] clauses of

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36. *Id.* at 319, 347 N.E.2d at 742.

37. *Id.* at 323, 347 N.E.2d at 746 (Underwood, J., dissenting).

38. *Id.* at 324, 347 N.E.2d at 747 (Underwood, J., dissenting).

39. The Idaho legislature enacted a statute as a result of the alleged "medical malpractice insurance crisis." Jones v. State Bd. of Medicine, 97 Idaho 859, 862, 555 P.2d 399, 402 (1976). This statute places limitations on the remedies and recovery of medical malpractice actions in Idaho against physicians and health care facilities licensed in the state. The legislature set the ceiling for recoverable damages in actions against physicians at $150,000 per claim and $300,000 per occurrence. *See* IDAHO CODE § 39-4204 (1977). The statute also sets a ceiling on recoverable damages for actions against acute care hospitals at $150,000 per claim and $300,000 per occurrence or the amount of $10,000 multiplied by the total number of beds in the hospital. *See id.* § 39-4205. The statute limits the grounds for malpractice actions to those of common law negligence and requires that recovery be restricted to compensatory damages that collateral sources do not satisfy. *See id.* § 39-4210. The statute also requires all physicians and hospitals in Idaho to obtain malpractice insurance as a condition of licensure. *Id.* §§ 39-4206, -4208, -4209.

40. 97 Idaho 859, 555 P.2d 399 (1976).

41. 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

42. *Jones*, 97 Idaho at 863, 555 P.2d at 403. The Supreme Court of Idaho held that "[t]o adopt that argument would be to hold that the common law as of 1890 governs the health, welfare, and safety of the citizens of this state and is unalterable without constitutional amendment." *Id.* at 864, 347 N.E.2d at 404.

43. *Id.* at 868, 555 P.2d at 407-08. The respondents in *Jones* contended that the 1975 Hospital-Medical Liability Act constituted a denial of due process in three respects: "(1) It deprives respondents of their constitutional right to pursue a recognized profession; (2) it

the federal and Idaho constitutions. The court, however, remanded the case back to the trial court for further fact findings in order to determine the validity of the stated purpose[45] of the statute and the relationship between the statutory limitation and its intended purpose.[46] Furthermore, the court clearly stated that it would utilize an intermediate level of scrutiny when it addressed the due process and equal protection arguments presented in the case.[47]

The Supreme Court of Nebraska in *Prendergast v. Nelson*[48] vaguely concerned itself with the constitutionality of a statutory limitation on liability in medical malpractice actions.[49] In a plurality

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limits medical malpractice actions without a corresponding quid pro quo; and (3) the recovery provisions are arbitrary, without a rational basis and against public policy." *Id.* at 867, 555 P.2d at 408.

The Supreme Court of Idaho decided that the respondents wanted the court to recognize that the pursuit of an occupation is a liberty and property interest which the due process clauses of the state and federal constitutions protect. The federal due process clause also protects against legislative interference with an individual's fundamental rights, unless such interference is necessary to protect the health, safety, or welfare of the citizenry. "This recognition does not impede the power of the legislature to regulate callings that are related to the public health so long as such regulations are not arbitrary or unreasonable." *Id.* The *Jones* court held that the requirements of the 1975 Hospital-Medical Liability Act do not violate the guarantees of due process because they bear a rational relationship to the health and welfare of the citizens of the state by providing protection to patients who may be injured as a result of medical malpractice. *Id.*

44. *Id.* at 870, 555 P.2d at 410. The respondents in *Jones* also argued that the portions of the 1975 Hospital-Medical Liability Act that limit recovery in medical malpractice actions create a discriminatory classification that violates the equal protection clauses of the fourteenth amendment and the Idaho Constitution. *See* U.S. CONST. amend. XIV; IDAHO CONST. art. I, § 2. The classification that the statutes create distinguishes between those who incur damages of more than $150,000 as a result of medical malpractice and other malpractice victims who incur damages of less than $150,000. Thus, those who are damaged in excess of the statutory limitation are denied full recovery. *Jones*, 97 Idaho at 870, 555 P.2d at 410. The court recognized that the standard of review that it uses determines whether it finds the classification invidiously discriminatory, and therefore in violation of the guarantees of equal protection. In *Jones*, the court determined that the challenged classification was neither suspect nor did it involve fundamental rights. *Id.*

45. *Id.* The act declared that its purpose was "to assure that a liability insurance market be available to . . . physicians, and licensed hospitals . . . and that the same be available at a reasonable cost, thus assuring the availability of such hospitals and physicians for the provision of care to persons of the state." *Id.* at 810, 555 P.2d 409-10 (quoting IDAHO CODE § 39-4202 (1977)).

46. *Id.* at 870, 555 P.2d at 410.

47. *Id.* at 871, 555 P.2d at 411. The Supreme Court of Idaho wrote, "While we recognize and agree with the concept of judicial restraint as it cautions against substituting judicial opinion of expediency for the will of the legislature, nevertheless, blind adherence and over-indulgence results in abdication of judicial responsibility. *Id.* This court admitted, however, that it ordinarily applies the test of minimum scrutiny to questions that arise in challenges to legislation. *Id.* at 870, 555 P.2d at 410.

48. 199 Neb. 97, 256 N.W.2d 657 (1977).

49. NEB. REV. STAT. § 44-2821 (1982) provides:

Unless the patient or his representative shall have (a) elected not to be bound by

opinion, the court rebuffed plaintiff's argument that a ceiling on judgments constitutes a special privilege for the health care provider and an undue restriction on the seriously injured patient. The court reasoned that the Nebraska procedure is an elective one which guarantees the claimant an assured fund of $500,000 for the payment of any malpractice claim. The claimant may opt out of the statute and face the possibility of no recovery against a practitioner who has been unable to acquire any malpractice insurance.[50] The court found the limitation constitutional because the classification created bears a rational relationship to a legitimate governmental objective.[51]

In *Arneson v. Olson*,[52] the Supreme Court of North Dakota found that a $300,000 limitation of liability provision[53] in medical malpractice cases violated the equal protection clauses of both the state and federal constitutions. The legislature stated that it passed the statute "to assure the availability of competent medical and hospital services to the public in North Dakota at reasonable costs."[54] The legislature's stated purpose did not influence the North Dakota court.[55] The

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the terms of §§ 44-2801 to 44-2855, (b) filed such election with the director in advance of any treatment, act or omission upon which any claim or cause of action is based, and (c) notified the health care provider of the election as soon as is reasonable under the circumstances that such patient has so elected, it shall be conclusively presumed that the patient has elected to be bound by the terms of §§ 44-2801 to 44-2855.

50. *Prendergast*, 199 Neb. at 109, 256 N.W.2d at 669.

51. *Id.* Additionally, the statute assures the claimant access to an impartial medical review panel that will determine whether the health care provider met the applicable standard of care. By electing to go to the medical review panel, the claimant agrees to the $500,000 ceiling. *Id.*

To support its decision, the Supreme Court of Nebraska stated: "Our Legislature is presumed to have acted within its constitutional power despite the fact that in practice its laws may result in some inequality. We will not set aside a statutory discrimination if any state of facts reasonably exists to justify it." *Id.* The *Prendergast* court defined its role with respect to a crisis motivated legislature. The court stated: "To attempt to meet a crisis, the Legislature is free to experiment and to innovate and to do so at will, or even at the whim." *Id.* The court stated that the statute was necessary because of an imminent danger that medical services in Nebraska would be curtailed. *Id.* at 108, 256 N.W.2d at 668. Thus, the limitation was a legitimate legislative response to a potential health care problem. Kehoe, *Medical Malpractice: A Sojourn Through the Jurisprudence Addressing Limitation of Liability*, 30 LOY. L. REV. 19, 131 n.103 (1984).

52. 270 N.W.2d 125 (N.D. 1978).

53. N.D. CENT. CODE § 26.1-14-11 (1983).

54. *Arneson*, 270 N.W.2d at 127.

55. The court noted that Duke Power Co. v. Carolina Envtl. Group was distinguishable from this situation. 438 U.S. 59 (1978). In *Duke*, the Supreme Court held that a limitation on recovery for damages from a nuclear accident was justified because of the "extremely remote possibility of an accident where liability would exceed the limitation" of $560 million. This, plus a commitment by Congress to "take whatever action is deemed necessary and appropriate to protect the public from the consequences of" any such disaster, was "within permissible limits and not violative of due process. *Id.* at 2637. In *Arneson*, there was a strong possibility

Arneson court adopted the *Wright* reasoning that a legislature may not arbitrarily eliminate or limit a preexisting common law right.[56] In departing from the rational basis test, the court employed an intermediate level of scrutiny that requires a "close correspondence between statutory classifications and legislative goals."[57]

The Supreme Court of North Dakota found a tenuous relationship between the recovery limitation and the statutory goal. The court stated the following reasons for this disparity: (1) the limitation failed to adequately compensate seriously injured victims with meritorious claims and had absolutely no impact on the filing of nonmeritorious claims;[58] (2) the limitation encouraged physicians to enter or remain in medical practice in North Dakota at the expense of the seriously injured victim of malpractice;[59] (3) the limitation might not allow the victim to recover all medical expenses that he might otherwise incur; (4) the "incidence of malpractice claims in North Dakota was far lower than the average in the U.S. . . . . [T]hus premiums were unjustifiably high for states such as North Dakota with fewer claims and smaller settlements and judgments";[60] and finally, (5) neither an insurance availability crisis nor an insurance costs crisis existed in North Dakota.[61] In short, through its use of an intermediate level of scrutiny, the court was able to discover whether the factual underpinnings of the medical malpractice crisis, which the legislature claimed would promote the enactment of a limitation restricting plaintiff's right to recovery, really existed or were merely figments of legislative imagination.[62]

In *Johnson v. St. Vincent Hospital, Inc.*,[63] the Supreme Court of Indiana became the first state supreme court majority decision that found a limitation of liability provision constitutional.[64] The court based much of its analysis on the similarities between Indiana's legis-

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of damages above the limitation and no legislative commitment beyond the limitation. *Arneson*, 270 N.W.2d at 135 n.6 (citing and discussing Duke Power Co. v. Carolina Envtl. Group, 438 U.S. 59 (1978)).

56. *Arneson*, 270 N.W.2d at 136.

57. *Id.* at 133.

58. *Id.* at 135-36.

59. *Id.* at 136.

60. *Id.*

61. *Id.* at 135-36.

62. Kehoe, *supra* note 51, at 131-32.

63. 273 Ind. 374, 404 N.E.2d 585 (1980).

64. This statute limits the total recovery in medical malpractice cases to $500,000 and limits the liability of any health care provider to $100,000 per occurrence. Any amounts due from a judgment or settlement which is in excess of the total liability of all health care providers are paid from the patient's compensation fund pursuant to provisions of the Indiana Medical Act. *See* IND. CODE § 40:1299 (1978).

lative responses to the medical malpractice crisis and the United States Congress' legislative response in the nuclear power field.[65] In *Duke Power Co. v. Carolina Environmental Group, Inc.*, plaintiffs unsuccessfully challenged the Price Anderson Act.[66] In this case the court used the rational basis test,[67] and found that the limitation was not arbitrary and irrational, but rather, a rational means of achieving the two stated purposes of the legislation, namely: (1) "preserving the availability of health care services"; and (2) maintaining an environment where malpractice insurance is available[68] and used.[69]

Although the limitation admittedly denied seriously injured plaintiffs full recovery, the Indiana court noted that it also provided those plaintiffs and the rest of the community with reciprocal benefits. For example, if the insurance industry had continued to operate in a state of uncertainty without the limitation serving as a factor in calculating premiums, it is possible that malpractice insurance would have become too expensive or totally unavailable.[70] Under such circumstances, seriously injured plaintiffs would have little or no chance of recovering substantial sums of money for injuries suffered. It follows that the limitation may have the effect of stabilizing insurance rates, thereby reducing the shortage of insurers willing to provide coverage to medical practitioners. This, in turn, will alleviate the reluctance of

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65. *Johnson*, 273 Ind. at 388, 404 N.E.2d at 599. In both the Price-Anderson Act and the Indiana Malpractice Act, the legislatures established a form of government sponsored insurance, set limitations on liability, and placed the burden of the limitation upon persons injured by the industry. *Id.*

66. *See supra* note 56 and accompanying text.

67. *See infra* notes 141-42 & 147 and accompanying text.

68. *Johnson*, 273 Ind. at 390, 404 N.E.2d at 601. The record before the court established that the increasing number and size of claims were prompting some insurers to curtail insurance coverage to some health care providers. The legislature, in turn, responded to this situation by creating a "government sponsored risk spreading mechanism as an alternative to insurance strictly from private sources." *Id.*

69. *Id.* at 388, 404 N.E.2d at 599. The court held that the recovery limitation was constitutional, and then went on to note that the limitation could present a burden to severely injured plaintiffs:

> It provides a factor for calculating premiums and charges to those covered. An insurance operation cannot be sound if the funds collected are insufficient to meet the obligations incurred. It must, however, be accepted that the badly injured plaintiff who may require constant care will not recover full damages, yet at the same time we are impressed with the large amount which is recoverable and its probable ability to fully compensate a large proportion of injured patients. In the same vein, badly injured patients would have little or no chance of recovering large sums of money if the evil the act was intended to prevent were to come about, i.e., that an environment would develop in the State in which private or public malpractice insurance were unavailable or unused.

Id.

70. *Id.*

those same practitioners who were unable to acquire coverage in the past to now provide their services to the public.[71]

The Indiana court also rejected plaintiff's argument that the limitation violated the equal protection clause of both the Indiana and federal constitutions.[72] The court determined that the classification created by the statute was neither arbitrary nor unreasonable."[73] Additionally, the Indiana statute provided for government sponsored medical malpractice insurance which would provide medical malpractice insurance at a reasonable cost, thus extinguishing the growing risk of worthless judgments.[74]

In *Carson v. Maurer*,[75] the Supreme Court of New Hampshire, in a per curiam opinion, invalidated a statutory provision that limited a plaintiff's right to recover noneconomic damages of $250,000.[76] The legislature stated that the purpose of the statute was to "stabilize insurance risks and reduce malpractice insurance rates."[77] The court determined that this provision denied plaintiffs equal protection of the law because it created an arbitrary damage limitation that precluded only the most seriously injured victims of medical malpractice negligence from receiving full compensation for their injuries.[78]

The court used an intermediate level of scrutiny, and found a weak relationship between the limitation on recovery and the legislative goal of reducing insurance rates.[79] Two reasons support this view. First, "paid out damages awards constitute only a small part of total insurance premium costs," and second, "few individuals suffer noneconomic damages in excess of $250,000."[80] The inequities imposed upon the seriously injured malpractice victims persuaded the court to concur with the *Arneson* court.[81] The *Carson* court stated

71. *Id.*

72. *Id.*

73. *Id.* at 389, 404 N.E.2d at 600.

74. *Id.*

75. 120 N.H. 925, 424 A.2d 825 (1980).

76. N.H. REV. STAT. ANN. § 507-C:7 (1979).

77. Carson v. Maurer, 120 N.H. at 936, 424 A.2d at 836. The statute attempts to achieve this goal by providing that insurers will not have to pay damages for "pain and suffering or other non-economic loss" in excess of $250,000. *Id.*

78. *Id.* The court acknowledged that though the right to recover for personal injuries is not a "fundamental right" which would require the court to use a strict scrutiny standard, it is an important substantive right, "sufficiently important to require that the restrictions imposed on those rights be subjected to a more rigorous judicial scrutiny than allowed under the rational basis test." *Id.* at 930, 424 A.2d at 830.

79. *Id.* at 936, 424 A.2d at 836.

80. *Id.* at 936, 424 A.2d at 836-37.

81. The Supreme Court of New Hampshire, agreeing with the Supreme Court of North Dakota's reasoning stated:

[T]he limitation of recovery does not provide adequate compensation to patients

that "[i]t is simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and therefore most in need of compensation."[82]

C. *The Supreme Court of California's Reasoning in* Fein v. Permanente Medical Group

In *Fein*,[83] the Supreme Court of California, deferring to the California state legislature, found that the $250,000 statutory limitation on noneconomic damages[84] is rationally related to the legitimate legislative objective of lowering the costs of insuring health care providers.[85] Moreover, the court found that the limitation was neither arbitrary nor irrational because there was ample evidence to support the legislature's perception that a "medical malpractice crisis" existed.[86] Accordingly, the Supreme Court of California held that the

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with meritorious claims, on the contrary, it does just the opposite for the most seriously injured claimants. It does nothing toward the elimination of nonmeritorious claims. Restrictions on recovery may encourage physicians to enter into practice and remain in practice, but do so only at the expense of claimants with meritorious claims.

Id. at 937, 424 A.2d at 837.

82. *Id.* The court refused to apply a formula or mathematical tool to compute noneconomic damages. Instead, the court recommended the use of a remittitur to control excessive jury awards. *Id. See, e.g.*, Reid v. Spadone Mach. Co., 119 N.H. 457, 466, 404 A.2d 1094, 1099-1100 (1979) (reducing an award of $150,000 to $125,000 for the loss of a portion of three fingers).

83. 106 S. Ct. 214 (1985).

84. CAL. CIV. CODE § 3333.2 (West 1975). This statute provides:

(a) In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage. (b) In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars ($250,000).

Id.

85. *Fein*, 38 Cal. 3d at 156, 695 P.2d at 686, 211 Cal. Rptr. at 390.

In May 1975, the Governor—citing serious problems that had arisen throughout the state as a result of a rapid increase in medical malpractice insurance premiums—convened the Legislature in extraordinary session to consider measures aimed at remedying the situation. The Governor's proclamation stated in part: "The cost of medical malpractice insurance has risen to levels which many physicians and surgeons find intolerable. The inability of doctors to obtain such insurance at reasonable rates is endangering the health of the people of this State, and threatens the closing of many hospitals. The longer term consequences of such closings could seriously limit the health care provided to hundreds of thousands of our citizens."

American Bank & Trust Co. v. Community Hosp., 36 Cal. 3d 359, 361, 683 P.2d 670, 672, 204 Cal. Rptr. 671, 673 (1984) (citing Governor's Proclamation to the Legislature (May 16, 1975)).

86. *Id.* at 153, 695 P.2d at 683, 211 Cal. Rptr. at 387. Evidence of the medical malpractice

limitation is constitutional.

The court rejected claims that California Civil Code section 3333.2 denied due process to malpractice claimants. The plaintiff argued that the statute limits his potential recovery without providing him with an adequate alternative.[87] Like other courts plagued by this assertion, the Supreme Court of California noted that a plaintiff has no vested property right in a particular measure of damages.[88] Moreover, the legislature possesses broad authority to modify the scope and nature of such damages.[89]

In deferring to the legislature, the court emphasized that the constitutionality of measures affecting such economic rights under the federal due process clause does not depend on a judicial assessment of the justifications for the legislation, or on its wisdom or fairness. So long as the measure is rationally related to a legitimate state interest, policy determinations as to the need and desirability of the enactment are best left for the legislature.[90]

The court acknowledged that the California statute, in seeking to lower malpractice costs, would give rise to lower judgments for plaintiffs than previously obtainable. Even though the legislature placed a $250,000 cap on awards of noneconomic damages, no limit was placed on a plaintiff's right to recover economic or pecuniary damages.[91]

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crisis included: (1) increasing numbers of claims, judgments, settlements, and rising insurance costs; (2) reduction of the number of health care insurers; and (3) financial losses by several insurers. *Id.*

87. *Id.* at 149, 695 P.2d at 679, 211 Cal. Rptr. at 384.

88. Courts in Illinois, Idaho, Ohio, and Indiana considered the issue as it relates to limiting medical malpractice recoveries. For a discussion of the quid pro quo issues relating to the limitations placed on medical malpractice recoveries, see *supra* notes 33-34, 41-42, 50 & 56 and accompanying text.

89. *Fein*, 38 Cal. 3d at 151, 695 P.2d at 679, 211 Cal. Rptr. at 382.

90. *Id.* The court cited American Bank & Trust Co. v. Community Hosp., which held that the legislature retains broad control over the measure, as well as the timing, of damage awards. 36 Cal. 3d 359, 375, 683 P.2d 670, 685, 204 Cal. Rptr. 671, 686, *cited in Fein*, 38 Cal. 3d at 151, 695 P.2d at 679, 211 Cal. Rptr. at 382. Additionally, the legislature may expand or limit recoverable damages so long as its action is rationally related to a legitimate state interest. *Id.* at 152, 695 P.2d at 680, 211 Cal. Rptr. at 383.

91. *Id.* The opinions of legal scholars influenced the opinion in *Fein*. These legal scholars have raised serious questions concerning the wisdom of awarding damages for pain and suffering in any negligence case. *Id.* For a forceful criticism of the rationale for awarding damages for pain and suffering in negligence cases, see Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROBS. 219, 240 (1953) (suggesting that we retain negligence actions, but eliminate certain extras which would result in very modest payments to those injured); Morris, *Liability for Pain and Suffering*, 59 COLUM. L. REV. 476, 483 (1959) (suggesting that legislatures acting prospectively limit pain and suffering recoveries gradually by postponing the effective date of the statute so that insurance companies can suitably adjust their rates); Plant, *Damages for Pain and Suffering*, 19 OHIO ST. L.J. 200, 210 (1958)

The court observed that the legislature had to contend with the prospect that, in the absence of some cost reduction, medical malpractice plaintiffs might have difficulty collecting judgments for any of their damages, pecuniary as well as nonpecuniary. Therefore, the legislature reached a rational conclusion that it was in the public interest to attempt to obtain some cost savings by limiting noneconomic damages.

The *Fein* court distinguished cases from other state courts that declared similar provisions unconstitutional.[92] With one exception, all of the invalidated statutes concerned a ceiling which applied to both pecuniary and nonpecuniary damages.[93] Several of the other courts, in reaching their decisions, were apparently influenced by the potential harshness of a limit that might prevent an injured person from ever recovering the amount of his medical expenses.[94]

The Supreme Court of California also rejected claims that section 3333.2 of the Medical Injury Compensation Reform Act (MICRA)[95] violated the equal protection clause of the fourteenth amendment. Plaintiff claimed that MICRA impermissibly discriminates between medical malpractice victims and other tort victims.[96] Also, it improperly discriminates within the class of medical malpractice victims, denying a "complete" recovery to those malpractice plaintiffs with noneconomic damages exceeding $250,000.[97]

The court quickly dismissed the first contention by acknowledging the existence of a medical malpractice insurance "crisis", noting

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(recommending that legislatures establish a "fair maximum" limit on the award of pain and suffering); Zelermyer, *Damages for Pain and Suffering*, 6 SYRACUSE L. REV. 27, 42 (1954) (suggesting a study of damages for pain and suffering which would group injuries based on severity and longevity and provide maximum and minimum awards rather than definite figures for these injuries).

92. The Supreme Court of California considered the opinions of the following courts which invalidated statutory provisions that put a limit on recoveries in medical malpractice actions: Wright v. Central Du Page Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976); Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978). *But see* Johnson v. St. Vincent Hosp., Inc., 273 Ind. 374, 404 N.E.2d 585 (1980) (upholding the statutory limit on damage awards in medical malpractice cases); Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977) (same).

93. The one exception is Carson v. Maurer, in which the Supreme Court of New Hampshire struck down a statutory provision that placed a limit only on noneconomic damages similar to the one in California. 120 N.H. 925, 424 A.2d 825 (1980). The *Carson* court, in invalidating a variety of provisions in this medical malpractice legislation, applied an "intermediate scrutiny" standard of review that is inconsistent with the standard applicable in California. Fein v. Permanente Medical Group, 38 Cal. 3d at 167, 695 P.2d at 682, 211 Cal. Rptr. at 395.

94. *See supra* notes 36, 42, 61 & 79 and accompanying text.

95. *Fein*, 38 Cal. 3d at 167, 695 P.2d at 682, 211 Cal. Rptr. at 395.

96. *Id.*

97. *Id.*

that the legislative enactment of MICRA is rationally related to the legislative purpose of quelling that crisis.[98] With respect to the second contention, the court first emphasized that the equal protection clause does not require the legislature to limit a victim's out-of-pocket medical expenses or lost earnings simply because it found it appropriate to place some limit on damages for pain and suffering and similar noneconomic losses.[99] Second, the court hypothesized that the legislature could have eliminated discrimination between plaintiffs with noneconomic damages less than $250,000 and those with noneconomic damages greater than $250,000 by completely eliminating all noneconomic damages.[100] The Supreme Court of California explained that its role under the rational basis standard is to "conduct a serious and genuine judicial inquiry into the correspondence between the classification and the legislative goals."[101]

The court may not properly strike down a statute simply because it disagrees with the wisdom of the law or because it believes that there is a fairer method dealing with the problem. "The forum for the correction of ill-considered legislation is a responsive legislature."[102] The choice between reasonable alternative methods for achieving a given objective is generally for the legislature.

In a vigorous dissent the chief justice of the Supreme Court of California asserted that the "[v]ictims of medical negligence, especially those afflicted with severe injuries, have been singled out to provide the bulk of this relief."[103] Even though the weight of authority

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98. *Id.*

99. *Id.* at 168, 695 P.2d at 683, 211 Cal. Rptr. at 396.

100. *Id.* The court commented that "just as the complete elimination of a cause of action has never been viewed as invidiously discriminating within the class of victims who have lost the right to sue, the $250,000 limitation—which applies to all malpractice victims—does not amount to an unconstitutional discrimination." *Id.*

101. *Id.* The court went on to speculate on the legislature's reasons for enacting the limitation and indicated that any reasonable purpose would justify its adoption:

> The Legislature could reasonably have determined that an across-the-board limit would provide a more stable base on which to calculate insurance rates. Furthermore, they may have felt that the fixed $250,000 limit would promote settlements by eliminating "the unknown possibility of phenomenal awards for pain and suffering that can make litigation worth the gamble." Finally, the Legislature simply may have felt that it was fairer to malpractice plaintiffs in general to reduce only the very large noneconomic damage awards, rather than to diminish the more modest recoveries for pain and suffering and the like in the great bulk of cases. Each of these grounds provides a sufficient rationale for the $250,000 limit.

Id.

102. *Id.* at 172, 695 P.2d at 687, 211 Cal. Rptr. at 400 (Bird, C.J., dissenting).

103. *Id.* The chief justice observed that recent statutes deprived malpractice plaintiffs of the benefit of various general rules which normally govern personal injury litigation. *Id. See, e.g.*, CAL. CODE CIV. PROC. § 667.7 (West 1975) (exception to general rule requiring immediate

from other jurisdictions supports the invalidation of the challenged provision, the statute plainly and simply denies severely injured malpractice victims compensation for negligently inflicted harm.[104]

Unlike the majority, the chief justice agreed with the *Carson* court's conclusion that it was "unreasonable" to require the most severely injured victims of medical negligence to support the health care industry. This conclusion is as relevant under a rational relation test as it is under an intermediate form of scrutiny.[105] Chief Justice Bird also noted that the only other constitutionally valid statute limiting the liability of health care providers included a state-run compensation fund as well.[106] By contrast, the California statute is not linked to a similar fund.[107]

The chief justice urged the court to apply a "heightened" level of equal protection scrutiny, and noted that the $250,000 limit on noneconomic damages could not survive any "serious and genuine judicial inquiry into the correspondence between the classification and the legislative goals."[108] Though the statute admittedly serves the legitimate objective of preserving insurance, that alone is not enough. Each statutory classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[109]

Also dissenting, Justice Mosk expressed his disagreement with the chief justice's proposed level of scrutiny. Justice Mosk preferred

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lump sum payment of a judgment); CAL. BUS. & PROF. CODE § 6146 (1975) (special restrictions on attorney fees); CAL. CIV. CODE § 3333.2 (1975) (special limit on noneconomic damages); CAL. CIV. CODE § 3333.1 (1975) (abrogation of collateral source rule).

104. *Fein*, 38 Cal. 3d at 172, 695 P.2d at 687, 211 Cal. Rptr. at 400 (Bird, C.J., dissenting).

105. *Id.* The majority distinguished *Carson* on the grounds that the Supreme Court of New Hampshire applied an intermediate level of equal protection which is not appropriate under the California Constitution. *Id.* at 173, 695 P.2d at 688, 211 Cal. Rptr. at 401. (Bird, C.J., dissenting); *see supra* note 93 and accompanying text. The majority further asserted that, with the exception of *Carson*, the decisions of other jurisdictions invalidated statutes that were more oppressive than the California statute at issue here. These statutes restricted recovery for all types of injury. *Id.* (Bird, C.J., dissenting). *Contra* Baptist Hosp. of S.E. Tex. v. Baber, 672 S.W.2d 296 (Tex. Ct. App. 1984) (where a Texas appellate court invalidated a $500,000 limit that applied only to damages other than medical expenses). *See* Simon v. St. Elizabeth Medical Center, 30 Ohio Op. 3d 164, 355 N.E.2d 903 (Ohio C.P. 1976) (where an Ohio appellate court stated in dictum that a $200,000 limit on "general" damages violated the United States and Ohio Constitutions). These provisions were not markedly more severe than MICRA's $250,000 limit on noneconomic damages. *Fein*, 38 Cal. 3d at 173, 695 P.2d at 688, 211 Cal. Rptr. at 401 (Bird, C.J., dissenting).

106. *Id.* at 174, 695 P.2d at 689, 211 Cal. Rptr. at 402 (Bird, C.J., dissenting).

107. *Id.* at 175, 695 P.2d at 690, 211 Cal. Rptr. at 403 (Bird, C.J., dissenting).

108. *Id.* (Bird, C.J., dissenting).

109. *Id.* (Bird, C.J., dissenting).

an intermediate test.[110] He suggested that the court should have used a balancing test so as to characterize the malpractice statute as a reasonable measure in furtherance of a public interest. The Mosk balancing test would weigh "the restrictions of private rights sought to be imposed" against "the benefits sought to be conferred upon the general public."[111]

III. THE CONSTITUTIONAL STANDARD

A. *Equal Protection*

The Supreme Court of California's use of the rational basis test is in harmony with past decisions of the Supreme Court of the United States. Traditionally, the Supreme Court has applied two standards in challenging a state statute on equal protection grounds—strict scrutiny[112] and rational basis. In order to withstand a strict scrutiny review, a statute must be precisely tailored to serve a compelling state interest.[113] The rational basis standard requires that the classification

110. The level of scrutiny for the intermediate test is whether the challenged classifications are reasonable and have a fair and substantial relationship to the object of the legislation. *See id.* at 181, 695 P.2d at 694, 211 Cal. Rptr. at 407 (Mosk, J., dissenting). Chief Justice Bird's recommendation of a heightened level of scrutiny suggests that any inquiry beyond the rational relation test will result in the limitation being held unconstitutional. *See id.* at 175, 695 P.2d at 690, 211 Cal. Rptr. at 403 (Bird, C.J., dissenting).

111. *Id.* at 181, 695 P.2d at 694, 211 Cal. Rptr. at 407 (Mosk, J., dissenting).

112. Courts apply the strict scrutiny test when the challenged state law creates a suspect class such as race. McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964) (holding that a Florida statute prohibiting an unmarried interracial couple from habitually living in and occupying the same room in the nighttime violates the equal protection clause of the fourteenth amendment and is invalid). The test also applies to alienage and ancestry. Graham v. Richardson, 403 U.S. 365, 372 (1971) (alienage: invalidating an Arizona statute which required aliens to reside in the United States for 15 years before they are eligible for general assistance); Oyama v. California, 332 U.S. 633, 644-46 (1948) (ancestry: holding a California statute which effected an escheat to the state of the land recorded in the name of a minor American citizen because a Japanese alien who was ineligible for naturalization had paid for the land). The test applies to categories impinging upon a fundamental right. Zablocki v. Redhail, 434 U.S. 374, 383-87 (1978) (invalidating a Wisconsin statute which required proof that a parent had met support obligations for existing children before that parent could remarry); Roe v. Wade, 410 U.S. 113, 154-64 (1973) (ruling unconstitutional a Texas criminal abortion statute which proscribes procuring or attempting to procure an abortion except for medical reasons to save the mother's life); Bullock v. Carter, 405 U.S. 134, 144 (1972) (invalidating a Texas statutory scheme which required all candidates for political office to pay fees ranging as high as $8,900); Shapiro v. Thompson, 394 U.S. 618, 627 (1969) (holding unconstitutional statutory provisions which deny welfare assistance to persons who are residents and meet all other eligibility requirements except that they have not resided within the jurisdiction for at least a year immediately proceeding the application for assistance); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-62 (1958) (holding that members of the NAACP are entitled under the federal constitution to be protected from being compelled by the State of Alabama to disclose their affiliation with the Association).

113. Plyler v. DOE, 457 U.S. 202, 216, 217 (1982) (held that a Texas statute which

created by the challenged legislation bear only a rational relation to a legitimate government objective.[114]

In recent years, the Supreme Court has developed an intermediate level of scrutiny.[115] Under this standard, a statutory classification is valid if it substantially furthers a purported legislative purpose. Although the reviewing court does not question the legitimacy of the legislative rationale, a state must give greater justification for a statute classification than a rational basis analysis requires.[116]

The standard that the reviewing state court selects and applies when evaluating statutory limitations on medical malpractice recoveries will in most cases determine the outcome of the case. Where the court utilizes the rational basis test, the statute is nearly always

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withholds from local school districts any state funds for education of children who were not "legally admitted" into the United States, and which authorizes local school districts to deny enrollment to such children, violates the equal protection clause of the fourteenth amendment).

114. In cases that do not involve a suspect classification or a fundamental right, the Court tests state statutes by applying the rational basis standard.

> The constitutional safeguard [of equal protection] is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any statement of facts reasonably may be conceived to justify it.

McGowan v. Maryland, 366 U.S. 420, 425-26 (1961) (upholding a Maryland statute which prohibits the sale on Sunday of only certain merchandise).

In *Fein* the record clearly supports the finding that the California legislature had a "plausible reason" to believe that the limitation on noneconomic recovery would limit the rise in the cost of malpractice insurance. The rising cost of medical malpractice insurance threatened to curtail the availability of medical care and created a real possibility that many doctors would practice without insurance. This would leave injured patients with the prospect of uncollectible judgments. *See supra* note 86 and accompanying text. The Supreme Court of California concluded that it was reasonable for the lawmakers to believe that placing a ceiling on noneconomic damages would help reduce the amount of malpractice insurance premiums. *Fein*, 38 Cal. 3d at 142, 695 P.2d at 680, 211 Cal. Rptr. at 382 (1985).

115. *See* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20-24 (1972). This level of scrutiny is sometimes referred to as the "means scrutiny" test. *Id.* at 22.

116. Hoffman v. United States, 767 F.2d 1431 (9th Cir. 1985) (holding that a rational basis supports Section 3333.2 of the California Civil Code in limiting recovery for noneconomic losses to $250,000 and, thus, did not violate the equal protection clause of the federal constitution). The Supreme Court has applied this intermediate level of scrutiny to gender based classifications. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (holding that an Oklahoma statutory scheme prohibiting the sale of "nonintoxicating" 3.2% beer to males under the age of 21 and females under the age of 18 constituted a gender-based discrimination that denied males 18-21 years of age equal protection of the law). The Court has also applied the intermediate test to categories premised on legitimacy. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762 (1972) (invalidating an Illinois law which allowed illegitimate children to inherit by intestate succession only from their mothers, even though legitimate children could inherit by intestate succession from either parent).

upheld.[117] Every state legislature that enacted medical malpractice statutes did so in response to the purported medical mapractice crisis. Under the rational basis test, courts have not questioned whether a crisis actually exists, or the underlying causes of a purported crisis. Rather, the relevant question for courts evaluating crisis motivated legislation is whether a rational relationship exists between the stated objective of the statute and the classification created. For these courts this question is naturally answered in the affirmative.[118]

The intermediate/means scrutiny test generally yields the opposite result.[119] Under this test the courts examine the statute to determine whether it substantially furthers a legitimate legislative objective. Medical malpractice crisis legislation is purposefully intended to stabilize insurance rates so as to assure the availability of health care to the public. Under the intermediate level of scrutiny, as with the rational basis test, courts evaluating crisis motivated legislation have not questioned the underlying causes of the purported crisis. Unlike the rational basis test, the intermediate standard does question whether there is a fair and substantial relationship between the legislation and its purported objective. This requires an inquiry into the factual basis of the legislature's decision to pass the medical malprac-

117. Federal courts employing the rational basis test have also found challenged statutes constitutional. *See* Hoffman v. United States, 767 F.2d 1431 (9th Cir. 1985) (holding constitutional a California statute limiting recovery of noneconomic damages to $250,000 in medical malpractice actions); Fitz v. Dolyak, 712 F.2d 330, 332 (8th Cir. 1983) (holding constitutional an Iowa statute that treated certain malpractice victims differently from others); DiAntonio v. Northampton-Accomack Memorial Hosp., 628 F.2d 287, 291 (4th Cir. 1980) (holding constitutional a Virginia statute that required prior notice of intention to file a medical malpractice action and mediation by a panel of physicians and lawyers); Woods v. Holy Cross Hosp., 591 F.2d 1164, 1173 (5th Cir. 1979) (holding that because there is no fundamental right to recover tort damages, the burden is upon the challenger to show that the restriction is wholly arbitrary).

118. One writer has critized the courts for blandly applying the rational basis test as a substitute for meaningful analysis when "the means-oriented scrutiny test [also known as the intermediate scrutiny test] . . . would raise the level of the minimal scrutiny of the statute from virtual abdication to genuine judicial inquiry." Note, *Iowa Code Section 147.136 Which Abolishes the Collateral Source Rule in Medical Malpractice Cases is Not Constitutional, Based on a Rational Relation Test*, 29 DRAKE L. REV. 849, 852 (1980). There are also two practical reasons for applying the means scrutiny test to medical malpractice legislation today. First, the legislation responds to a perceived "crisis" which no longer exists. Circumstances have changed; physicians are better able to get insurance. *See* Cunningham & Lane, *Malpractice—the Illusory Crisis*, 54 FLA. BAR J. 114, 119 (1980). Second, the statutes are not achieving the goal of effecting a speedy resolution of claims. In Indiana, for example, of 2,302 cases filed by May 31, 1983, 1,136 were still pending and only 18% had had panel decisions rendered. The average pendency of cases reaching a panel decision was 23.4 months, with one case still pending after 84.34 months. Williams, *Indiana's Medical Malpractice Act—The Developing Law*, 27 RES GESTAE 494, 497 (1984).

119. *See, e.g.*, Carson v. Maurer, 120 N.H. 925, 933, 424 A.2d 825, 838 (1980); Arneson v. Olson, 270 N.W.2d 125, 136 (N.D. 1978).

tice act. Thus far, courts using the intermediate level of scrutiny have found that the statutes limiting medical malpractice recoveries do not substantially further the legislative objective.[120]

B. *Due Process*

Traditionally, federal courts evaluating the constitutional due process issue of a state statute have applied a rational basis standard of review.[121] When courts apply the rational basis standard in evaluating a state law on due process grounds, there is a presumption of constitutionality, and the law is upheld absent proof of arbitrariness or irrationality on the part of the lawmaking body.[122] Previously, the Supreme Court held that the federal constitution prevents federal courts from reviewing factual determinations made by a state legislature. "Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation."[123]

State courts have been reluctant to use a determinative due process analysis when evaluating state statutes limiting medical malpractice recoveries. The first consideration by the courts is generally whether an injured party can have a property right in a level of recovery. Courts have uniformly answered this question in the negative.[124] There is, however, a question as to whether there should be a corresponding quid pro quo where a common law right to recovery is limited by legislative enactment.[125] Courts have overcome this question

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120. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 443-51 (1983). *See supra* note 119.

121. *Id.* at 443.

122. Ferguson v. Skrupa, 372 U.S. 726 (1963). The Court went on to explain this constitutional limitation:

> We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. . . . Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to "subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure."

Id. at 730 (citation omitted).

In Lincoln Union v. Northwestern Co., the Court stated that "the due process clause is [not] to be so broadly construed that the Congress and state legislatures are put in a straitjacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare. 335 U.S. 525, 536-37 (1949).

123. *Ferguson*, 372 U.S. at 731-32.

124. *See, e.g.*, Werner v. Southern Cal. Newspapers, 35 Cal. 2d 121, 129, 216 P.2d 825, 833 (1950); Feckenscher v. Gamble, 12 Cal. 2d 482, 499-500, 85 P.2d 885, 902 (1938); Tulley v. Tranor, 53 Cal. 274, 280 (1878).

125. Learner, *supra* note 24, at 145.

by centering their attentions on whether the invalidation of the statute will also render the health insurance market of the applicable state incapable of providing adequate recoveries for plaintiffs.[126]

IV. THE IMPACT OF *Fein v. Permanente Medical Group*

The *Fein v. Permanente Medical Group* opinion represents a step backwards for medical malpractice attorneys who have sought to invalidate or remove legislation which limits medical malpractice recoveries. The medical malpractice crisis gave rise to legislative reform. Uncertainty as to the adequacy of health care in the midst of the rising cost or lack of medical malpractice insurance has inspired legislators to enact statutes limiting maximum recoveries in medical malpractice suits. State courts have evaluated these statutes on the basis of the equal protection and due process clauses of the federal and applicable state constitutions. These courts, like their legislatures, have produced varied results.

The due process issue seems to be the greater constitutional challenge for state statutes limiting medical malpractice recoveries. Justice White, the only Supreme Court justice to write in *Fein*, questioned in dissent "[w]hether Due Process required a legislatively enacted compensation scheme or a quid pro quo for the common law or state law remedy it replaces, and if so, how adequate it must be."[127] The majority in *Fein* addresses this question directly. "[A] plaintiff has no vested property right in a particular measure of damages. Thus, the fact that the section [California Civil Code section 3333.2 (1975)] may reduce a plaintiff's award does not render the provision unconstitutional so long as the measure is rationally related to a legitimate state interest."[128]

Through all of this, few courts have examined whether a medical malpractice crisis actually exists. It appears that the total blame for the medical malpractice crisis centers on a battle between physicians and attorneys. Insurance companies are presumably only reacting to the economics of the matter.

One writer suggests that an inquiry into the underlying causes of a crisis should be within the realm of the court. He blames the insurers for covertly manufacturing the medical malpractice crisis.[129]

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126. *Id.*

127. Fein v. Permanente Medical Group, 106 S. Ct. 214, 216 (1985).

128. Fein v. Permanente Medical Group, 38 Cal. 3d at 141, 695 P.2d at 679, 211 Cal. Rptr. at 380.

129. Londrigan, *The Medical Malpractice Crisis*, TRIAL, May 1985, at 22, 24.

Moreover, he asserts that immunity from federal antitrust laws[130] and the absence of state statutory rate restraints[131] have permitted insurers to arbitrarily withdraw liability insurance from a selected state while still writing policies in neighboring states.[132] The impact of insurers selectively providing insurance was immediate, and gave rise to the medical malpractice crisis.[133] An inquiry into the underlying causes of a crisis would not occur where the evaluating court uses the rational basis test. Only a court using an intermediate form of scrutiny would look toward the cause of a crisis when considering the constitutionality of a statute.

Legislators enacted statutes to lower malpractice rates and courts approved these statutes because they were rationally related to the stated legislative goals. Factors unrelated to this crisis legislation are responsible for achieving these goals.[134] The question follows whether a proponent of crisis legislation would have to factually prove a crisis for the legislation to pass constitutional muster. The Supreme Court of Idaho in *Jones v. State Board of Medicine*[135] anticipating this problem remanded the case to determine whether a medical malpractice crisis actually existed in the state of Idaho. Furthermore, the court declared that, when confronting a statute limiting medical malpractice recoveries, they would use an intermediate level of scrutiny in evaluating the relevant due process and equal protection issues.[136]

The Supreme Court's dismissal of the *Fein* appeal, although having some precedential value, does not provide any real guidance for

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130. *Id.* One recent court of appeals decision gave the antitrust exemption a broad interpretation. Proctor v. State Farm Mut. Auto. Ins., 675 F.2d 308 (D.C. Cir. 1982).

131. Londrigan, *supra* note 129, at 24. Congress premised the antitrust exemption on the existence of effective state regulation of ratemaking. State insurance agencies originally required prior approval of new liability insurance rates to be placed in the statute. Because of changes in state laws and budgetary constraints, most states no longer require prior approval. *Id.*

132. In the malpractice crisis of 1975, major liability carriers like St. Paul and Aetna stopped writing medical malpractice insurance in many states, but continued to write policies in others. This selective withdrawal allocated the medical malpractice market and eliminated competition among insurers. In the absence of both national antitrust regulation and effective state rate regulation, medical malpractice rates rose dramatically.

Id.

133. *See supra* notes 18-25 and accompanying text.

134. Londrigan, *supra* note 129, at 25. The legislation gave rise to "a favorable climate to defend medical malpractice actions . . . . Medical malpractice claims litigated during the three-and-a-half years after 1975 resulted in defense verdicts in 81 percent of the cases." *Id.* (quoting the NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, MALPRACTICE CLAIMS, MEDICAL MALPRACTICE CLOSED CLAIMS 1975-1978 at 3 (Sept. 1980)).

135. 97 Idaho 859, 555 P.2d 399 (1976); *see supra* notes 39-47 and accompanying text.

136. *Jones*, 97 Idaho at 870, 555 P.2d at 411.

state legislatures or courts. Some state legislatures may mimic the California statute by placing a similar limit on pain and suffering while leaving compensatory damages unaffected. Justice White's concern with the adequacy of the recovery suggests that a lesser limitation may not pass constitutional muster. This observation will probably influence legislators to keep their maximum recoveries at a high level as more states enact statutes affecting medical malpractice recoveries.

Medical malpractice statutes developed in "crisis" motivated legislatures present an interesting timing dilemma for the court evaluating the appropriate standard of scrutiny. The court should defer to the legislature which passes a statute to alleviate the detrimental effects of a confirmed crisis. In this case the court would tend to use a rational relation test which denies any intrusion into the legislative justifications for the statute. In the case where a crisis never existed or has already passed, the court may question whether the legislation is still valid. Courts using the rational relation test will probably defer to the legislature and should find the statute valid. Should a court prefer to use an intermediate test, it will probably find a tenuous relationship between the statute and its objective. In the wake of a nonexistent or passe crisis, the court will likely invalidate the statute. By failing to provide definitive guidelines for evaluating statutes limiting medical malpractice recoveries, the Supreme Court has left the future of this crisis legislation in the hands of state courts.[137]

V. CONCLUSION

At this time, the Supreme Court appears to be reluctant to develop a definite position on whether to approve the imposition of statutory caps on medical malpractice recoveries. The Court's implied use of the traditional rational relation test sidestepped the equal protection and due process issues presented in this case. Employing the intermediate/means scrutiny test could commit the Court to an examination of the particular facts and policies underlying the passage of each state medical malpractice statute. In the absence of a national standard that limits medical malpractice recoveries, the Supreme Court will probably stay out of the business of determining the constitutionality of state statutes limiting recoveries.

State supreme courts are split on whether statutes limiting medi-

137. An interesting question to consider is whether the Supreme Court would have dismissed an appeal of Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980). In this case the Supreme Court of New Hampshire found unconstitutional a statute nearly identical to the one upheld in *Fein*. *See supra* notes 75-82 and accompanying text.

cal malpractice recoveries are constitutional. In the absence of any further Congressional or Supreme Court guidance, the fate of statutory caps on medical malpractice claims is as wide open as the recoveries which have inspired the need for crisis legislation.

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* The author wishes to dedicate this note to his beautiful wife, Myoushi, and his sons, Derek and Durel, for patiently bearing with him and supporting him throughout his law school experience.