

***Central Pathology Service Medical
Clinic, Inc. v. Superior Court: Statute
Limiting Punitive Damages for the
Professional Negligence of Health Care
Providers Includes Intentional Torts***

The nation's attention is focused on health care policy and an essential element of health care policy is tort reform. California began its medical malpractice reform in 1975 when the legislature enacted the Medical Injury Compensation Reform Act (MICRA). Enacted in response to rapid increases in medical malpractice insurance premiums, MICRA set monetary caps on noneconomic damage and attorney fee awards.

Recently, in Central Pathology Service Medical Clinic, Inc. v. Superior Court the California Supreme Court extended this policy to punitive damages and intentional torts. After Central Pathology, every plaintiff injured by a health care provider must comply with section 452.13 of the California Civil Procedure Code provided the injuries are directly related to the provision of professional services. Section 452.13 requires a pretrial determination of whether a punitive damage claim has a substantial probability of prevailing. Further, the statute applies to intentional torts, in which the plaintiff is injured by treatment to which the plaintiff did not consent. This Casenote analyzes whether additional procedural obstacles are warranted for victims of the intentional torts of health care providers, whether any potential decrease in damage awards may create a disincentive for attorneys to take these cases, and whether the court's holding broadens other statutes

I. INTRODUCTION

In *Central Pathology Service Medical Clinic, Inc. v. Superior Court*,¹ the California Supreme Court held that the statute limiting punitive damages in cases involving professional negligence of a health care provider² applies to intentional torts, if the injury caused by the provider is directly related to the provision of professional services.

The California Supreme Court analyzed the language and legislative history of section 425.13 of the California Civil Procedure Code, and disapproved an earlier statutory construction by the court of appeal in *Bommareddy v. Superior Court*.³ The court's inclusion of intentional torts within the definition of professional negligence broadens the scope of professional negligence beyond its usual application.⁴ Further, by placing strict procedural burdens on all punitive damage claims, the decision will create less incentive for plaintiff's lawyers to take medical malpractice cases, which are often expensive and complex.⁵

1. 3 Cal. 4th 181, 832 P.2d 924, 10 Cal. Rptr. 2d 208 (1992).

2. CAL. CIV. PROC. CODE § 425.13 (West Supp. 1993).

3. 222 Cal. App. 3d 1017, 272 Cal. Rptr. 246 (1990), *overruled by* Central Pathology Serv. Medical Clinic, Inc. v. Superior Court, 3 Cal. 4th 181, 832 P.2d 924, 10 Cal. Rptr. 2d 208 (1992). See *infra* part II.C, for a discussion of the facts and holding in *Bommareddy*.

4. Usually negligence and intentional torts are considered separate bases for liability. See, e.g., *Review of Selected 1975 Legislation*, 7 PAC. L.J. 544, 546, 557 (1976) (analyzing the Medical Injury Compensation Reform Act which uses the phrase "professional negligence" in six statutory sections) [hereinafter *Selected 1975 Legislation*]. See *infra* part II.B, for discussion of the statutory definitions of professional negligence.

This is the third major case within the past year in which the supreme court has creatively construed a statute against a tort plaintiff. In *Ford v. Gouin*, a waterskier sued the driver of a ski boat for injuries the waterskier sustained when he struck a tree branch overhanging a narrow river channel through which he was waterskiing barefoot and backwards. The court stated that § 658 of the Harbors and Navigation Code, which provides that the driver of a boat towing a person on water skis has a duty to operate the boat in such a manner so as to prevent the skier from striking an object or person, did not apply to the defendant. The statute was intended to safeguard only the lives and property of third persons with whom a waterskier may collide, therefore the plaintiff was not in the class of persons the statute was intended to protect. *Ford v. Gouin*, 3 Cal. 4th 339, 834 P.2d 724, 11 Cal. Rptr. 2d 30 (1992). In *Ornelas v. Randolph*, the court construed § 846 of the Civil Code broadly and exempted the defendant landowner from the general duty of reasonable care for injuries sustained by a minor child who was injured while playing near stored farm equipment. The court held that children playing on stored farm equipment constituted a recreational activity, falling within the statute's exemption from the ordinary duty of care. *Ornelas v. Randolph*, 4 Cal. 4th 1095, 847 P.2d 560, 17 Cal. Rptr. 2d 594 (1993).

5. Medical malpractice cases require expert testimony and the litigation is often complex and expensive. Plaintiffs' attorneys, working on a contingency basis, must essentially finance these cases out of their own pockets. See generally, PAUL C. WEILER, MEDICAL MALPRACTICE ON TRIAL 19, 28 (1991). Statutory restrictions on noneconomic

The issue raised by this decision is whether the supreme court interpreted the statute too broadly. All plaintiffs seeking punitive damages for injuries caused by medical malpractice are now brought under the mandate of this statute, regardless of the nature of the defendant's conduct. The decision also carries significant implications for other statutes concerning the professional negligence of health care providers. This includes those statutes that limit the recovery of noneconomic damages,⁶ allow for periodic payments of future damages,⁷ and allow for admission of evidence of collateral benefits paid to the plaintiff.⁸ Therefore, this decision will affect the amount of recovery, and timing for payment, in future actions against health care providers regardless of the theory of liability.

This Casenote discusses the *Central Pathology* decision and analyzes its implications. Part II provides the legislative and case law background for the application of punitive damages against health care providers. Part III reviews the facts, procedural history, and the majority's opinion in *Central Pathology Service Medical Clinic, Inc. v. Superior Court*. Part IV is an analysis of the decision including a discussion of whether the court properly construed the statute. It also discusses the implications of this decision on the construction of other statutes and its effect on future cases. Part V concludes that the supreme court properly applied the legislative policy of protecting health care providers from unsubstantiated claims for punitive damages. Nonetheless, the statute, as construed, fails to protect the class of patients injured by medical treatment that is different from or exceeds the patient's consent. Further clarification by the legislature is needed to relieve these patients of the additional procedural burdens imposed by section 425.13.

damages and contingency fees, however, create disincentives for a lawyer to take a case unless there is the potential for a large damage award. *See generally, infra* notes 24-25, for a description of special legislation limiting damage awards and attorneys' contingency fees for medical malpractice cases. Thus, plaintiffs suffering medical injuries may be unable to find a lawyer to take their case because the case would not be cost-effective for the lawyer working on a contingency basis.

6. CAL. CIV. CODE § 3333.2 (West Supp. 1993).

7. CAL. CIV. PROC. CODE § 667.7 (West 1987).

8. CAL. CIV. CODE § 3333.1 (West Supp. 1993).

II. BACKGROUND

A. Legislation Affecting Punitive Damages Against Health Care Providers

Section 425.13 of the Civil Procedure Code was added as one section of the Brown-Lockyer Civil Liability Reform Act of 1987 (CLRA).⁹ That section of CLRA provides that in any action arising out of the professional negligence of a health care provider, no claim for punitive damages is allowed in the original complaint.¹⁰ Plaintiffs must make a motion seeking the court's approval for an amended pleading claiming punitive damages.¹¹

In 1988, the legislature amended section 425.13, clarifying the statute's intent.¹² The statute, as amended, is specifically intended to protect health care providers from unsubstantiated claims of punitive damages in actions alleging professional negligence.¹³ The legislature was concerned that section 425.13, as originally enacted, could be interpreted to protect health care providers from punitive damage claims that were based on conduct *unrelated* to the practitioner's professional activities.¹⁴ The procedure established by section 425.13 protects health care providers by creating a pretrial hearing mechanism in which a court evaluates the legitimacy of a punitive damage claim before allowing the claim to proceed.¹⁵ On the basis of supporting and opposing affidavits, a court may grant a motion for leave

9. Willie L. Brown, Jr. - Bill Lockyer Civil Liability Reform Act of 1987, ch. 1498, 1987 Cal. Stat. 5777 [hereinafter CLRA] (amending § 6146 of the Business and Professions Code, and §§ 3294 and 3295 of the Civil Code; adding § 1714.45 to the Civil Code, and Title 13.5 to Part 4 of Division 3 of the Civil Code; and adding § 425.13 to the Civil Procedure Code).

10. CAL. CIV. PROC. CODE § 425.13(a) (West Supp. 1993). "Health care provider" is defined in § 425.13(b) as:

[A]ny person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code; and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code, "Health care provider" includes the legal representatives of a health care provider.

11. *Id.* § 425.13(a).

12. Act of Sept. 22, 1988, ch. 1204, sec. 1, 1988 Cal. Stat. 4021, ch. 1205, sec. 1, 1988 Cal. Stat. 4028.

13. ASSEMBLY SUBCOMM. ON THE ADMINISTRATION OF JUSTICE, REP. ON S. BILL 1420, at 1 (1987-88 Reg. Sess.).

14. *Id.* As originally enacted, § 425.13 states that "no claim for punitive damages against a health care provider shall be included in a complaint or other pleading unless the court enters an order allowing an amended pleading that includes a claim for punitive damages to be filed." CLRA, *supra* note 9, at 5782.

15. Central Pathology Serv. Medical Clinic, Inc. v. Superior Court, 3 Cal. 4th 181, -189, 832 P.2d 924, 929, 10 Cal. Rptr. 2d 208, 213 (1992).

to amend a complaint provided the plaintiff has established, pursuant to section 3294 of the Civil Code, a substantial probability of prevailing.¹⁶ Section 3294 concerns punitive damages in general and was amended by the CLRA.¹⁷ Punitive damages are available in certain actions for the purpose of punishing the defendant and deterring others from similar conduct.¹⁸ CLRA increased the evidentiary burden for recovery of punitive damages to clear and convincing evidence of malice, oppression, or fraud.¹⁹ CLRA also redefined malice to include “*despicable*”²⁰ conduct which is carried on by the defendant with a *willful* and conscious disregard²¹ of the rights or safety of others.”²² These changes reflect the legislature’s attempt to ensure greater validity in claims for punitive damages.²³

The potential for recovery of punitive damages becomes particularly important in light of special legislation — the Medical Injury Compensation Reform Act (MICRA) — which limits the recovery

16. CAL. CIV. PROC. CODE § 425.13(a) (West Supp. 1993).

17. CLRA, *supra* note 9, at 5780-81.

18. CAL. CIV. CODE § 3294(a). With the purpose of punitive damages to punish the defendant rather than compensate the plaintiff, more than mere negligence is required. Conduct subject to punitive damages has been described as “circumstances of aggravation or outrage, such as spite or ‘malice,’ or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton.” W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* 9-10 (5th ed. 1984).

19. CAL. CIV. CODE § 3294(a) (West 1970 & Supp. 1993). See *infra* note 22 for the statutory definitions of malice, oppression, and fraud.

20. “Despicable” is defined as meriting hatred, scorn, or loathing. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 614 (Philip B. Gove ed. 1986).

21. Conscious disregard requires establishing “that the defendant was aware of the probable dangerous consequences of his conduct, and that he wilfully and deliberately failed to avoid those consequences.” *Taylor v. Superior Court*, 24 Cal. 3d 890, 895-96, 598 P.2d 854, 856, 157 Cal. Rptr. 693, 696 (1979).

22. CAL. CIV. CODE § 3294(c)(1) (emphasis added). CLRA added the words *despicable* and *willful* to the definition of malice. Section 3294(c) includes the following definitions of malice, oppression, and fraud:

“Malice” means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

“Oppression” means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person’s rights.

“Fraud” means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

Id.

23. *Central Pathology Serv. Medical Clinic, Inc. v. Superior Court*, 3 Cal. 4th 181, 189, 832 P.2d 924, 929, 10 Cal. Rptr. 2d 208, 213 (1992).

of damages in medical malpractice cases.²⁴ MICRA added section 3333.2 of the Civil Code, which places a \$250,000 cap on noneconomic losses based on a health care provider's professional negligence.²⁵ Plaintiffs with large damage claims could be undercompensated as a result of this legislation. Punitive damages provide an appealing alternative method for recovering larger damage awards.

Unlike the MICRA statutes, the statute controlling punitive damages, section 3294 of the Civil Code, does not place a cap on the recovery of punitive damages.²⁶ The general rule governing the amount of punitive damage awards is that the award must bear a reasonable relationship to the actual damages applied.²⁷ Plaintiffs seeking punitive damages against a health care provider may also be required to meet the heavy evidentiary burden imposed by section 425.13 of the Civil Procedure Code.²⁸ Whether a plaintiff's claim

24. See Medical Injury Compensation Reform Act, ch. 1, 1975 Cal. Stat 3949 (2d Ex. Sess.) [hereinafter MICRA]. MICRA was enacted by an extraordinary legislative session in response to a perceived crisis in California's medical malpractice industry. See *Selected 1975 Legislation*, supra note 4, at 544. This crisis consisted of a dramatic increase in medical malpractice premiums. In protest, medical professionals threatened work slowdowns. In response, the legislature formed an extraordinary session which resulted in passage of MICRA. The purpose of the legislation was to effect a reduction in insurance premiums by making reforms in the medical, legal, and insurance fields. In part, MICRA consists of laws affecting medical quality, the timing of claims, attorneys' fees, and the methods for protesting insurance premium rates. *Id.* at 544-45.

Initially MICRA was the focus of constitutional attacks. See, e.g., R. Scott Jenkins & Wm. C. Schweinfurth, Note, *California's Medical Injury Compensation Reform Act: An Equal Protection Challenge*, 52 S. CAL. L. REV. 829 (1979); Geri O'Brien, Comment, *Medical Malpractice — \$250,000 Cap on Pain & Suffering — Cal. Civ. Code § 3333.2 — Does the Statute Meet Its Constitutional Burden and Legislative Goals?*, 8 WHITTIER L. REV. 601 (1986). California courts have held that the provisions of MICRA are constitutionally valid. See, e.g., *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985) (\$250,000 cap on noneconomic loss recovery did not violate due process or the equal protection clause as discriminatory against medical tort victims because the statute was rationally related to a legitimate state objective).

25. CAL. CIV. CODE § 3333.2 (West Supp. 1993). In addition to placing a cap on noneconomic damages, MICRA also places limitations on attorneys' contingency fees for representing persons seeking damages against a health care provider based on the provider's professional negligence. CAL. BUS. & PROF. CODE § 6146 (West 1990). The fee schedule was amended by CLRA and current limitations are as follows:

- (1) Forty percent of the first fifty thousand dollars (\$50,000) recovered.
- (2) Thirty-three and one-third percent of the next fifty thousand dollars (\$50,000) recovered.
- (3) Twenty-five percent of the next five hundred thousand dollars (\$500,000) recovered.
- (4) Fifteen percent of any amount on which the recovery exceeds six hundred thousand dollars (\$600,000).

Id.

Another MICRA provision allows for periodic payments, rather than lump-sum payment, at the request of any party, provided the award equals or exceeds fifty thousand dollars (\$50,000) in future damages. CAL. CIV. PROC. CODE § 667.7 (West 1987).

26. CAL. CIV. CODE § 3294 (West 1970 & Supp. 1993).

27. E.g., *Hecht v. Smith*, 183 Cal. App. 2d 723, 727, 7 Cal. Rptr. 209, 212 (1960).

28. Although § 425.13 places no cap on the recovery of punitive damages, the plaintiff must establish a substantial probability of prevailing pursuant to § 3294 of the Civil Code, and the plaintiff must comply with the timing requirements imposed by

falls within this statute will depend on the construction of key phrases in the statute: "arising out of" and "professional negligence."²⁹

B. Legislation Defining the Professional Negligence of Health Care Providers

Section 425.13 of the Civil Procedure Code applies to actions "arising out of the professional negligence of a health care provider."³⁰ "Professional negligence" is not defined in this section of the Civil Procedure Code. Instead, it is defined in section 2 of CLRA which amends section 6146 of the Business and Professions Code.³¹ This section of the Business and Professions Code was amended in 1975 as part of MICRA.³² The definition of professional negligence under MICRA is:

[A] negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that the services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.³³

A key issue raised by this definition is whether intentional torts are within the scope of "professional negligence."³⁴ In one commentary reviewing MICRA,³⁵ the legislative intent was interpreted as making a distinction between intentional torts and professional negligence:

§ 425.13 of the Civil Procedure Code.

29. This was the focus of the *Central Pathology* decision. 3 Cal. 4th 181, 832 P.2d 924, 10 Cal. Rptr. 2d 208 (1992). The supreme court opinion construing these statutes is discussed in part III, *infra*.

30. CAL. CIV. PROC. CODE § 425.13(a) (West Supp. 1993).

31. CLRA, *supra* note 9, at 5778.

32. MICRA, *supra* note 24, at 3993. Of significance to the issue of punitive damages are the six sections of MICRA which all contain the same definition of professional negligence: §§ 364, 667.7, and 1295 of the Civil Procedure Code; § 6146 of the Business and Professions Code; and §§ 3333.1 and 3333.2 of the Civil Code.

33. CAL. BUS. & PROF. CODE § 6146(c)(3) (West 1990).

34. See *Bommareddy v. Superior Court*, 222 Cal. App. 3d 1017, 272 Cal. Rptr. 246 (1990), *overruled by* *Central Pathology Serv. Medical Clinic, Inc. v. Superior Court*, 3 Cal. 4th 181, 832 P.2d 924, 10 Cal. Rptr. 2d 208 (1992) (discussed *infra* part II.C); *Feister v. Superior Court*, 7 Cal. App. 4th 223, 1 Cal. Rptr. 2d 150 (1991), *review granted*, 824 P.2d 570, 4 Cal. Rptr. 2d 764 (1991), *review dismissed*, 838 P.2d 781, 13 Cal. Rptr. 2d 53 (1992) (also discussed *infra* part II.C); *Central Pathology Serv. Medical Clinic, Inc. v. Superior Court*, 3 Cal. 4th 181, 832 P.2d 924, 10 Cal. Rptr. 2d 208 (1992) (facts and opinion are reviewed *infra* part III).

35. See, e.g., *Selected 1975 Legislation*, *supra* note 4, at 557.

From the outset, it seems notable that the legislature chose to specifically regulate only those actions brought upon a theory of "professional negligence," as defined as a negligent act or omission by a health care provider in the rendering of professional services which cause personal injuries or wrongful death. Hence, a "malpractice" action brought on a theory of an unconsented-to-battery upon the patient, breach of warranty, or other non-negligence theory would apparently be without the ambit of this legislation.³⁶

C. California Law Prior to Central Pathology

1. The Fifth District

In *Bommarreddy v. Superior Court*³⁷ the Fifth District Court of Appeal construed the phrase "professional negligence" in the context of section 425.13. In *Bommarreddy*, the plaintiff's complaint included a cause of action for battery alleging that the defendant ophthalmologist operated on the plaintiff's right eye without the plaintiff's consent.³⁸ The doctor argued that the phrase "professional negligence" in section 425.13 of the Civil Procedure Code should include any cause of action arising out of the provision of medical services, and that the plaintiff's battery cause of action was inseparable from her negligence claim.³⁹ The court of appeal held that the term "professional negligence" as it appears in section 425.13 of the Civil Procedure Code is the same term of art that appears in the MICRA legislation.⁴⁰ The court then concluded that "[p]rofessional negligence" . . . does not include intentional torts, such as battery, even when occurring during the provision of medical services."⁴¹

36. *Id.*

37. 222 Cal. App. 3d 1017, 272 Cal. Rptr. 246 (1990), *overruled by* Central Pathology Serv. Medical Clinic, Inc. v. Superior Court, 3 Cal. 4th 181, 832 P.2d 924, 10 Cal. Rptr. 2d 208 (1992). Punitive damages were allowed against health care providers prior to the enactment of § 425.13. *See Baker v. Sadick*, 162 Cal. App. 3d 618, 208 Cal. Rptr. 676 (1984) (arbitrator had the authority to award punitive damages in a claim asserting intentional and negligent causes of action when the plaintiff developed a severe post-operative infection following breast reduction surgery); *See also Nelson v. Gaunt*, 125 Cal. App. 3d 623, 178 Cal. Rptr. 167 (1981) (punitive damages allowed for assault and battery, fraud, and intentional infliction of emotional distress when a doctor injected non-FDA-approved silicone into the plaintiff's breasts without disclosing the substance or the dangers of the injection to the patient).

38. The plaintiff alleged she consented to tear duct surgery on her left eye, not a cataract extraction with an intraocular lens implant on her right eye. *Bommarreddy*, 222 Cal. App. 3d at 1018, 272 Cal. Rptr. at 246.

39. *Id.* at 1019, 272 Cal. Rptr. at 247.

40. *Id.* at 1023, 272 Cal. Rptr. at 249.

41. *Id.* at 1024, 272 Cal. Rptr. at 250. The *Bommarreddy* court relied on earlier California decisions that followed the same general view that professional negligence is separate from intentional torts. In *Cobbs v. Grant*, a medical malpractice case concerning informed consent, the court mentioned that "a doctor could be held liable for punitive damages under a battery count . . ." 8 Cal. 3d 229, 240, 502 P.2d 1, 8, 104 Cal. Rptr.

2. The First District

The First District Court of Appeal in *Feister v. Superior Court*⁴² disagreed with *Bommareddy* and found that actions for intentional torts are within the scope of section 425.13.⁴³ In *Feister*, a medical malpractice case concerning the medical management of the plaintiff's rectal cancer, the plaintiff's complaint included causes of action for intentional infliction of emotional distress, and breach of the duty of good faith and fair dealing.⁴⁴ The trial court denied the plaintiff's motion for leave to amend seeking punitive damages.⁴⁵ In denying

505, 512 (1972) (discussing the consequences of a battery or negligence theory). In *Noble v. Superior Court*, a case concerning the timing of a "Notice of Intention to Commence Action" under § 364 of the Civil Procedure Code, the court compared the term "professional negligence" under MICRA to another section that did not use this phrase. 191 Cal. App. 3d 1189, 1192-93, 237 Cal. Rptr. 38, 40 (1987). The *Noble* court noted that § 1295 of the Civil Procedure Code (governing arbitration provisions in medical services contracts) contained the phrase "any dispute as to medical malpractice," not the phrase "professional negligence" which the court considered a more limited phrase. *Id.* The court then mentioned that the distinction between negligence and battery was "not lost on our Supreme Court, and we do not believe it was lost on the Legislature" *Id.* at 1194, 237 Cal. Rptr. at 41.

42. 7 Cal. App. 4th 223, 1 Cal. Rptr. 2d 150 (1991), review granted, 824 P.2d 570, 4 Cal. Rptr. 2d 764 (1991), and review dismissed, 838 P.2d 781, 13 Cal. Rptr. 2d 53 (1992). *Feister* and *Bommareddy* are the only appellate court decisions construing the meaning of professional negligence under § 425.13 prior to *Central Pathology*.

43. *Id.* at 226, 1 Cal. Rptr. 2d at 151.

44. *Id.* at 228-29, 1 Cal. Rptr. 2d at 152-53. The plaintiff's complaint included six causes of action. The first cause of action was against her physician for professional negligence in failing to properly and adequately diagnose the plaintiff's condition. The plaintiff alleged that this negligence lead to her second cause of action against her physician for negligent infliction of emotional distress. Her third cause of action was directed against the defendant hospital for negligent infliction of emotional distress. The plaintiff alleged that the hospital was aware of her susceptibility to mental suffering, yet after being informed for the first time that she had cancer and only a 50 percent chance of surviving the surgery, the hospital told her surgery would not be performed and neither defendant would continue to treat her. Her fourth cause of action for intentional infliction of emotional distress was directed against both defendants and was based on the facts underlying the second and third causes of action. The fifth cause of action was brought by her husband for loss of consortium. Her sixth cause of action against both defendants was for breach of the duty of good faith and fair dealing. This cause of action incorporated the allegations of medical negligence and negligent infliction of emotional distress. *Id.*

45. *Id.* at 227, 1 Cal. Rptr. 2d at 151. On March 1, 1990, the plaintiffs filed a petition for a writ of mandate which was denied by the First District. The supreme court denied review of that decision. *Id.* Subsequently, the Fifth District filed its opinion in *Bommareddy* on August 8, 1990. On August 23, 1990, plaintiffs filed another petition for a writ of mandate based on the *Bommareddy* decision. The First District again denied the petition, but the supreme court granted review and remanded the matter to the First District with directions to issue an alternative writ, hear formal argument, and decide the matter. *Id.* at 227, 1 Cal. Rptr. 2d at 151-52. This Casenote discusses the First District's latest decision as directed by the supreme court.

plaintiff's petition for a writ of mandate, the court of appeal focused on the legislative intent.⁴⁶ According to the First District, if "the gravamen of the complaint arises from alleged medical malpractice," any claim for punitive damages must be subject to judicial review under section 425.13.⁴⁷

III. *CENTRAL PATHOLOGY SERVICE MEDICAL CLINIC, INC. v. SUPERIOR COURT*

A. *Facts and Procedural History*

Plaintiffs Constance and Michael Hull filed a medical malpractice claim against multiple defendants including Central Pathology Service Medical Clinic, Inc., Central Pathology Service Medical Group, Inc., Elizabeth Irwin, M.D., and Elizabeth Irwin, M.D., Inc.⁴⁸ The original claim asserted causes of action for negligence and loss of consortium.⁴⁹

Two months before the scheduled trial, plaintiffs moved for leave to amend the complaint so as to add causes of action for fraud and intentional infliction of emotional distress.⁵⁰ The plaintiffs sought punitive damages for these additional claims. In the amended complaint, plaintiffs made the following allegations: (1) Dr. Irwin performed a pap smear on Constance Hull and sent the specimen to the defendant lab for analysis; (2) the defendant lab failed to notify Mrs. Hull that she was developing cancer, despite the presence of abnormal cells in her specimen; (3) after the defendant lab was ordered to retest all persons tested in the past five years, the lab intentionally failed to notify Mrs. Hull that she should be retested; and (4) Dr. Irwin denied using the defendant lab in an effort to conceal her medical negligence.⁵¹ In asserting intentional infliction of emotional distress, the plaintiffs claimed that the defendants acted in an outrageous manner with the intent to cause severe emotional distress.⁵²

Defendants opposed the motion for leave to amend the complaint on the grounds that it failed to satisfy the requirements of subsection 425.13(a) of the Civil Procedure Code.⁵³ The defendants argued that under the statute the plaintiffs motion was untimely, and that the

46. *Id.* at 232-33, 1 Cal. Rptr. 2d at 155.

47. *Id.* at 233, 1 Cal. Rptr. 2d at 155.

48. *Central Pathology Serv. Medical Clinic, Inc. v. Superior Court*, 3 Cal. 4th 181, 185, 832 P.2d 924, 926, 10 Cal. Rptr. 2d 208, 210 (1992).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

plaintiffs would be unable to establish a substantial probability of prevailing on their punitive damage claim.⁵⁴ The plaintiffs argued that section 425.13 did not apply to the amended causes of action.⁵⁵

The trial court, relying on *Bommareddy v. Superior Court*,⁵⁶ granted the plaintiffs motion, holding that fraud and intentional infliction of emotional distress did not fall within the meaning of professional negligence under section 425.13.⁵⁷ The defendants sought a writ of mandate from the court of appeal directing the trial court to deny the plaintiffs' motion, but the court of appeal summarily denied defendants petition.⁵⁸ Subsequently, the California Supreme Court granted review.

B. Majority Opinion

1. Legislative Intent

The California Supreme Court construed section 425.13 by examining the legislative intent. First, the court examined the statutory language for the meaning of "professional negligence" and "arising out of."⁵⁹ The court determined that "professional negligence" as used in section 425.13 has the same definition as the phrase "professional negligence" in MICRA.⁶⁰ The phrase "arising out of" is not defined in section 425.13 or any of the MICRA statutes. The court used the definition "origination, growth or flow from the event" from the definition of "arising out of" used in earlier cases.⁶¹ The court then noted that the question of whether an intentional tort can "arise

54. *Id.*

55. *Id.* For the plaintiffs to recover punitive damages, it was essential that their claim not fall within the scope of § 425.13. Section 425.13 requires plaintiffs to file their motion within two years of filing and not less than nine months before the date the matter is first set for trial, whichever is earlier. CAL. CIV. PROC. CODE § 425.13(a) (West Supp. 1993). Here, because the plaintiffs made their motion just two months before the case was scheduled for trial, the motion would be untimely under the statute.

56. 222 Cal. App. 3d 1017, 272 Cal. Rptr. 246 (1990), *overruled by* Central Pathology Serv. Medical Clinic, Inc. v. Superior Court, 3 Cal. 4th 181, 832 P.2d 924, 10 Cal. Rptr. 2d 208 (1992).

57. *Central Pathology*, 3 Cal. 4th at 185, 832 P.2d at 927, 10 Cal. Rptr. 2d at 211.

58. *Id.* at 186, 832 P.2d at 927, 10 Cal. Rptr. 2d at 211.

59. *Id.* at 186-87, 832 P.2d at 927-28, 10 Cal. Rptr. 2d at 211-12.

60. *Id.* at 187, 832 P.2d at 928, 10 Cal. Rptr. 2d at 212. *See supra* note 33 and accompanying text for the MICRA definition of professional negligence.

61. *Central Pathology*, 3 Cal. 4th at 187, 832 P.2d at 928, 10 Cal. Rptr. 2d at 212.

out of” professional negligence was not clear from the statutory language.⁶² An examination of the legislative history was required to answer this question.

The legislative history of CLRA suggests that two major goals of the act were to increase the evidentiary threshold for recovering punitive damages, and to create a pretrial hearing mechanism for eliminating unsubstantiated claims for punitive damages against health care providers.⁶³ The court focused on the 1988 amendment of section 425.13 and concluded that because the chief purpose of the amendment was to protect health care providers in their capacity as practitioners, the legislature did not intend to exclude intentional torts from the statute.⁶⁴ This is in direct conflict with the interpretation of section 425.13 by the appellate court in *Bommarreddy*.⁶⁵

2. Disapproval of *Bommarreddy*

The *Central Pathology* court disapproved of *Bommarreddy* on three grounds.⁶⁶ First, the court determined that the *Bommarreddy* court’s focus on the relationship between intentional torts and negligence was misplaced.⁶⁷ The *Central Pathology* court determined that the question is *not* whether professional negligence includes intentional torts, but whether the injury for which damages are sought “arises out of” the professional services provided by the health care provider.⁶⁸ Second, the court determined that the *Bommarreddy* decision would render the statute virtually meaningless because there are so few punitive damage claims that do not involve intentional torts.⁶⁹ A narrow interpretation limited to negligence causes of action would be inconsistent with the legislature’s intent to protect health care providers from frivolous, unsubstantiated claims for punitive damages.⁷⁰ Third, the *Bommarreddy* interpretation allows for artful pleading to avoid application of the statute. By merely including a cause of action based on an intentional tort, the plaintiff would avoid section 425.13 and thereby defeat the legislative intent.⁷¹

62. *Id.* at 188, 832 P.2d at 928, 10 Cal. Rptr. 2d at 212.

63. *See supra* notes 13-23 and accompanying text discussing the statutory history of CLRA and the subsequent 1988 amendment of § 425.13 of the Civil Procedure Code.

64. *Central Pathology*, 3 Cal. 4th at 190, 832 P.2d at 929, 10 Cal. Rptr. 2d at 213. This point is discussed further in part IV.A, *infra*.

65. 222 Cal. App. 3d 1017, 272 Cal. Rptr. 246 (1990), *overruled by* *Central Pathology Serv. Medical Clinic, Inc. v. Superior Court*, 3 Cal. 4th 181, 832 P.2d 924, 10 Cal. Rptr. 2d 208 (1992). *See supra* part II.C.

66. *Central Pathology*, 3 Cal. 4th at 190-92, 832 P.2d at 930-31, 10 Cal. Rptr. 2d at 214-15.

67. *Id.* at 190, 832 P.2d at 930, 10 Cal. Rptr. 2d at 214.

68. *Id.* at 191, 832 P.2d at 930, 10 Cal. Rptr. 2d at 214.

69. *Id.*

70. *Id.* This point is analyzed further in part IV.B, *infra*.

71. *Id.* This problem is discussed further in part IV.C, *infra*.

3. *Scope of Section 425.13 and Application to Facts*

The court noted "that in the medical malpractice context, there may be considerable overlap of intentional and negligent causes of action."⁷² To preserve the legislative intent, the court concluded the statute could not be limited to negligent acts or omissions.⁷³ Intentional torts could "arise out of professional negligence" if the injury caused by them is directly related to the provision of professional services.⁷⁴ The statute would even apply to situations where the health care provider committed battery by providing treatment that exceeded, or was different from, the treatment for which the patient consented.⁷⁵

In *Central Pathology*, the plaintiff's claims for intentional infliction of emotional distress and fraud were both directly related to the defendants provision of professional services.⁷⁶ The alleged injuries resulted from the manner in which defendants performed and communicated the results of medical tests.⁷⁷ This is an ordinary and usual part of the provision of medical services, and thus within the scope of section 425.13.⁷⁸

The supreme court ruled that the court of appeal erred in denying defendant's petition for a writ of mandate.⁷⁹ An alternative writ of mandate was issued directing the court of appeal to order the trial court to vacate its order granting plaintiff's motion for leave to amend the complaint.⁸⁰

72. *Id.* at 192, 832 P.2d at 931, 10 Cal. Rptr. 2d at 215.

73. *Id.*

74. *Id.*

75. *Id.* This broad application of § 425.13 particularly disturbed Justice Mosk. *Id.* at 193, 832 P.2d at 932, 10 Cal. Rptr. 2d at 216 (Mosk, J., concurring and dissenting). Justice Mosk viewed the majority approach as virtually eliminating any possibility of punitive damages against a health care provider, regardless of the provider's conduct. In particular, he was concerned about unauthorized treatment exceeding a patient's consent. Justice Mosk considered this battery which should not be shielded from punitive damages solely because the battery was committed by a health care provider. *Id.* This point is discussed in part IV.D, *infra*.

76. *Id.* at 192-93, 832 P.2d at 931, 10 Cal. Rptr. 2d at 215.

77. *Id.*

78. *Id.* at 193, 832 P.2d at 931, 10 Cal. Rptr. 2d at 215.

79. *Id.*

80. *Id.*

IV. ANALYSIS

A. Did the Court Correctly Determine the Legislative Intent?

The fundamental rule of statutory construction is that courts should ascertain the intent of the legislature to ensure the purpose of the law is correctly effectuated.⁸¹ In determining the legislative intent, the court should give the statutory words their usual, ordinary meaning.⁸² The plain words "professional negligence" indicates a cause of action distinct from an intentional tort.⁸³ However, statutory construction requires consideration of the purpose of the law, and courts should adopt a construction that furthers that purpose.⁸⁴ A literal interpretation of the words should not prevail if it creates a result contrary to the apparent intent of the legislature.⁸⁵ As discussed in Part II, section B, the supreme court concluded that compliance with the legislative intent required including intentional torts within the statute.⁸⁶ The question is whether the supreme court construed the statute too broadly in its attempt to effectuate the legislative intent.⁸⁷

The statute could be interpreted as providing protection for health care providers only for *negligent* acts or omissions.⁸⁸ If the statute were intended to include intentional torts, the legislature could have excluded the limiting term "professional negligence," and used wording similar to that in section 1295 of the Civil Procedure Code:⁸⁹ "any dispute as to medical malpractice."⁹⁰ A report by the Assembly Subcommittee on the Administration of Justice indicates that the major purpose of the 1988 amendment of section 425.13 was to limit

81. *E.g.*, *People v. Hull*, 1 Cal. 4th 266, 271, 820 P.2d 1036, 1040, 2 Cal. Rptr. 2d 526, 530 (1991).

82. *Id.*

83. *See supra* note 36 and accompanying text. *See also* *Bommarreddy v. Superior Court*, 222 Cal. App. 3d 1017, 1023, 272 Cal. Rptr. 246, 249 (1990) ("'[P]rofessional negligence' . . . has a specific meaning which does not include unconsented-to battery upon a patient."), *overruled by* *Central Pathology Serv. Medical Clinic, Inc. v. Superior Court*, 3 Cal. 4th 181, 832 P.2d 924, 10 Cal. Rptr. 2d 208 (1992).

84. *E.g.*, *Robinson v. Fair Employment and Hous. Comm'n*, 2 Cal. 4th 226, 234, 825 P.2d 767, 770-71, 5 Cal. Rptr. 2d 782, 785-86 (1992).

85. *E.g.*, *Altaville Drug Store, Inc. v. Employment Dev. Dep't*, 44 Cal. 3d 231, 235, 746 P.2d 871, 873, 242 Cal. Rptr. 732, 734 (1988).

86. *Central Pathology*, 3 Cal. 4th at 192, 832 P.2d at 931, 10 Cal. Rptr. 2d at 215.

87. Justice Mosk claimed the majority went too far: "the majority paint with much too broad a brush in their apparent desire to eliminate any possibility of punitive damages against a medical provider, no matter how egregious the conduct." *Id.* at 193, 832 P.2d at 932, 10 Cal. Rptr. 2d at 216 (Mosk, J., concurring and dissenting).

88. That would be consistent with the *Bommarreddy* view, *supra* part II.C.

89. CAL. CIV. PROC. CODE § 1295 (West 1982) (governing arbitration provisions in medical services contracts).

90. *See Noble v. Superior Court*, 191 Cal. App. 3d 1189, 1193, 237 Cal. Rptr. 38, 40 (1987) (emphasis added).

the statute's scope.⁹¹ Comment one of that report stated: "This bill is intended to correct an oversight. As written, Section 425.13 could apply to any lawsuit against any health care provider Arguably, this could include lawsuits unrelated to the practitioner's practice, such as defamation, fraud, and *intentional torts*."⁹² The supreme court concluded that this reference to intentional torts in comment one did not undercut the central purpose of the amendment in protecting health care providers in their capacity as practitioners.⁹³

Nevertheless, it is plausible to interpret the plain language of the statute opposite to the supreme court's view. The present statutory language could be read as imposing two requirements. First, the injury must be caused by a negligent act or omission in the traditional sense. Second, the act or omission must directly result from the health care provider's treatment.⁹⁴

B. *Would Exclusion of Intentional Torts Render the Statute Meaningless?*

The California Supreme Court was also concerned that excluding intentional torts from section 425.13 would render the statute meaningless because there are few situations in which punitive damages are not based on intentional tort causes of action.⁹⁵ However, punitive damages may be awarded for unintentional torts. Section 3294 of the Civil Code expressly provides for punitive damages for unintentional torts if the defendant's conduct is despicable and in conscious disregard of the rights and safety of others.⁹⁶

Punitive damages are used to punish the defendant and deter others from similar conduct.⁹⁷ Therefore, the availability of punitive damages does not depend on the distinction between intentional or unintentional torts, but rather the egregiousness of the defendant's

91. ASSEMBLY SUBCOMM. ON THE ADMINISTRATION OF JUSTICE, *supra* note 13, cmt. 1.

92. *Id.* (emphasis added).

93. *Central Pathology Serv. Medical Clinic, Inc. v. Superior Court*, 3 Cal. 4th 181, 190, 832 P.2d 924, 929, 10 Cal. Rptr. 2d 208, 213 (1992).

94. The injury must be caused by an act or omission that was the proximate cause of the plaintiff's injury. "Professional" negligence requires that the act or omission is by a health care provider. *See, e.g.*, CAL. CIV. CODE § 3333.2(c)(2) (West Supp. 1993).

95. *Central Pathology*, 3 Cal. 4th at 191, 832 P.2d at 930, 10 Cal. Rptr. 2d at 214.

96. CAL. CIV. CODE § 3294 (West 1970 & Supp. 1993).

97. *See supra* note 18 and accompanying text.

conduct.⁹⁸ Most often this type of conduct is intentional, but the possibility that such egregious conduct could result from unintentional acts or omissions is not so remote as to render the statute meaningless. For example, in *Bell v. Sharp Cabrillo Hospital*,⁹⁹ the trial court refused to instruct the jury on punitive damages because there was a lack of evidence that the defendant hospital consciously disregarded the safety of others when it renewed a physician's staff privileges.¹⁰⁰ Nevertheless, had the hospital renewed the physician's staff privileges with knowledge that the physician was an incompetent surgeon or posed a threat to patients' safety, punitive damages would have been available.¹⁰¹ Thus, exclusion of intentional torts from section 425.13 will narrow the statute's application, but it will not render the statute meaningless.¹⁰²

98. See *Bommareddy v. Superior Court*, 222 Cal. App. 3d 1017, 1020, 272 Cal. Rptr. 246, 248 (1990), *overruled by* Central Pathology Serv. Medical Clinic, Inc. v. Superior Court, 3 Cal. 4th 181, 832 P.2d 924, 10 Cal. Rptr. 2d 208 (1992) (mentioning that the supreme court has never drawn a "bright line" distinction between intentional and unintentional torts for the availability of punitive damages). See also *Taylor v. Superior Court*, in which the supreme court allowed a claim for punitive damages holding "one who voluntarily commences, and thereafter continues, to consume alcoholic beverages to the point of intoxication, knowing from the outset that he must thereafter operate a motor vehicle demonstrates . . . such a conscious and deliberate disregard of the interests of others that his conduct may be called wilful or wanton." 24 Cal. 3d 890, 899, 598 P.2d 854, 859, 157 Cal. Rptr. 693, 699 (1979).

99. 212 Cal. App. 3d 1034, 260 Cal. Rptr. 886 (1989).

100. *Id.* at 1038, 260 Cal. Rptr. at 887. In this case, the plaintiff recovered economic and noneconomic damages when her 16 year-old son died from surgery negligently performed by a hospital staff physician. The plaintiff also sued for punitive damages claiming that when the hospital renewed the surgeon's staff privileges, it failed to investigate warnings about the doctor's possible incompetence. *Id.* at 1037-38, 260 Cal. Rptr. at 886-87. The physician who performed the surgery was previously denied renewal of staff privileges at Grossmont Hospital, and also had his surgical privileges revoked at Mercy Hospital. *Id.* at 1039, 260 Cal. Rptr. at 888.

101. *Id.* at 1047, 260 Cal. Rptr. at 893.

102. Examples where unintentional torts have given rise to claims for punitive damages include *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989) (child suffered injury and death caused by pre-natal oxygen deficiency when the obstetrician admitted lowering his standard of care at night by having routine orders not to disturb him until "crowning," the stage of labor when the baby's head reaches the vaginal opening); *Strauss v. Biggs*, 525 A.2d 992 (Del. 1987) (permanent nerve injury caused by a misplaced surgical incision for a purported fasciotomy which the defendant podiatrist in fact did not complete; and complicated by the podiatrist's failure to refer the plaintiff to the appropriate specialists); *Medvecz v. Choi*, 569 F.2d 1221 (3d Cir. 1977) (jury was allowed to decide the issue of punitive damages if the anesthesiologist was found to have abandoned the patient during surgery); *Short v. Downs*, 537 P.2d 754 (Colo. Ct. App. 1975) (patient suffered injuries following defendant physician's injection of silicone labeled "not for human use" into the patient's breasts).

*C. Would Exclusion of Intentional Torts from Section 425.13
Allow Plaintiffs an Escape from the Statute Through Artful
Pleading?*

The best argument for including intentional torts within the scope of section 425.13 is that exclusion would provide plaintiffs an opportunity to avoid the statute's requirements through artful pleading.¹⁰³ In a claim involving medical malpractice, plaintiffs could file a complaint alleging negligence along with a cause of action alleging some kind of intentional tort, which would serve as the basis for punitive damages.¹⁰⁴

Statutes must be construed to avoid absurd results,¹⁰⁵ yet exclusion of intentional torts may result in the statute never being applied. This is inconsistent with the legislative goal of requiring pretrial judicial scrutiny of punitive damage claims filed against health care providers.¹⁰⁶ Sidestepping the requirements of section 425.13 will not guarantee plaintiffs success in recovering punitive damages,¹⁰⁷ but the threat of punitive damages could be used by plaintiffs to coerce a more favorable settlement.¹⁰⁸ High settlements coerced through the threat of punitive damages would undermine the general legislative philosophy of limiting damage awards in medical malpractice claims.¹⁰⁹

D. Implications for Future Cases

The California Supreme Court's ruling in *Central Pathology* ensures that all claims for punitive damages asserted against health

103. See *Central Pathology Serv. Medical Clinic, Inc. v. Superior Court*, 3 Cal. 4th 181, 191, 832 P.2d 924, 930, 10 Cal. Rptr. 2d 208, 214 (1992); *Feister v. Superior Court*, 7 Cal. App. 4th 223, 233, 1 Cal. Rptr. 2d 150, 155 (1991), *review granted*, 824 P.2d 570, 4 Cal. Rptr. 2d 764 (1992), and *review dismissed*, 838 P.2d 781, 13 Cal. Rptr. 2d 53 (1992).

104. The plaintiff would then claim to seek punitive damages only in connection with the intentional tort. *Central Pathology*, 3 Cal. 4th at 191, 832 P.2d at 930, 10 Cal. Rptr. 2d at 214; *Feister*, 7 Cal. App. 4th at 233, 1 Cal. Rptr. 2d at 155.

105. *People v. Morris*, 46 Cal. 3d 1, 15, 756 P.2d 843, 851, 249 Cal. Rptr. 119, 127 (1988).

106. *Central Pathology*, 3 Cal. 4th at 191, 832 P.2d at 930, 10 Cal. Rptr. 2d at 214; *Feister*, 7 Cal. App. 4th at 233, 1 Cal. Rptr. 2d at 155.

107. Plaintiffs must still meet the "clear and convincing evidence" standard of § 3294 of the Civil Code. See CAL. CIV. CODE § 3294(a) (West 1970 & Supp. 1993).

108. See generally, *Feister*, 7 Cal. App. 4th at 234 n.5, 1 Cal. Rptr. 2d at 156-57 n.5.

109. See generally, *MICRA*, *supra* note 24; *Selected 1975 Legislation*, *supra* note 4.

care providers must comply with the pretrial hearing mechanism imposed by section 425.13.¹¹⁰ Procedural devices aimed at discouraging punitive damages in the medical setting are consistent with the underlying policy of limiting medical malpractice claims in general.¹¹¹ Whether this is sound policy to begin with is debatable.¹¹² Nevertheless, within the framework of this policy the question is what types of cases, if any, should give rise to punitive damages in the medical setting? Under the *Central Pathology* court's view, all cases arising out of the professional's treatment of the patient must come under judicial scrutiny before punitive damages may be pleaded, regardless of the egregiousness of the defendant's conduct. This includes cases alleging battery where a practitioner performs treatment exceeding or different from that to which a plaintiff consented.¹¹³ Though this approach facilitates the legislative policies described above, it may be unfair to this group of patients.¹¹⁴

The relationship between health care providers and patients is a special consent-based relationship whereby the provider is authorized to touch and examine the patient in a manner that exceeds the usual legal limit for such bodily contact.¹¹⁵ The relationship is also special because of the trust patients must place in the provider's skill and knowledge concerning medical matters which are beyond the average

110. Provided the basis for the claim arises from the practitioner's professional conduct. *See supra* part III.B. The pretrial mechanism imposes an elevated evidentiary burden on plaintiffs. *See supra* part II.A.

111. *See, e.g., supra* notes 24-25, detailing the impetus for the MICRA legislation.

112. The underlying policy of discouraging medical malpractice claims by limiting damages, contingency fees, and imposing additional procedural burdens may be unsound. Supporters of the tort system claim that the true cause of escalating malpractice litigation and insurance costs is the large amount of medical malpractice that actually occurs. The American Law Institute Reporters suggest that more, not fewer, medical tort claims are needed. *See* 1 AMERICAN LAW INST., REPORTERS' STUDY ON ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 297 (1991) [hereinafter ALI STUDY]. The ALI reports that studies show less than 30,000 malpractice claims are paid each year out of an estimated 300,000 medical injuries. *Id.* at 295-96.

The need to compensate injured patients must be weighed against physicians' legitimate concerns about escalating liability costs. Physicians in high risk specialties (such as obstetrics or neurosurgery) are subject to large, rapid rate hikes in their malpractice insurance premiums while being subject to cost containment measures in their fees. The result is a sudden, significant decrease in the physician's personal income. 2 ALI STUDY, *supra* at 113-19. One proposed solution is "enterprise liability," where the financial burden of medical malpractice is shifted from the individual physician to the health care organization in which the physician practices. *Id.*

113. *Central Pathology Serv. Medical Clinic, Inc. v. Superior Court*, 3 Cal. 4th 181, 192, 832 P.2d 924, 931, 10 Cal. Rptr. 2d 208, 215 (1992).

114. *See* Justice Mosk's concurrence and dissent. *Id.* at 193, 832 P.2d at 932, 10 Cal. Rptr. 2d at 216.

115. Such contact made without consent is a battery. Battery is defined as "[a] harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such a contact, or apprehension that such a contact is imminent." KEETON ET AL., *supra* note 18, at 39 (citing RESTATEMENT (SECOND) OF TORTS § 13 (1965)).

person's level of understanding.¹¹⁶ Patients trust that the medical provider will perform only those bodily contacts which are necessary to diagnose and treat the illness or injury.¹¹⁷ With the exception of an emergency situation, a health care provider's privilege to treat the patient extends only as far as the patient's consent.¹¹⁸ When the medical provider has consent to perform one type of treatment and subsequently performs a substantially different type of treatment, a battery has occurred.¹¹⁹ Traditionally, health care providers are liable for punitive damages in these cases of battery.¹²⁰

The question presented by the *Central Pathology* decision is whether it is fair to subject these patients to the additional procedural burdens imposed by the statute. One view is that imposing such a burden is fair because not all cases of medical battery justify punitive damages.¹²¹ On the other hand, there is something troubling about protecting a health care provider solely because the alleged injury was a direct result of the provider's treatment of the plaintiff, when that treatment was one which the plaintiff did not want.¹²² This is distinguishable from situations in which the results of treatment may be damaging, but the injuries are a direct result of treatment the plaintiff sought and desired. As currently construed, the

116. The personal nature of the relationship between doctor and patient presents an interesting conflict. On the one hand, patients want to develop trust, confidence, and a comfortable relationship with their physician, and are less likely to file a malpractice claim. On the other hand, once a claim is filed the physician often feels personally attacked, and the claim has a stigmatizing effect on the physician's practice and self-esteem. See generally, 1 ALI STUDY, *supra* note 112, at 297.

117. This includes the duty to disclose, which is a function of the trust, confidence, and dependence of the patient. See generally, *Nelson v. Gaunt*, 125 Cal. App. 3d 623, 634, 178 Cal. Rptr. 167, 173 (1981) (allowing the patient to maintain actions against a doctor who injected silicone into the patient's breast without disclosing what he was injecting, or its risks).

118. *Cobbs v. Grant*, 8 Cal. 3d 229, 239, 502 P.2d 1, 7, 104 Cal. Rptr. 505, 511 (1972) (discussing the implications of a battery versus negligence claim in a case involving whether the doctor's failure to disclose all the inherent risks of a surgical procedure vitiated the plaintiff's consent to operate).

119. *Id.*

120. *Id.* at 240, 502 P.2d at 8, 104 Cal. Rptr. at 512.

121. *Feister v. Superior Court*, 7 Cal. App. 4th 223, 234, 1 Cal. Rptr. 2d 150, 156 (1991), *review granted*, 824 P.2d 570, 4 Cal. Rptr. 2d 764 (1991), and *review dismissed* 838 P.2d 781, 13 Cal. Rptr. 2d 53 (1992). Punitive damages are not warranted unless there is clear and convincing evidence establishing a culpable state of mind. *Id.*

122. According to Justice Mosk, "A plaintiff should not be required to beg the court's permission to seek any or all of those damages merely because the battery arises out of medical services provided by the defendant when the services were neither sought nor desired." *Central Pathology Serv. Medical Clinic, Inc. v. Superior Court*, 3 Cal. 4th 181, 193, 832 P.2d 932, 928, 10 Cal. Rptr. 2d 208, 216 (1992) (Mosk, J., concurring and dissenting).

statute does not distinguish between these patients. If the procedural burden is to be lifted from patients injured by unconsented-to treatment, the legislature ought to amend the statute. For example, the phrase "arising out of the professional negligence of a health care provider" could be limited to include only those actions based on treatment for which the plaintiff has manifested consent. Under this approach, the extent of the procedural burden in pleading punitive damages would depend on the nature of the health care provider's conduct. Egregious conduct, such as an unconsented-to procedure, can be better deterred by removing the procedural restrictions of section 425.13.¹²³ The potential for punitive damage liability for unconsented-to procedures would encourage better communication between the physician and patient, thereby ultimately reducing the number of these types of injuries and claims.

E. Implications for the Construction of Other Statutes

Three statutes pertaining to damages enacted under MICRA are directly affected by the *Central Pathology* decision. Section 3333.2 of the Civil Code limits noneconomic damages¹²⁴ to \$250,000 in "any action for injury against a health care provider based on *professional negligence*."¹²⁵ Section 3333.1 of the Civil Code allows evidence of benefits paid to the plaintiff from other sources to be admissible in actions based on *professional negligence*.¹²⁶ Although it has been argued that the legislature made a distinction between the phrases "based on" and "arising out of,"¹²⁷ the California Supreme Court in *Central Pathology* determined that there is no distinction between the two phrases.¹²⁸ Therefore, the scope of sections 3333.1 and 3333.2 of the Civil Code has probably been broadened to include actions alleging intentional torts, provided that the basis for

123. Physician behavior in failing to obtain adequate patient consent should be contrasted with the more common causes of medical injury — inadvertent mistakes, slipups, and momentary inattention — which is the type of behavior unlikely to be deterred by the tort system. See 1 ALI STUDY, *supra* note 112, at 298.

124. Damages for pain, suffering, inconvenience, physical impairment, and disfigurement. CAL. CIV. CODE § 3333.2(a) (West Supp. 1993).

125. *Id.* (emphasis added).

126. CAL. CIV. CODE § 3333.1 (West Supp. 1993). Section 3333.1 abolishes the "collateral source rule" where evidence of insurance benefits paid to an injured plaintiff are not admissible to reduce damages because of the policy against allowing a wrongful defendant to benefit from prudent financial planning by the plaintiff. See *Selected 1975 Legislation*, *supra* note 4, at 547.

127. See *Feister v. Superior Court*, 7 Cal. App. 4th 223, 233-34, 1 Cal. Rptr. 2d 150, 156 (1991), *review granted*, 824 P.2d 570, 4 Cal. Rptr. 2d 764 (1991), and *review dismissed*, 838 P.2d 781, 13 Cal. Rptr. 2d 53 (1992) (construing "arising out of" as a broader phrase encompassing all possible causes of action flowing from the provider's treatment of the patient).

128. *Central Pathology Serv. Medical Clinic, Inc. v. Superior Court*, 3 Cal. 4th 181, 187 n.3, 832 P.2d 924, 928 n.3, 10 Cal. Rptr. 2d 208, 212 n.3 (1992).

the claim arises from the health care provider's treatment of the plaintiff.

Section 667.7 of the Civil Procedure Code permits periodic payment of future damages,¹²⁹ provided the damages are over \$50,000 in "any action for injury or damages against a provider of health care services."¹³⁰ This statute is broader than section 425.13 of the Civil Procedure Code, and sections 3333.1 and 3333.2 of the Civil Code because there is no limiting phrase "arising out of" or "based on." Therefore, there is even a stronger argument for allowing large judgments for future damages caused by intentional torts to be paid in periodic installments, if the injury was caused by the health care provider's treatment of the plaintiff.

V. CONCLUSION

In *Central Pathology Service Medical Clinic, Inc. v. Superior Court*, the California Supreme Court construed section 425.13 of the Civil Procedure Code broadly to ensure that all claims for punitive damages against a health care provider will fall within the statute, provided the injuries are directly related to the provision of professional services. The supreme court based its holding on its conclusion that the legislative intent was to protect health care providers from frivolous and unsubstantiated claims for punitive damages, regardless of the theory of liability.

The implications of this decision include the broadening of other statutes concerning damage awards in medical malpractice cases. Section 3333.2 of the Civil Code, limiting noneconomic damages to \$250,000, and section 3333.1 of the Civil Code, allowing admission of evidence of collateral benefits paid to the plaintiff, will both be expanded to include injuries caused by intentional torts, if the injuries are directly related to the provision of medical services. Additionally, section 667.7 of the Civil Procedure Code, allowing periodic payment for future damages over \$50,000, will also include actions alleging intentional torts, if the injuries are directly related to the provision of medical services. Ultimately, there will be less incentive for plaintiff's lawyers to take on these cases if the damage awards are limited in a broad manner.

In all future cases where the underlying injury is caused by the

129. "'Future damages' includes damages for future medical treatment, care or custody, loss of future earnings, loss of bodily function, or future pain and suffering" CAL. CIV. PROC. CODE § 667.7(e)(1) (West 1987).

130. *Id.* § 667.7(a).

health care provider's treatment, the plaintiff must comply with the statute. This would include claims where the injury was caused by a treatment for which the plaintiff did not consent. If this group of plaintiffs are to avoid the additional procedural burdens imposed by the statute, the legislature should amend the statute to allow for their exclusion.

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