

Comments

CALIFORNIA'S MICRA: THE NEED FOR LEGISLATIVE REFORM

In an effort to reduce the costs underlying medical malpractice insurance premiums, the California legislature enacted the Medical Injury Compensation Reform Act of 1975 (MICRA). MICRA divests medical malpractice victims of traditional protections governing personal injury litigation while granting broad immunity to negligent health care providers. The constitutionality of several of MICRA's tort reform provisions was recently upheld in four California Supreme Court cases. This Comment examines the discrimination wrought by MICRA and shows how its sweeping reforms undermine California's policy of fault-based liability. The California legislature is called upon to amend MICRA. This Comment provides numerous suggestions for its revision.

INTRODUCTION

In 1975 the California legislature enacted the Medical Injury Compensation Reform Act (MICRA),¹ divesting medical malprac-

1. Ch. 1, § 1, 1975 Cal. Stat. 2d Ex. Sess. 3949. In calling for the legislature to enact MICRA, the Governor of California, in his proclamation convening the legislature in Second Extraordinary Session, 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.

In my judgment, no lasting solution is possible without sacrifice and fun-

tice victims of traditional personal injury compensation and protection.² The enactment of MICRA arose in the face of claims made by medical malpractice insurers to the effect that they could no longer provide health care professionals with low cost malpractice coverage. Some insurers had withdrawn from the medical malpractice field, while others raised the premiums they charged to health care providers to "skyrocketing" rates.³ Without MICRA, it was feared many doctors would be forced to practice without malpractice insurance, practice "defensive medicine,"⁴ or terminate their practice in California altogether. As a consequence, the availability of medical care in some parts of the state would decline, and malpractice victims treated by uninsured doctors would be left with unenforceable judgments.

MICRA was enacted to address and remedy these malpractice insurance problems from several directions. Primarily, it was designed to reduce the costs underlying high medical malpractice insurance premiums.⁵ The Act generally decreases the amount medical malpractice victims may recover for non-economic damages, "theoretically compelling a reduction in insurance premiums."⁶ This theory

damental reform. It is critical that the Legislature enact laws which will change the relationship between the people and the medical profession, the legal profession and the insurance industry, and thereby reduce the costs which underlie these high insurance premiums.

Proclamation by the Governor, 1975 Cal. Stat. 2d Ex. Sess. 3947.

2. See, e.g., CAL. CIV. CODE § 3333.2 (West Supp. 1985) (special limit on non-economic damages); *id.* § 3333.1 (abrogation of collateral source rule); CAL. CIV. PROC. CODE § 667.7 (West Supp. 1985) (exception to general rule requiring immediate lump sum payment of a judgment); CAL. BUS. & PROF. CODE § 6146 (West Supp. 1985) (special restrictions on attorney's fees).

3. Preamble to MICRA, ch. 2, § 12.5, 1975 Cal. Stat. 2d Ex. Sess. 4007. The Preamble states in part:

The Legislature finds and declares that there is a major health care crisis in the State of California attributable to skyrocketing malpractice premium costs and resulting in a potential breakdown of the health delivery system, severe hardships for the medically indigent, a denial of access for the economically marginal, and depletion of physicians such as to substantially worsen the quality of health care available to citizens of this state.

4. In a 1973 study by the Commission on Medical Malpractice of the United States Department of Health, Education, and Welfare, "defensive medicine" was defined as: "the alteration of modes of medical practice, induced by the threat of liability, for the principal purposes of forestalling the possibility of lawsuits by patients as well as providing a good legal defense in the event such lawsuits are instituted." U.S. DEPT OF HEALTH, EDUC. AND WELFARE, Pub. No. 73-88, THE REPORT OF THE SECRETARY'S COMM'N ON MEDICAL MALPRACTICE 14 (1973) [hereinafter cited as HEW REPORT]. There is no clear consensus defining "defensive medicine." What might appear to be defensive medical practice to one clinician may, to another, be quality medical care. Trancredi & Barondess, *The Problem of Defensive Medicine*, 200 SCIENCE 879 (1978). For example, one report concluded that, while increased electronic fetal monitoring and caesarian sections probably were caused by the increasing number of suits surrounding fetal injuries, those procedures did increase the survival of newborn babies. *Id.* at 882.

5. Preamble to MICRA, ch. 2, § 12.5, 1975 Cal. Stat. 2d Ex. Sess. 4007.

6. *Review of Selected 1975 California Legislation: Torts*, 7 PAC. L.J. 544, 545

assumes a high correlation between the cost of insurance premiums and the dollar value of claims paid out to malpractice victims. However, this assumption is questionable.⁷

It is estimated that only twenty-five cents of every premium dollar goes to compensate injured malpractice victims.⁸ As much as forty-five cents covers the retention costs of the insurer; these include the cost of selling, servicing and underwriting policies, and paying taxes and overhead expenses. Approximately twenty-nine cents of every premium dollar pays defense costs. Moreover, one medical malpractice insurance company president has concluded that due to the large return on investments, even with loss payments of ninety-eight percent of premium, company investments will produce a profit equal to five percent of premiums collected.⁹ In light of the weak correlation between premium costs and damage awards, placing limits on the medical malpractice victim's amount of recovery will have a negligible impact on premiums.¹⁰

Four cases have recently come before the California Supreme Court challenging several of the provisions of MICRA.¹¹ In all four cases, the court has upheld the constitutionality of the challenged provisions. Although the court has not strongly embraced the rationale justifying the contested provisions,¹² it has, nonetheless, deferred to the legislature's decision to place the burden of reducing medical malpractice insurance rates on the victims of medical negligence.

(1976) (emphasis in original).

7. *An Overview of Medical Malpractice: Hearing Before the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 1st Sess. 20 (1975) ("[i]t is frequently claimed that medical malpractice insurance is the most inefficient form of insurance in terms of getting dollars to injured patients"); HEW REPORT, *supra* note 4, at 100. ("[i]t is estimated that a lower portion of the premium dollar is paid to medical malpractice claimants than to claimants under any other form of casualty insurance").

8. *An Overview of Medical Malpractice: Hearing Before the House Comm. on Interstate and Foreign Commerce*, *supra* note 7, at 20.

9. *Id.* at 21.

10. See Note, *California's Medical Injury Compensation Reform Act: An Equal Protection Challenge*, 52 S. CAL. L. REV. 829, 840-41 (1979).

11. Three of the four recent test cases, *American Bank & Trust Co. v. Community Hosp.*, 36 Cal. 3d 359, 683 P.2d 670, 204 Cal. Rptr. 671 (1984); *Roa v. Lodi Medical Group*, 37 Cal. 3d 920, 695 P.2d 164, 211 Cal. Rptr. 77 (1985); and *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985), *appeal denied*, 54 U.S.L.W. 3250 (1985), were decided by a slim four to three majority. The fourth, *Barme v. Wood*, 37 Cal. 3d 174, 689 P.2d 446, 207 Cal. Rptr. 816 (1984), was decided by a vote of five to two.

12. *Fein*, 38 Cal. 3d at 163-64, 695 P.2d at 684, 211 Cal. Rptr. at 387. ("[o]ur recent decisions do not reflect our support for the challenged provisions of MICRA as a matter of policy, but simply our conclusion that under established constitutional principles the Legislature had the authority to adopt such measures").

The Challenged Provisions

Section 667.7 of the California Civil Procedure Code¹³ requires that payments of judgments for future damages in excess of \$50,000

13. CAL. CIV. PROC. CODE § 667.7 (West Supp. 1985). This code section reads as follows:

(a) In any action for injury or damages against a provider of health care services, a superior court shall, at the request of either party, enter a judgment ordering that money damages or its equivalent for future damages of the judgment creditor be paid in whole or in part by periodic payments rather than by a lump-sum payment if the award equals or exceeds fifty thousand dollars (\$50,000) in future damages. In entering a judgment ordering the payment of future damages by periodic payments, the court shall make a specific finding as to the dollar amount of periodic payments which will compensate the judgment creditor for such future damages. As a condition to authorizing periodic payments of future damages, the court shall require the judgment debtor who is not adequately insured to post security adequate to assure full payment of such damages awarded by the judgment. Upon termination of periodic payments of future damages, the court shall order the return of this security, or so much as remains, to the judgment debtor.

(b) (1) The judgment ordering the payment of future damages by periodic payments shall specify the recipient or recipients of the payments, the dollar amount of the payments, the interval between payments, and the number of payments or the period of time over which payments shall be made. Such payments shall only be subject to modification in the event of the death of the judgment creditor.

(2) In the event that the court finds that the judgment debtor has exhibited a continuing pattern of failing to make the payments, as specified in paragraph (1), the court shall find the judgment debtor in contempt of court and, in addition to the required periodic payments, shall order the judgment debtor to pay the judgment creditor all damages caused by the failure to make such periodic payments, including court costs and attorney's fees.

(c) However, money damages awarded for loss of future earnings shall not be reduced or payments terminated by reason of the death of the judgment creditor, but shall be paid to persons to whom the judgment creditor owed a duty of support, as provided by law, immediately prior to his death. In such cases the court which rendered the original judgment, may, upon petition of any party in interest, modify the judgment to award and apportion the unpaid future damages in accordance with this subdivision.

(d) Following the occurrence or expiration of all obligations specified in the periodic payment judgment, any obligations of the judgment debtor to make further payments shall cease and any security given, pursuant to subdivision (a) shall revert to the judgment debtor.

(e) As used in this section:

(1) "Future damages" includes damages for future medical treatment, care or custody, loss of future earnings, loss of bodily function, or future pain and suffering of the judgment creditor.

(2) "Periodic payments" means the payment of money or delivery of other property to the judgment creditor at regular intervals.

(3) "Health care provider" means any 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.

(4) "Professional negligence" means a negligent act or omission to act by a

be made periodically rather than in one lump sum. This raises the constitutional issues of equal protection and right to a jury trial.

Section 3333.1(a) of the California Civil Code¹⁴ alters the collateral source rule¹⁵ by permitting a medical malpractice defendant to introduce evidence of collateral source benefits received by or paya-

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 such 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.

(f) It is the intent of the Legislature in enacting this section to authorize the entry of judgments in malpractice actions against health care providers which provide for the payment of future damages through periodic payments rather than lump-sum payments. By authorizing periodic payment judgments, it is the further intent of the Legislature that the courts will utilize such judgments to provide compensation sufficient to meet the needs of an injured plaintiff and those persons who are dependent on the plaintiff for whatever period is necessary while eliminating the potential windfall from a lump-sum recovery which was intended to provide for the care of an injured plaintiff over an extended period who then dies shortly after the judgment is paid, leaving the balance of the judgment award to persons and purposes for which it was not intended. It is also the intent of the Legislature that all elements of the periodic payment program be specified with certainty in the judgment ordering such payments and that the judgment not be subject to modification at some future time which might alter the specifications of the original judgment.

14. CAL. CIV. CODE § 3333.1 (West Supp. 1985). This section, in pertinent part, reads as follows:

(a) In the event the defendant so elects, in an action for personal injury against a health care provider based upon professional negligence, he may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the personal injury pursuant to the United States Social Security Act, any state or federal income disability or worker's compensation act, any health, sickness or income-disability insurance, accident insurance that provides health benefits or income-disability coverage, and any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the cost of medical, hospital, dental, or other health care services. Where the defendant elects to introduce such evidence, the plaintiff may introduce evidence of any amount which the plaintiff has paid or contributed to secure his right to any insurance benefits concerning which the defendant has introduced evidence.

(b) No source of collateral benefits introduced pursuant to subdivision (a) shall recover any amount against the plaintiff nor shall it be subrogated to the rights of the plaintiff against a defendant.

15. The collateral source rule bars the deduction of collateral compensation, such as insurance benefits or workers' compensation benefits, from a tort victim's damage award. The rule prohibits evidence of collateral coverage from being introduced at trial and prevents tortfeasors and their insurers from benefiting from the collateral source funds which "are usually created through the prudence and foresight of persons other than the tortfeasor, frequently including the injured person himself." *Gypsum Carrier, Inc. v. Handelsman*, 307 F.2d 525, 534-35 (9th Cir. 1962). See *Hrnjak, v. Graymar, Inc.*, 4 Cal. 3d 725, 484 P.2d 599, 94 Cal. Rptr. 623 (1971). See generally Schwartz, *The Collateral-Source Rule*, 41 B.U.L. REV. 348, 354 (1961).

ble to the plaintiff. Section 3333.1(b) of the Civil Code prevents a "collateral source" from obtaining reimbursement from the defendant's insurer. As applied, these sections benefit both negligent tortfeasors and their insurers where a victim had the foresight to obtain insurance. It shifts liability for the defendant's negligence onto the innocent plaintiff and the plaintiff's collateral source insurer. This can only drive up *victims'* insurance rates.

Section 6146 of the California Business and Professions Code¹⁶ establishes a sliding scale which places incremental limits on the amount of contingent fees a plaintiff's attorney may obtain in a medical malpractice action. These limits were intended to protect the victim's recovery. In practice, however, they undermine the ability of medical malpractice plaintiffs to contract for the best legal representation possible, thereby tending to restrict victims' access to the courts.¹⁷

Finally, section 3333.2 of the California Civil Code¹⁸ limits non-

16. CAL. BUS. & PROF. CODE § 6146 (West Supp. 1985) reads in relevant part as follows:

(a) An attorney shall not contract for or collect a contingency fee for representing any person seeking damages in connection with an action for injury or damage against a health care provider based upon such person's alleged professional negligence in excess of the following limits:

(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 one hundred thousand dollars (\$100,000) recovered.

(4) Ten percent of any amount on which the recovery exceeds two hundred thousand dollars (\$200,000).

Such limitations shall apply regardless of whether the recovery is by settlement, arbitration, or judgment, or whether the person for whom the recovery is made is a responsible adult, an infant, or a person of unsound mind.

(b) If periodic payments are awarded to the plaintiff pursuant to Section 667.7 of the Code of Civil Procedure, the court shall place a total value on these payments based upon the projected life expectancy of the plaintiff and include this amount in computing the total award from which attorney's fees are calculated under this section.

(d) For purposes of this section:

(1) "Recovered" means the net sum recovered after deducting any disbursements or costs incurred in connection with prosecution or settlement of the claim. Costs of medical care incurred by the plaintiff and the attorney's office-overhead costs or charges shall not be deductible disbursements or costs for such purpose.

17. See *Roa*, 37 Cal. 3d at 937, 695 P.2d at 175, 211 Cal. Rptr. at 88 (Bird, C.J., dissenting) ("the right of petition is protected by the 1st and 14th Amendments to the . . . Constitution. It encompasses the right of access to the courts . . . Here, in the judicial context, the expenditure of money for attorney fees is no less essential to the exercise of First Amendment rights").

18. CAL. CIV. CODE § 3333.2 (West Supp. 1985) reads in part as follows:

(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,

economic damages (for example, pain and suffering) in medical malpractice actions to \$250,000. Section 3333.2 divests severely injured medical negligence victims of their right to full compensation while protecting the economic interests of health care providers and their insurers.

In light of the narrow margins by which the cases challenging the MICRA provisions were decided, and the decisions of other states which have invalidated similar legislation, the constitutionality of MICRA is tenuous. This should be of serious concern to the legislature.¹⁹

Legislative action concerning MICRA is imperative. This Comment examines the deleterious effects of MICRA's tort reform provisions and provides recommendations for modifying the Act to avoid the harsh inequities affecting medical malpractice victims under the existing law.

THE DISCRIMINATIONS WROUGHT BY MICRA

According to a significant minority of the California Supreme Court, MICRA violates the equal protection clauses of both the United States²⁰ and California Constitutions.²¹ MICRA discriminates against plaintiffs whose injuries are the result of professional negligence in health care. Those victims injured in any other manner may be compensated without the restrictions of MICRA.²² MICRA

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).

19. Recently, a California Senate bill, which would have repealed the four MICRA provisions to which this Comment is addressed (*see supra* note 2) was killed. S. 520, Cal. Leg. 1985-86 Regular Sess.

20. U.S. CONST. amend. XIV, § 1 (“[nor shall any State] deny to any person within its jurisdiction the equal protection of the laws”).

21. CAL. CONST. art. I, § 7.

22. The classifications established by MICRA raise the issue of whether the tort reform provisions can withstand a constitutional attack based on the equal protection doctrine. The resolution of the equal protection issue requires a determination of the proper standard of review to be applied by the courts.

Traditionally, equal protection analysis has employed two standards of review: strict scrutiny and minimal scrutiny (the “two-tier” approach). Strict scrutiny requires that the challenged legislation be necessary to the promotion of a compelling state interest. The less stringent standard—minimal scrutiny—merely requires that the provisions of a challenged statute bear some rational relationship to a legitimate state interest. This level of scrutiny is characterized by extreme deference to the legislative branch.

The California Supreme Court, in the cases challenging the constitutionality of MICRA, has utilized the rational relationship test, *i.e.*, minimal scrutiny, in consistently upholding the constitutionality of the provisions. Justice Mosk, in his dissenting opinion in *Fein*, 38 Cal. 3d at 179, 695 P.2d at 694, 211 Cal. Rptr. at 397, advocates an interme-

further discriminates *within* the class of medical malpractice victims, affecting most severely those plaintiffs most seriously injured. MICRA also creates two classes of defendants: 1) health care providers defending against actions for professional negligence; and 2) defendants, whether or not health care providers, defending against actions for personal injuries sustained outside the medical malpractice context. The former class enjoys immunity from liability for non-economic damages which exceed \$250,000. The latter is subject to unlimited liability.

Consider this illustration: A patient visits a physician for a routine examination. While on the examining table, the patient is given an injection which makes him dizzy. Left unattended, the patient falls off the examining table, fracturing a cervical vertebrae resulting in permanent quadriplegia. The patient is driven by ambulance to a nearby hospital. The physician drives to the hospital; the patient's spouse is enroute to the same hospital. The physician, while walking across the street to the hospital, is struck by a vehicle. This vehicle is driven by the patient's spouse. The collision causes a fracture of one of the doctor's cervical vertebrae causing permanent quadriplegia. Under section 3333.2, the quadriplegic patient, suing the physician, cannot recover more than \$250,000 in non-economic damages, while the quadriplegic physician, suing the patient's spouse for personal injuries, may recover for non-economic loss without limitation.²³

Young victims are discriminated against as well. For example, assume two persons are victims of medical malpractice: a seventy-five-year-old man whose leg was mistakenly amputated, and a six-year-old child who suffered the same injury. Assume further, the senior citizen recovers a judgment of \$250,000 for non-economic damages. In light of the remaining years the child will suffer, it seems reasonable to expect the child to recover an amount significantly greater than the senior citizen. The senior is fairly compensated, while the child is permitted to recover only part of his non-economic award, under section 3333.2.²⁴

Section 6146 of the Business and Professions Code²⁵ places incremental limits on attorney's fees in medical malpractice actions. Consequently, plaintiffs' right to contract is severely curtailed. Additionally, the method of paying damages awarded by the trier of fact in a medical malpractice action is now controlled by the court, unlike any

date standard of equal protection review. See Note, *supra* note 10, at 857-64. See also G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 657-97 (9th ed. 1975).

23. Respondent and Cross-Appellant's Opening Brief at 70, *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985).

24. *Id.* at 69.

25. CAL. BUS. & PROF. CODE § 6146 (West Supp. 1985).

other tort action. Section 667.7 of the Civil Procedure Code²⁶ permits the court to order periodic payment of future damages exceeding \$50,000, in lieu of the traditional lump sum payment. Similarly, unlike any other tort action, evidence of collateral benefits is admissible under section 3333.1 of the Civil Code.²⁷ In an attempt to shift the costs of negligence from the physician to the victim or victim's insurer, this rule of evidence can only be expected to decrease the amount of damages awarded by the trier of fact.

"Skyrocketing malpractice premium costs" motivated the enactment of MICRA by the California legislature.²⁸ Such concerns, however, do not justify the immunity conferred upon health care providers at the expense of victims who are less able to absorb the risk.

There is no logically supportable reason why the most severely injured malpractice victims should be singled out to pay for special relief to medical tortfeasors and their insurers. The idea of preserving insurance by imposing huge sacrifices on a few victims is logically perverse. Insurance is a device for spreading risks and costs among large numbers of people so that no one person is crushed by misfortune [citations omitted]. In a strange reversal of this principle [MICRA] concentrates the costs of the worst injuries on a few individuals.²⁹

MICRA-type Legislation Outside California

Numerous states have held their medical malpractice legislation unconstitutional on equal protection grounds. For example, the Illinois Supreme Court struck down a \$500,000 limit on *total* damages,³⁰ finding the limitation violated the equal protection provisions of the Illinois Constitution.³¹

In New Hampshire, the state supreme court invalidated a medical

26. CAL. CIV. PROC. CODE § 667.7 (West Supp. 1985).

27. CAL. CIV. CODE § 3333.1 (West Supp. 1985).

28. Preamble to MICRA, ch. 2, § 12.5, 1975 Cal. Stat. 2d Ex. Sess. 4007.

29. *Fein*, 39 Cal. 3d at 173, 695 P.2d at 690, 211 Cal. Rptr. at 393 (Bird, C.J., dissenting). Some of the tort reform provisions of MICRA, such as § 3333.1(a) and (b) which abolishes the collateral source rule and limits the plaintiff's insurer's subrogation rights, actually impose burdens on the plaintiff's insurance company rather than the plaintiff. However, these provisions can be expected to increase plaintiff's liability insurance costs. Other MICRA provisions, such as § 667.7 which requires that the plaintiff's damage awards be paid in periodic installments rather than in one lump sum, adversely affect the plaintiff directly.

30. *Wright v. Central Du Page Hospital Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

31. ILL. CONST. art. I, § 13. Although the limit imposed by California applies only to non-economic damages, where a California plaintiff's damages are mostly non-economic, the limit may produce greater hardship than the Illinois limit.

malpractice act containing provisions almost identical to all four of the MICRA provisions upheld by the California Supreme Court.³² The New Hampshire Supreme Court stated: "It 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."³³

The Florida Supreme Court invalidated several statutory provisions, similar to those of California, reasoning "it is impossible that singling out the most seriously injured malpractice victims (rather than imposing the same burden equally upon all medical malpractice victims) bears any reasonable relationship to the announced purpose of alleviating the 'medical malpractice insurance crisis.'"³⁴

The Ohio Medical Malpractice Act,³⁵ which, among other things, limits "general" (non-economic) damages to \$200,000, received constitutional review in two separate cases: *Graley v. Satayatham*³⁶ and *Simon v. St. Elizabeth Medical Center*.³⁷ In each case, the court felt the limit on general damages denied equal protection of the law, violating both the United States³⁸ and Ohio Constitutions.³⁹ This \$200,000 provision is not markedly different than the \$250,000 limit of MICRA. In *Graley*, the court also invalidated a statutory provision mandating collateral benefits be stated in medical malpractice complaints, finding this requirement unconstitutionally discriminated against medical malpractice victims.⁴⁰

The North Dakota Supreme Court struck down the Medical Malpractice Act of its state;⁴¹ its provisions included a \$300,000 limit on total damages, a collateral source disclosure rule similar to MICRA's, and a periodic payment of damages provision. The court found these provisions were "arbitrary and unreasonable and discriminatory"⁴²

Other states recently invalidating similar provisions include Pennsylvania⁴³ and Texas.⁴⁴ The Texas decision, however, is presently

32. *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980).

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

34. *Florida Medical Center, Inc. v. Von Stetina*, 436 So. 2d 1022, 1027 (Fla. 1983).

35. OHIO REV. CODE ANN. §§ 2305.27, 2307.42, 2307.43, 2711.21, 2743.02 (Page 1983).

36. 74 Ohio St. 2d 316, 343 N.E.2d 832 (1976).

37. 3 Ohio Op. 3d 164, 170, 355 N.E.2d 903, 910 (1976) ("[t]his court rejects . . . the societal . . . argument that some must give up their rights to damages so that all can achieve cheaper medical care").

38. U.S. CONST. amend. XIV.

39. OHIO CONST. art. I, § 2.

40. 74 Ohio St. 2d at 316, 343 N.E.2d at 832.

41. N.D. CENT. CODE §§ 26.40.1-01—26.40.1-18 (1978).

42. *Arneson v. Olson*, 270 N.W.2d 125, 137 (N.D. 1978).

43. *Heller v. Frankston*, 76 Pa. Commw. 294, 464 A.2d 581 (1983).

44. *Baptist Hosp. of Southeast Texas v. Baber*, 672 S.W.2d 296 (Tex. 1984).

under review by the Texas Supreme Court. The Idaho Supreme Court questioned the constitutionality of several provisions of medical malpractice legislation in Idaho, but ultimately declined to invalidate them without more factual data.⁴⁵

MICRA IS NOT RATIONALLY RELATED TO A LEGITIMATE STATE INTEREST

The California Supreme Court has deferred to the wisdom of the legislature and found the tort reform provisions of MICRA to be rationally related to the state's legitimate interest in lowering medical malpractice insurance premiums. However, considering the narrow margins by which the provisions of the Act have been upheld in California, and the decisions of sister states that have found almost identical legislation unconstitutional, it becomes clear that the constitutionality of MICRA is at least debatable.

The California legislature must be concerned about passing unconstitutional laws. The handwriting on the wall requires another close look at the statute with a view towards assessing its methods in achieving the interests of the state.⁴⁶

There is No Legitimate State Interest Supporting MICRA

In the mid-1970's, physicians, other health care providers, and institutions nationwide campaigned for legislation which would bring down the cost of medical malpractice premiums. Insurance carriers justified their high premiums by pointing to the large increases in both the number and dollar amounts of settlements and verdicts in medical malpractice lawsuits.⁴⁷ Thus, the major goal of the health care industry was to limit the impact of successful suits on medical profession defendants and their insurers.⁴⁸ This campaign for reform was extremely successful. Every state in the nation, with the excep-

45. *Jones v. State Board of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976).

46. The California legislature has, in some instances, invalidated or revised discriminatory legislation soon after the California Supreme Court upheld the statute in question as constitutional. For example, one year after the language of the California Civil Procedure Code, precluding dependent stepchildren from maintaining a wrongful death action, CAL. CIV. PROC. CODE § 377 (West 1973), withstood challenge in *Steed v. Imperial Airlines*, 12 Cal. 3d 114, 524 P.2d 801, 115 Cal. Rptr. 329 (1974), the California legislature amended the statute to include dependent stepchildren within the class of persons who may maintain an action for wrongful death.

47. A.M.A. SPECIAL TASK FORCE ON PROFESSIONAL LIABILITY AND INSURANCE, *PROFESSIONAL LIABILITY IN THE '80S*, Report 2, at 13 (1984) [hereinafter cited as *PROFESSIONAL LIABILITY IN THE '80S*].

48. *Id.*

tion of West Virginia, has enacted some type of reform.⁴⁹ However, the reasons motivating MICRA are without empirical support. In enacting MICRA, the legislature failed to consider evidence which showed that a limit on non-economic medical malpractice damages might not result in appreciable savings to the insurance companies.⁵⁰ Moreover, losses experienced by the medical malpractice insurance companies in the mid-1970's, in many instances, had little if anything to do with malpractice claims.

The insurance industry losses which led to dramatic premium increases were, in many cases, caused by large stock market investment losses, not by large non-economic damage awards. Malpractice insurance companies lost approximately \$193 million in the stock market in 1974.⁵¹ One major malpractice insurance company in California began underwriting malpractice coverage in 1973. By 1975, that insurer had collected approximately fifteen million dollars in premiums and had paid out only \$250,000. This same company lost over \$140 million in the stock market in 1974 and, thereafter, raised insurance premiums over 300%.⁵² Another large commercial carrier of medical malpractice insurance lost twenty-one million dollars on its investments in 1974. In addition, it saw the paper value of its bond and stock portfolio decrease by almost ninety million dollars that same year.⁵³ Now, in 1986, when interest rates are again low, thus driving down investment income, it is not surprising to hear renewed concern for the "malpractice crisis" from the health care insurance industry.

According to some studies, the medical malpractice insurance industry was not experiencing financial difficulty at all, despite industry claims that high malpractice awards were forcing them out of business. According to one study, during the "crisis" period of 1970 through 1976, total malpractice insurance expenses nationwide (including payments, administrative costs and associated expenses) reached just over \$3.6 billion. This figure corresponds to an industry income of \$4.3 billion. Assuming that these commercial companies were responsible for ninety percent of the insurance volume, industry profits were well over one billion dollars for that seven year period.⁵⁴

49. *Id.*

50. *Fein*, 38 Cal. 3d at 172, 695 P.2d at 690, 211 Cal. Rptr. at 393 (Bird, C.J., dissenting). ("in the years prior to the enactment of MICRA, no more than 14 medical malpractice plaintiffs in any year received compensation totaling over \$250,000 for economic and non-economic damages combined").

51. Charbonneau, *Medical Malpractice Crisis: Fact or Fiction?*, 3 ORANGE COUNTY B.J. 139, 141 (1976).

52. *Id.*

53. Aitken, *Medical Malpractice: The Alleged "Crisis" in Perspective*, 1976 INS. L.J. 90, 96 (citing N.Y. Times, June 18, 1975, at 49, col. 1).

54. J. GUNTHER, *THE MALPRACTITIONERS* 188 (1978).

Another study, using statistics from the State Board of Medical Examiners and the State Auditor General, reveals that the total amount of claims paid in settlements and judgments on malpractice cases in California in 1974 was \$33.7 million.⁵⁵ This compares poorly to the \$120 million in medical malpractice premiums collected by the insurance industry during that same year.⁵⁶

Moreover, the Association of Trial Lawyers of America conducted their own study, finding that between 1978 and 1983 the medical malpractice insurance industry earned approximately \$300 million more on the investment of premiums than it paid out to victims.⁵⁷ Considering that the insurance companies earned \$7.34 billion in premiums over that period,⁵⁸ it becomes evident that malpractice insurers are doing much better than they have lead the public, or the doctors they insure, to believe.

Consequently it is highly questionable whether a "health care crisis" was responsible for the enactment of MICRA and whether such a crisis exists today. Some insurance companies may have experienced severe stock market losses. However, this stock market crisis is not a legitimate state interest which will support discriminatory legislation. In cases challenging MICRA-type statutes, several state supreme courts have expressed doubt concerning the reality of the medical malpractice "crisis."⁵⁹ Even the American Medical Association (AMA) admitted that by 1978 the medical liability insurance availability crisis appeared to have abated.⁶⁰

Interestingly, in 1979, Travelers Insurance Company, which carried all the commercial medical malpractice insurance in Southern California, was sued by 5500 doctors in Los Angeles county for overcharging on medical malpractice insurance premiums. The case settled prior to trial for approximately fifty million dollars.⁶¹ Where did Travelers get the money to settle this suit if it is experiencing a

55. Charbonneau, *supra* note 51, at 140.

56. *Id.*

57. PUBLIC AFFAIRS DEP'T, ASS'N OF TRIAL LAWYERS OF AM., INV. INCOME ANALYSIS OF MEDICAL MALPRACTICE (1985).

58. A.M. Best's Casualty Loss Reserve Development (1984).

59. See *Jones*, 97 Idaho at 872, 555 P.2d at 412 ("[i]t is argued that the Act is a necessary legislative response to a 'crisis in medical malpractice insurance' in Idaho, but the record does not demonstrate any such 'crisis'"). See also *Arneson*, 270 N.W.2d at 136 (in which the North Dakota Supreme Court claimed that no medical malpractice crisis existed); *Boucher v. Sayeed*, 459 A.2d 87, 93 (R.I. 1983) ("[a] plethora of facts exists to substantiate the trial justice's finding that no malpractice crisis existed in 1981").

60. PROFESSIONAL LIABILITY IN THE '80s, *supra* note 47, Report 1, at 6.

61. L.A. Times, Feb. 6, 1981, at 3, col. 4.

financial crisis?⁶²

According to the health care profession, the "new" crisis is not one of availability of insurance but rather one of affordability. The AMA reports that between 1975 and 1983, medical liability premiums increased by more than eighty percent.⁶³ However, one survey shows that the *lowest* rate hikes in the nation have occurred in California.⁶⁴ In 1984, the Saint Paul Insurance Company, the largest insurer of medical liability insurance, charged a premium of between \$7014 and \$8536 for the high risk category of obstetrician/gynecologist in California.⁶⁵ This premium would cover the physician for one million dollars/three million dollars.⁶⁶ The average gross salary for physicians, nationwide, is over \$230,000.⁶⁷ A \$9000 premium represents less than five percent of this salary.

The average doctor pays 2.9% of his gross income on malpractice premiums.⁶⁸ Even the average neurosurgeon spends only 5.8% on medical malpractice insurance premiums, assuming an annual income of only \$200,000.⁶⁹ Fifty-seven percent of doctors spend less than \$5000 per year on malpractice premiums, while only twelve percent spend over \$15,000.⁷⁰ As Richard Shandell, a New York trial lawyer observed recently: "A New York City doctor, who pays the highest [malpractice] premiums in the country, pays a smaller *percentage* of his gross income on liability insurance than does a New York cab driver."⁷¹

These statistics bring into question the need for MICRA-type legislation. Assuming, *arguendo*, medical liability premium costs are too high, as the Ohio Supreme Court has observed:

There obviously is no "compelling governmental interest" [in enacting

62. *Id.* at 28, col. 1. William Shernoff, the attorney representing the physicians in the lawsuit, called the malpractice furor a "phony crisis" and stated: "It's very simple. They made excessive profits and now they have to disgorge them."

63. PROFESSIONAL LIABILITY IN THE '80s, *supra* note 47, Report 1, at 8.

64. *Id.* at 12. This survey was conducted by the American Medical Assurance Company.

65. Insurance Rates Listing from Daugard Insurance Agency, Inc., Tarzana, California (1984).

66. *Id.* This coverage allows three one-million dollar claims per year.

67. The average net salary is \$129,500. Owens, *Doctors' Earnings: The Year of the Big Surprise*, MEDICAL ECONOMICS, Sept. 9, 1985, at 195, 203.

68. Kirchner, *Is Your Practice Begging For More Money?*, MEDICAL ECONOMICS, Nov. 12, 1984, at 214, 230. In addition, the doctor's malpractice insurance premiums can be deducted as a business expense from his or her income tax. This amount is close to the 2.3% spent on "professional car upkeep," and well over the 1.2% spent on continuing education. *Id.*

69. *Id.* at 230. The percentage would be lower for most neurosurgeons who typically make more than \$200,000 per year.

70. *Id.* at 229.

71. Letter from R. Shandell to the Editor of the Wall Street Journal (Oct. 6, 1983) (On file with the Public Affairs Dep't, Ass'n of Trial Lawyers of Am., Washington, D.C.).

MICRA-type legislation] unless it be argued that any segment of the public in financial distress be at least partly relieved of financial accountability for its negligence It is not the business of government to manipulate the law so as to provide succor to one class, the medical, by depriving another, the malpractice patients, of the equal protection mandated by the constitution.⁷²

MICRA Promotes Litigation Targeting Defendants Not Immunized

The tort reform provisions of MICRA can be expected to decrease the litigation costs of health care providers in two ways. Due to the \$250,000 limit placed on plaintiffs' potential recovery for non-economic damages, and limits on their ability to contract for quality legal representation, MICRA will deter the redress of legitimate grievances through litigation. Consequently, victims of malpractice may go either uncompensated or undercompensated.

On the other hand, defendants targeted in litigation can be expected to shift from health care providers to manufacturers of health care products, drugs, and equipment. For example, section 6146 of the California Business and Professions Code, limiting plaintiffs' attorney's contingency fees, applies only to actions against "health care providers."⁷³ Plaintiffs' attorneys can naturally be expected to name the manufacturers of the surgical instruments, drugs, or anesthetics used in a negligent medical procedure in medical malpractice lawsuits.⁷⁴ The \$250,000 limit on non-economic damages under sec-

72. *Graley*, 74 Ohio St. 2d at 321, 343 N.E.2d at 837.

73. "Health care provider," as defined in MICRA, includes any person licensed or certified pursuant to Division 2 (commencing with § 500) of the Business and Professions Code, or licensed pursuant to the Osteopathic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with § 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 § 1200) of the Health and Safety Code. "Health care provider" includes the legal representatives of a health care provider. *See, e.g.*, CAL. BUS. & PROF. CODE § 6146 (West Supp. 1985).

74. *Niles v. City of San Rafael*, 42 Cal. App. 3d 230, 116 Cal. Rptr. 733 (1974), provides an example of the extension of liability in malpractice cases, in which suit is brought against potential litigants other than the negligent health care provider(s). In *Niles*, suit was brought for damages arising from injuries sustained in a fight on a school playground. Liability was found on the part of the health care providers for medical malpractice, and also on the part of the city for negligent supervision of the playground.

This phenomenon has occurred in other tort liability cases as well. In *Barker v. Lull Eng'g Co., Inc.*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978), the manufacturer of a high lift loader was sued and held liable for injuries sustained by the inexperienced operator. Suit was not brought against the plaintiff's employer for negligent supervision, as the damage award would likely have been limited by the plaintiff's workers' compensation. *See also Pike v. Frank G. Hough Co.*, 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970) (wrongful death action against the manufacturer of a paydozer

tion 3333.2 of the Civil Code also motivates such creative pleading which names defendants not protected by MICRA.

Actions against drug and medical equipment manufacturers can only raise the overhead costs of health care providers by increasing the price of medical products. This, in essence, defeats the purpose of MICRA. The lower insurance costs to health care providers are offset by increased costs for drugs and medical supplies and equipment. Even if MICRA is successful in decreasing the overall costs to health care providers through a decrease in defense litigation costs, the severely injured malpractice victims—those most in need of compensation—ultimately shoulder the burden of subsidizing insurance costs for the medical profession.

MICRA and Traditional Negligence Liability

A central issue in the MICRA debate is the extent to which public policy allows a tortfeasor or his insurer to avoid liability for the consequences of his conduct. Section 1714(a) of the California Civil Code states: "Everyone is responsible, not only for the result of his willful acts, but also for any injury occasioned to another by his want of ordinary care or skill in the management of his property or person."⁷⁵ Justice Traynor, writing for the majority in *Malloy v. Fong*,⁷⁶ stated that the policy behind section 1714 "admits of no exception based upon the objectives, however laudable, of the tortfeasor."⁷⁷ This pro-plaintiff public policy declaration was preserved and re-emphasized in *Brown v. Merlo*.⁷⁸

It is difficult to justify MICRA within the spirit of public policy espoused in *Malloy*. The statute does not require that costs saved in litigation expenses be passed on to health care providers in the form of lower malpractice premiums. Insurance companies can internalize the savings they realize as a result of MICRA and continue to charge high premiums for medical malpractice coverage. A statutory scheme which relies upon the altruism of insurance companies should not dilute the traditional fault-based liability system by granting broad immunity to one of the wealthiest segments of our society.

In *Li v. Yellow Cab*,⁷⁹ the California Supreme Court made it clear that "in a system in which liability is based on fault, the extent of fault should govern the extent of liability . . ."⁸⁰ The *Li* court, in

which was driven in reverse into decedent).

75. CAL. CIV. CODE § 1714 (West 1985).

76. 37 Cal. 2d 356, 232 P.2d 241 (1951).

77. *Id.* at 366, 232 P.2d at 247.

78. 8 Cal. 3d 855, 867, 506 P.2d 212, 224, 106 Cal. Rptr. 388, 400 (1973).

79. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

80. *Id.* at 811, 532 P.2d at 1231, 119 Cal. Rptr. at 863.

eliminating contributory negligence, created "a system under which liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault."⁸¹

MICRA undermines the fault-based liability policy proclaimed in both *Malloy* and *Li*. By limiting potential damage awards, placing limits on attorney's fees, and allowing the court to prescribe the schedule of damage payments, MICRA has injected characteristics of the no-fault workers' compensation regime into a fault-based liability system. By creating this hybrid, MICRA adopts the elements of a no-fault system without the accompanying advantages of strict liability. Incorporating the severe restrictions of MICRA into the traditional fault-based civil litigation system creates a legal mismatch in which the plaintiff is unfairly disadvantaged. This hybrid system disguises medical malpractice dispute resolution under the illusion of fair judicial determination.

Either a no-fault system should be fully instituted to resolve all medical malpractice personal injury actions, imputing strict liability to negligent health care providers, or medical malpractice actions should return to unlimited liability whereby tortfeasors must fully compensate victims for their wrongs as determined by the trier of fact. In its present form, MICRA has no place in our civil litigation system.⁸²

REVISION OF MICRA'S TORT REFORM PROVISIONS

Section 3333.2 of the Civil Code

Section 3333.2 of the California Civil Code⁸³ establishes a \$250,000 limit for non-economic damages in medical malpractice actions. This provision also denies medical negligence victims the right to a jury trial by requiring the judge to decrease the jury's non-economic damage award to a level not exceeding \$250,000.⁸⁴ In effect,

81. *Id.* at 813, 532 P.2d at 1232, 119 Cal. Rptr. at 864.

82. If the legislature believes that MICRA provides a reasonable framework for tort dispute resolution, then no-fault regimes, such as workers' compensation, should be brought back into the courts for hybridized judicial determination. Alternatively, medical malpractice cases could be treated the same as workers' compensation cases. Either way, the small class of seriously injured malpractice victims would then not be subjected to the unique treatment afforded by the restrictions of MICRA.

83. CAL. CIV. CODE § 3333.2 (West Supp. 1985).

84. CAL. CONST. art. I, § 16. ("[t]rial by jury is an inviolate right and shall be secured to all . . .") It is well established that this constitutional guarantee entitles the parties in a personal injury action to a jury finding on the amount of damages. *See Langdon v. Superior Ct.*, 65 Cal. App. 41, 43-44, 223 P. 72, 73 (1923); *Farrell v. City of Ontario*, 39 Cal. App. 351, 353-57, 178 P. 740, 741-42 (1919).

the statute takes away from the jury the right to make a finding of fact that non-economic losses are greater than this cap.

Section 3333.2 of the Civil Code Discriminates Against Manufacturing Defendants

Section 3333.2 discriminates against manufacturers who are included as defendants in medical malpractice actions.⁸⁵ Generally, contributory wrongdoers, whether joint, concurrent, or successive tortfeasors, are jointly and severally liable for all damages proximately caused by any defendant.⁸⁶ Suppose a health care provider and a drug manufacturer were joined as defendants in an action brought by a malpractice victim. The jury awards \$750,000 in non-economic damages jointly and severally against the two defendants and the plaintiff collects the entire judgment against the drug manufacturer. If the drug manufacturer sought contribution against the health care provider, it would not be able to recover the full pro rata share of \$375,000 due to the \$250,000 ceiling imposed by section 3333.2 of the Civil Code. The drug manufacturer would sustain a \$125,000 loss.⁸⁷

There is no rational justification for imposing a greater burden on the manufacturing defendant than on the health care provider. This result undermines the public policy of California, which favors comparative negligence and indemnity among joint tortfeasors.⁸⁸ The manufacturing defendant, like the victim, is arbitrarily penalized by the discrimination inherent in this provision.

Non-Economic Damages Should Not Be Limited By Statute

The limits placed by MICRA on the recovery of non-economic damages apparently assumes such damages are less compelling than other types of damages. This proposition is disputable. Chief Justice Bird, in *Fein v. Permanente Medical Group*,⁸⁹ stated: "The burden on medical malpractice victims is no less real by virtue of the fact that it is 'non-economic' injury which goes uncompensated."⁹⁰ The propriety of awarding non-economic damages is firmly embedded in our common law jurisprudence and includes not only recovery for physical pain and loss of enjoyment of life, but also recovery for

85. Respondent and Cross-Appellant's Opening Brief at 78, *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985).

86. CAL. CIV. PROC. CODE § 875(c) (West 1980).

87. This hypothetical presupposes that each defendant is found equally liable. The California Civil Procedure Code provides for contribution among joint tortfeasors. *Id.* §§ 875-880.

88. See *American Motorcycle Ass'n v. Superior Ct.*, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

89. 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985).

90. *Id.* at 171, 695 P.2d at 689, 211 Cal. Rptr. at 392 (Bird, C.J., dissenting).

"fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal."⁹¹

While \$250,000 might, on first impression, appear to be a considerable sum to award for non-economic damages, a report by the National Association of Insurance Commissioners shows that in 1978 infants accounted for twenty-five percent of all cases in which indemnity was paid for "permanent major injuries."⁹² The same study shows that infants accounted for thirty-two percent of all "grave injuries."⁹³ Spread over an entire lifetime of suffering by these infants, \$250,000 shrinks to insignificance.⁹⁴

Although the concepts of "pain and suffering," loss of consortium, and other similar non-economic damages are admittedly difficult to value in monetary terms,⁹⁵ they are not unquantifiable or undefinable concepts.

For a child victim of medical negligence who has, for example, become paralyzed, the compensation collected for a lifetime worth of suffering comes from "non-economic damages."⁹⁶ Similarly, a person, whether child, adolescent, or adult, who has been severely disfigured, is compensated by "non-economic damages" for the suffering resulting from humiliation and embarrassment.⁹⁷

Clearly "pain and suffering" is a reality for those who must endure the symptoms. For poor plaintiffs, non-economic damages provide the principal source of compensation for reduced lifespan or loss of physical capacity in instances where they are unable to prove substantial loss of future earnings or other economic damages.

Because it is difficult for one to place a dollar value on non-economic losses, that responsibility has traditionally been delegated to the jury. In *Hysell v. Iowa Public Service Co.*,⁹⁸ the court observed:

91. *Capelouto v. Kaiser Found. Hosp.*, 7 Cal. 3d 889, 892-93, 500 P.2d 880, 883, 103 Cal. Rptr. 856, 859 (1972).

92. "Permanent major injuries" is a category just below "grave injuries." PROFESSIONAL LIABILITY IN THE '80s, *supra* note 47, Report 1, at 8.

93. *Id.*

94. If the plaintiff invests the non-economic award at an interest rate of 10%, the award would yield \$25,000 per year. However, when considered with the other provisions of MICRA, most notably § 667.7, the \$25,000 non-economic award, paid periodically, will not yield the interest that a lump sum payment would.

95. See *Seffert v. Los Angeles Transit Lines*, 56 Cal. 2d 498, 511-12, 364 P.2d 337, 350, 15 Cal. Rptr. 161, 174 (1961) (Traynor, J., dissenting).

96. Koskoff, *The Nature of Pain and Suffering*, 13 TRIAL 21, 23 (1977).

97. Hampton, *Anxiety Neurosis Following Trauma*, 30 AM. JUR. PROOF OF FACTS 1, 2 (1973).

98. 559 F.2d 468 (8th Cir. 1977).

“There is no market in pain and suffering—any monetary value is necessarily inexact, and the trier of fact must be afforded wide discretion in determining what is fair compensation.”⁹⁹ Section 3333.2 has preempted a role most appropriately left to the jury.

A likely by-product of section 3333.2 is the characterization of non-economic damages as enacting special damages. For example, where medical malpractice resulting in disfigurement gives rise to a maximum non-economic award of only \$250,000, recovery of costs for psychotherapy and psychoanalysis in treating the mental effects of the disfigurement is unlimited. Such costs can be expected to be claimed with increasing frequency and creativity as a result of the arbitrary limit placed on claims for non-economic damages.

Suggested Revisions

Non-economic damages are as real and worthy of compensation as any other form of damages. Our common law tradition has always recognized the right of a person to be made whole for injuries by the responsible tortfeasor or tortfeasors.¹⁰⁰ Because the limitation placed by MICRA on the recovery of non-economic damages is only weakly related to the goal of lowering malpractice premiums,¹⁰¹ an arbitrary limit on non-economic damages is not justified. No rational basis exists for singling out the most severely injured victims of medical negligence to subsidize health care providers and their insurers in reduced non-economic damages. It is difficult to propose revisions, within the framework of damage limitations, which preserve any degree of equity for the medical malpractice plaintiff.

However, a patient compensation fund would help ensure that injured plaintiffs are fully compensated for their injuries, while lowering the cost burden on the medical profession. Such a fund could be operated by the state and used to pay the remainder of any settlement or judgment against a health care provider in excess of a statutorily defined amount. The patient compensation fund might be funded through a surcharge on health care providers, medical institutions, insurance companies, health care consumers, or taxpayers in general. This system would spread the risk of liability over a statutorily specified group, prevent individual insurance companies from suffering potentially lethal losses, and ensure that professional liability insurance remains available and affordable. Patient compensation funds have been upheld by the state supreme courts in Florida, Indiana, Louisiana, and Nebraska.¹⁰²

99. *Id.* at 472.

100. *Malloy*, 37 Cal. 2d at 356, 232 P.2d at 241.

101. See *supra* text accompanying notes 7-10.

102. PROFESSIONAL LIABILITY IN THE '80S, *supra* note 47, Report 1, at 12-13.

The California legislature might enact a pro rata reduction for all non-economic damages.¹⁰³ For example, if the legislature provided for a five to fifteen percent reduction on *all* non-economic damage awards, it would reduce the financial burden on medical malpractice insurers, while at the same time reducing the present burden on those plaintiffs with the most severe injuries.¹⁰⁴

Another possible revision would be to simply raise the limit on non-economic damages to, for instance, one million dollars. Such a reform minimizes the inequities and discriminations inherent in the original provision by adversely affecting fewer severely injured malpractice victims. Of course, the small group of individuals with non-economic damage awards over this figure would remain under-compensated.¹⁰⁵

Section 6146 of the Business and Professions Code

Section 6146¹⁰⁶ undermines the concept of high quality legal representation by prescribing fees much lower than those obtainable by attorneys in other tort actions. This provision severely limits the ability of seriously injured plaintiffs to contract for quality legal representation. By artificially depressing the victim's legal representation fees in medical malpractice actions, while at the same time permitting defendants to otherwise pay whatever the market will bear for top quality legal services, medical malpractice plaintiffs are denied full enjoyment of their constitutional rights of equal protection and due process.¹⁰⁷

Section 6146 establishes a sliding scale of fee limits; the greater the recovery, the lower the allowable percentage. This regime has several effects. By imposing fee limits (ten percent of all awards over \$200,000), the plaintiff will have the most difficulty obtaining qual-

103. See Note, *supra* note 10, at 952.

104. This presupposes that juries would need to be kept in the dark concerning the pro rata reduction of the non-economic award. As soon as one juror became aware of the statutory reduction, that jury could be expected to increase the non-economic award by the same percentage that the award is required to be decreased by the statute. This suggested reform removes only one of the several types of discrimination inherent in MICRA. It does not resolve the constitutional "jury trial" question.

105. The number of malpractice victims with non-economic damages exceeding one million dollars would indeed be small. In 1978, only three out of every 1000 claims, a total of 23 claims, represented a one million dollar plus award in economic and non-economic damages *combined*. PROFESSIONAL LIABILITY IN THE '80s, *supra* note 47, Report 1, at 6-8.

106. CAL. BUS. & PROF. CODE § 6146 (West Supp. 1985).

107. U.S. CONST. amend. XIV, § 1.

ity representation in those cases requiring a large recovery to fully compensate the victim. These are the very cases which most deserve and require quality legal representation. Because section 6146 pertains only to medical malpractice, these cases may become less attractive to plaintiffs' attorneys, leaving the malpractice victim with a smaller pool of attorneys to choose from.¹⁰⁸ Conversely, defendants can concentrate their legal resources on those cases with the highest potential loss. Given that medical malpractice defendants are now limited to paying \$250,000 in non-economic damages, defendants can focus on liability issues in those cases with large special damages by assigning these cases to their best, most highly paid attorneys, creating a legal mismatch which finds plaintiffs on the losing end.

Another likely effect of the decreasing sliding scale arrangement is to reduce the amount of time and money available to plaintiffs' attorneys in obtaining a higher damage award. This exacerbates the inherent conflict of interest between attorneys and their clients in contingent fee arrangements.¹⁰⁹ Defendants' attorneys may be motivated to include plaintiffs' attorney's fees, at rates higher than that allowed by section 6146, as a part of settlement arrangements. This may persuade plaintiffs' attorneys to encourage earlier settlement at lower recovery levels.

One study showed that 440 attorney hours are expended on the average "zero recovery" malpractice case.¹¹⁰ Under the sliding scale provision, along with the other tort reform provisions of MICRA, many attorneys can be expected to turn away medical malpractice cases despite valid claims, where complex injuries will require expensive expert testimony. Alternatively, plaintiffs' attorneys can be expected to seek compensation on an hourly rate basis; hourly fees are not controlled by the statute. In this instance, the Act discriminates against poor plaintiffs who cannot afford to retain legal representation at an hourly rate.

In a survey conducted by this writer of personal injury/medical malpractice attorneys throughout California,¹¹¹ ninety percent of

108. As the New Hampshire Supreme Court stated in *Carson v. Maurer*: The regulation of attorney's fees solely in the area of medical malpractice inevitably will make such cases less attractive to the plaintiff bar. Consequently, [the statute] will at least somewhat deter the litigation of legitimate causes of action, thus creating a potential impediment to injured individuals' access to the courts and counsel.

120 N.H. at 939, 424 A.2d at 839.

109. A comparison may be drawn here to a progressive tax system wherein each additional dollar earned is taxed to a greater degree, thus decreasing the work incentive. See Note, *supra* note 10, at 944 n.696 ("[t]o some extent, [the disincentive on plaintiff's attorney to pursue a higher recovery] must have been the goal of MICRA").

110. HEW REPORT, *supra* note 4, at 33. When handling a case on a contingency fee basis, the attorney receives a "zero recovery" unless the suit is won.

111. To better gauge the effect MICRA has had on practicing attorneys in Cali-

those responding claimed that they are less likely to take a medical malpractice case under MICRA. Interestingly, fifty-eight percent of those surveyed said that, of the four tort reform provisions addressed in this Comment, the sliding scale provision most discouraged them from taking a medical malpractice case. Limiting contingency fees tends to drive attorneys out of the medical malpractice market, increasing the burden on malpractice victims who deserve high quality legal representation.

Plaintiffs' ability to obtain competent legal representation is essential to the successful prosecution of a medical malpractice action. The fee limits imposed by section 6146 may undermine the plaintiffs' right to petition the government for redress of grievances, even though a similar argument was recently rejected by the United States Supreme Court within the limited context of Veterans Ad-

ifornia, surveys were mailed to 127 personal injury/medical malpractice attorneys throughout the state. A total of 40 were completed and returned, for a response ratio of 31%. The questions and results are as follows:

- A. California Civil Code § 3333.1
- B. California Civil Code § 3333.2
- C. California Business & Professions Code § 6146
- D. California Civil Procedure Code § 667.7

Question 1. Do you agree that MICRA, in some form, is needed in California?

Results: Yes-4, No-36

Question 2. Of the four MICRA provisions identified above, place the letter of the provision which you find most discourages you from taking a medical malpractice case next to each of the following types of malpractice situations:

Results: (More than one answer was given for each situation)

- i. Wrongful death action: A-3, B-15, C-14, D-6
- ii. Soft tissue injury: A-11, B-8, C-8, D-3
- iii. Failure to diagnose: A-5, B-17, C-17, D-6
- iv. Malpractice generally: A-8, B-19, C-18, D-10

Question 3. Given that California has enacted MICRA, are you a) MORE INCLINED, b) LESS INCLINED, c) NEITHER to resolve a medical malpractice case by settlement than if California had not enacted MICRA?

Results: MORE INCLINED-18, LESS INCLINED-0, NEITHER-19

Question 4. Given that California has enacted MICRA, are you a) MORE LIKELY, b) LESS LIKELY, c) NEITHER to take a plaintiff's medical malpractice case than if California had not enacted MICRA?

Results: MORE LIKELY-0, LESS LIKELY-35, NEITHER-4

Question 5. Do you tend to charge the maximum fee allowed under MICRA (Business & Professions Code]] 6146) in cases with small recoveries (\$50,000 dollars)?

Results: Yes-34, No-6

Question 6. Would a provision in the statute allowing for higher fees in exceptionally difficult cases make it more likely for you to take medical malpractice cases?

Results: Yes-31, No-7

Question 7. In your view what changes, if any, should be made to California's MICRA?

Results: Several responses to this question have been incorporated, in some form, into this Comment.

ministration benefit hearings.¹¹²

In *Roa v. Lodi Medical Group*,¹¹³ the majority compared MICRA to workers' compensation, claiming that regulation of attorney's fees in California is not unusual.¹¹⁴ However, workers' compensation is readily distinguishable from section 6146. Under the Workers' Compensation Act,¹¹⁵ injured parties do not have to prove negligence. Also, attorneys are not likely to be discouraged from taking cases in the workers' compensation field since the risks are relatively low and "reasonable compensation" is statutorily provided.¹¹⁶ In malpractice actions, however, attorneys receive no compensation unless there is a recovery in the case.

Non-limited Contingency Fees Screen Out Groundless Suits

A further justification offered for the sliding-scale fee arrangement is the deterrence of frivolous suits.¹¹⁷ However, bringing frivolous medical malpractice suits is highly unlikely given the costs, time, and effort required to win.¹¹⁸ The risk of a zero recovery is already quite high; sixty percent of medical malpractice cases which go to trial are unsuccessful, resulting in no recovery.¹¹⁹ In 1973, a

112. In *Walters v. National Ass'n of Radiation Survivors*, 105 S. Ct. 3180 (1985), the Court overturned the decision of the United States District Court for the Northern District of California which had issued a nationwide preliminary injunction barring the enforcement of a \$10 fee limit on attorney's fees in cases in which veterans seek death and disability benefits. The District Court, holding that the attorney's fee limitation infringed on the plaintiff's right of petition, had stated, "[i]t is evident that the First Amendment protects individual's rights to obtain the adequate legal representation necessary to ensure their rights of petition, access to the courts, and association, just as it protects organizations' rights to such representation." *National Ass'n of Radiation Survivors v. Walters*, 589 F. Supp. 1302, 1324-25 (N.D. Cal. 1984).

The Supreme Court, with Justice Rehnquist writing for the majority, upheld the constitutionality of the statutory fee limitation on the grounds that: 1) invalidation of the fee limitation would frustrate the Congressional goal of giving the veteran the entire benefits award, without dividing it with an attorney, 105 S. Ct. at 3189-91; 2) invalidation would complicate a process that Congress wished to be as informal and nonadversarial as possible, *id.* at 3191-92; and 3) "the process allows a claimant to make a meaningful presentation" on behalf of his claim for disability benefits without the assistance of an attorney. *Id.* at 3197.

In a well-reasoned dissent, Justice Stevens stated that "[w]hat is at stake is the right of an individual to consult an attorney of his choice In my opinion that right is firmly protected by the Due Process Clause of the Fifth Amendment and by the First Amendment." *Id.* at 3214 (Stevens, J., dissenting).

113. 37 Cal. 3d 920, 922, 695 P.2d 164, 166-67, 211 Cal. Rptr. 77, 79-80 (1985).

114. *Id.* at 922, 695 P.2d at 166-67, 211 Cal. Rptr. at 79-80.

115. CAL. LAB. CODE § 3600 (West 1971).

116. *Id.* § 4903 (the statute provides for "a reasonable attorney's fee for legal services pertaining to any claim for compensation . . .").

117. *Roa*, 37 Cal. 3d at 931, 695 P.2d at 170-71, 211 Cal. Rptr. at 83-84.

118. Keene, *California's Medical Malpractice Crisis*, in A LEGISLATOR'S GUIDE TO THE MEDICAL MALPRACTICE ISSUE 29-30 (1976).

119. Reder, *Contingent Fees in Litigation with Special Reference to Medical Malpractice*, in THE ECONOMICS OF MEDICAL MALPRACTICE 218, 227 (1978).

United States Department of Health, Education, and Welfare Commission on Medical Malpractice found the contingency fee arrangement operates as an effective screening device against groundless liability suits, since the lawyer who loses collects nothing.¹²⁰ The prospect of spending a great deal of time pursuing a suit that will ultimately be lost caused medical liability attorneys to reject eighty-five percent of all prospective plaintiffs.¹²¹ Arguably, limiting the attorney's contingency fee will further prevent the litigation of meritorious claims.

Some experts suggest that limiting an attorney's percentage of a liability award only encourages plaintiffs' attorneys to seek even larger awards.¹²² Indeed, the survey this writer conducted reveals that the great majority (eighty-five percent) of attorneys involved with medical malpractice cases tend to charge the maximum fee allowed under section 6146 in cases with small recoveries. In such cases, the statute may actually increase the attorney's contingency fee by providing a floor (forty percent of the first \$50,000 recovered) as well as a ceiling on the contingency percentage rate.

Suggested Revisions

Generally, the goal of section 6146 of the Business and Professions Code is to lower malpractice insurance premiums by reducing "over-compensation" paid to plaintiffs' attorneys.¹²³ However, these fees are not significantly greater than those of defendants' attorneys.¹²⁴ There is no rational basis for restricting plaintiffs' fees while leaving defendants' fees untouched. In fact, since defendants' fees are paid directly out of insurance funds, limits on these fees would yield a far greater potential reduction of premiums than equivalent limits on plaintiffs' fees. Section 6146 should, therefore, be revised to place limits on defendants' attorney's fees.

If limits are imposed on plaintiffs' attorney's fees, there are several reforms that, if instituted, would help ease the burden on injured

120. HEW REPORT, *supra* note 4, at 33. In its survey, the Commission found that plaintiffs' attorneys believed that medical liability cases were the most difficult of all personal injury suits.

121. PROFESSIONAL LIABILITY IN THE '80s, *supra* note 47, Report 2, at 18.

122. *Id.*

123. See *Roa*, 37 Cal. 3d at 920, 695 P.2d at 164, 211 Cal. Rptr. at 77. The theory is that, because plaintiffs' attorneys will take a smaller percentage of a damage award, there will be less of an incentive to continue work on a case and lower settlements will be more likely, thus leading to lower malpractice insurance costs.

124. HEW REPORT, *supra* note 4, at 33.

malpractice victims. One method would reverse the statute's sliding scale by providing the highest percentage rate to the highest recoveries. Attorneys would thus not be discouraged from taking on the most difficult cases. This would make it easier for the most severely injured malpractice victims to obtain quality legal representation.¹²⁶

Of course it could be argued that if the present fee schedule were reversed, those plaintiffs with the lowest potential damage awards would have a more difficult time contracting for legal counsel. This argument has merit, given that the most difficult aspects of a malpractice case, proof of negligence and proximate causation, are present regardless of the size of the damage award. Perhaps the better method of limiting plaintiffs' attorney's contingency fees would be to establish a fixed 33.3% contingency fee rate for all levels of recovery. This limit is reasonable and is in keeping with most other tort cases. It also eliminates higher contingency fees (those over this percentage).

If plaintiffs' attorney's fees are to remain limited to present levels, some method should be incorporated to provide higher fees in exceptionally difficult cases. This would, of course, present the problem of determining which cases are the most difficult. The vast majority of all malpractice cases are difficult to prosecute. Consequently, this may not be a feasible revision. Significantly, eighty-two percent of all attorneys surveyed by this writer said that a statutory provision allowing for higher fees in exceptionally difficult cases would make it more likely for them to take a medical malpractice case.

Section 667.7 of the Civil Procedure Code

By requiring periodic payments for future damages awards over \$50,000, the legislature hoped to alleviate the detrimental effect on insurance companies of paying large, lump sum judgments.¹²⁶ However, section 667.7¹²⁷ may bring great harm to medical malpractice victims by denying them due compensation.

Section 667.7 Usurps the Traditional Role of the Jury

The right to a jury trial is guaranteed by the California Constitution.¹²⁸ Section 667.7 deprives medical malpractice victims of this right by failing to leave intact the determination of damages made by the jury. While the jury makes the initial award, in cases involv-

125. Malpractice victims will be harder pressed than other tort victims to obtain quality legal representation until all of the restrictive tort provisions of MICRA are either revised or repealed.

126. See Note, *supra* note 10, at 966-68 (discussing the relationship between § 667.7 and the attainment of the goals of MICRA).

127. CAL. CIV. PROC. CODE § 667.7 (West Supp. 1985).

128. CAL. CONST. art. I, § 16.

ing future damages of \$50,000 or more, the judge determines the dollar amount and schedule of payments. This statute denies medical malpractice plaintiffs the right to trial by jury concerning these factual issues. In her dissenting opinion in *American Bank & Trust Co. v. Community Hospital*,¹²⁹ Chief Justice Bird stated:

Under [section 667.7] the judge possesses the power to nullify the jury's award of damages even though the award is entirely proper. A defendant who fails to convince the jury enjoys a second chance before the judge. The procedure violates the very essence of the right to trial by jury.¹³⁰

The power given to the court to alter a jury award may be devastating to the plaintiff. Overestimating the victim's lifespan, as determined by the jury, may spread future damages over a period longer than that which the injured victim will actually live. A significant percentage of the jury award can, therefore, remain in the hands of the defendant. A court error of only one year may deprive the plaintiff of twenty-five percent of the jury award.¹³¹ The court may ultimately deprive the plaintiff of this award when it is most needed or, alternatively, might second guess the findings made by the jury on the expected inflation rate. This could lead to a significant difference in the size of the actual recovery.

If the victim dies before receiving full payment of the damage award, the balance of the money that was awarded becomes a windfall for the defendant's insurance company. Moreover, the defendant's insurance company need not pay interest to the injured victim. Any profit made from investments remains in their hands. By depriving the malpractice victim of access to the entire amount of the judgment, the statute places upon that individual the entire risk that unforeseen future contingencies, related to the injury, will render the periodic payments inadequate to meet his or her needs.

Jury-designated damage awards are not restricted in any other type of civil action. There is no rational reason why medical malpractice damage awards should be paid out differently in these cases than in other actions. Alternatively, if periodic damage payments must remain a part of medical malpractice awards, no-fault and attorney's fees provisions, such as those found in the workers' compensation system, are necessary to make it rational.¹³²

129. 36 Cal. 3d 359, 683 P.2d 670, 204 Cal. Rptr. 671 (1984).

130. *Id.* at 390, 683 P.2d at 690, 204 Cal. Rptr. at 691 (Bird, C.J., dissenting).

131. *Id.*

132. *See supra* note 82 and accompanying text.

Suggested Revisions

Any time a judge is permitted to tamper with the findings made by the jury, the jury trial guarantee is abrogated to some degree. Short of repeal, the solution might be found in making the periodic payment provision discretionary on the part of the jury, rather than mandatory on the court. This would be more in keeping with the historical and constitutional function of the jury in determining damages.

If the legislature intends the provision to remain mandatory, it should be revised to guarantee the plaintiff at least fifty percent of the entire damage award. This guaranteed percentage should be paid in a lump sum to reduce the possibility of inadequate coverage of the plaintiff's future needs arising from his or her injury.

Plaintiffs with the largest future damage awards are generally severely injured, with future needs that are difficult to predict. To help ensure that the unexpected contingency needs of these plaintiffs will be provided for, periodic payments should be set at a \$100,000 per year minimum for awards exceeding \$100,000 in future damages.

In the event the victim dies before complete payment has been made, all outstanding periodic payments should revert to the victim's heirs or dependents. This would eliminate defendant's insurer obtaining a windfall by retaining the funds which the jury has awarded to the victim. Alternatively, if the legislature believes that these funds should not go to the victim's estate, any profit the insurance companies make from the plaintiff's early demise or from investment income should be utilized to reduce malpractice insurance premiums.¹³³

Section 3333.1(a) of the Civil Code

Section 3333.1(a)¹³⁴ distinguishes between medical malpractice victims and all other tort victims by allowing the defendants in malpractice actions to introduce evidence of insurance or other compensation obtained by the plaintiff, thus invalidating the collateral source rule. The supporters of MICRA claim the provision eliminates double recoveries,¹³⁵ but this argument is not convincing. The victim (or his family) has either paid the premiums for the "collateral" insurance or has earned the payments as a part of benefits which substitute for earned wages. Because tort victims must pay

133. While it is apparently assumed by the legislature that savings from periodic payments and reduced plaintiff recoveries will be used to reduce premiums, MICRA contains no provisions requiring insurance carriers to pass on these savings in the form of lower premiums.

134. CAL. CIV. CODE § 3333.1 (West Supp. 1985).

135. See Keene, *supra* note 118, at 31.

attorney's fees and costs out of their damage awards, the collateral source rule provides a closer approximation to full compensation. "Abolishing the collateral source rule is like saying it's unjustified to collect on three life insurance policies when the insured only dies once though the insured has systematically paid the premiums on those policies."¹³⁶

The tortfeasor is given a windfall by being exempted from the general rule that negligent wrongdoers must fully compensate their victims. If there must be a windfall, the injured victim should get it, not the tortfeasor.¹³⁷ Abolition of the collateral source rule not only adversely affects the malpractice victim and the victim's insurer by requiring the insurer to compensate even though the negligent tortfeasor is fully insured, but it will likely result in an increased insurance burden on the general public.¹³⁸

Suggested Revisions

Section 3333.1(a) of the Civil Code allows negligent health care providers and their insurers to benefit from the foresight of medical negligence victims who have obtained insurance. If the collateral source rule is appropriate in general, then it surely is appropriate for medical malpractice litigation and should not be abolished by MICRA. If the legislature is intent on invalidating the collateral source rule solely in the context of malpractice litigation, the defendant should be required to disclose to the judge and jury the amount of insurance procured to protect against negligence. Because section 3333.1(a) is discretionary, the jury could weigh this evidence in deciding whether or not to reduce the plaintiff's award.¹³⁹

Another possibility would be to revise section 3333.1(a) so that it would not apply to an award for future medical expenses. As it presently reads, the provision allows for the introduction of evidence "of

136. Report of the Commission on Medical Professional Liability, *Excerpts from the Separate Statement of Richard M. Markus (Former President of the Ass'n of Trial Lawyers of Am.)*, 1977 A.B.A. ANN. REP. 153.

137. See *Grayson v. Williams*, 256 F.2d 61, 65 (10th Cir. 1958).

138. See Note, *supra* note 10, at 948 n.727 (as plaintiff's insurers find themselves paying off medical malpractice claims, they can naturally be expected to raise their policy rates to cover the additional burden).

139. The legislature, in making the provision discretionary, likely believed that the jury would take the plaintiff's collateral benefits into account when assigning a damage award. This creates a degree of arbitrariness. For instance, when two individuals, similarly situated with respect to injuries and collateral benefits, are before two different juries, one individual may have his award reduced by the value of his collateral benefits while the other may not.

any amount payable”¹⁴⁰ However, evidence of “amounts payable” with reference to future medical expenses is speculative. Even if the victim has insurance at the time of trial, future coverage may not be accurately predicted. Likewise, the victim may not be working when the need for future care arises, providing no guarantee of coverage under an employee health plan.

The statute should provide for jury instructions informing the jury there is a cap on non-economic damages. This would give the jury a better overall understanding of the plaintiff’s true financial situation when deciding the total amount of damages recoverable.

Section 3333.1(b) of the Civil Code

Section 3333.1(b)¹⁴¹ bars the plaintiff’s collateral source from obtaining reimbursement from the medical malpractice defendant. In effect, the provision shifts the burden of medical malpractice from the tortfeasor’s insurance carrier to the collateral source, whether that source be the plaintiff’s employer, workers’ compensation carrier, or insurance company. Section 3333.1(b) thus insulates the health care provider from much of the responsibility for negligence.

The cities that must bear the burden of section 3333.1(b) suffer a decrease in revenues by not being able to recover their workers’ compensation expenditures, or by paying higher premiums for their workers’ compensation insurance.¹⁴² Shifting the burden of rising malpractice insurance costs to cities and other employers is not a rational way of meeting the goals of MICRA, because both are already under financial duress due to rising workers’ compensation costs and, certainly for public employers, shrinking budgets.

Where subrogation rights are at issue, the policy question is whether the tortfeasor should be allowed to shift the burden of payment to an innocent collateral source. While this is often a question of which insurance company will bear the loss, the effect of section 3333.1(b) may be more extensive. Because the phrase “collateral source” is broadly defined in section 3333.1 to include provisions of the United States Social Security Act and “any state or federal income disability . . . act,”¹⁴³ the subrogation rights established for Federal Disability Benefits under 42 U.S.C. § 401, Aid to Families and Dependent Children under 42 U.S.C. § 601, Supplemental Security Income for the Blind and Disabled under 42 U.S.C. § 1381, Medicare under 42 U.S.C. § 1395, and Medi-Cal under 42 U.S.C. §

140. CAL. CIV. CODE § 3333.1 (West Supp. 1985).

141. *Id.*

142. *Barme*, 37 Cal. 3d at 184, 689 P.2d at 452, 207 Cal. Rptr. at 822 (Mosk, J., dissenting).

143. CAL. CIV. CODE § 3333.1 (West Supp. 1985).

1396 could be impacted.¹⁴⁴ Section 3333.1(b) undermines these federal programs by contravening the established public policy to shift, wherever possible, certain public economic burdens to the tortfeasor or its malpractice insurance carrier. Depriving the malpractice victim's collateral source of its right to recover tort damages is contrary to the public policy of the state of California in that it allows the tortfeasor to avoid responsibility for its own conduct, by shifting the burden to employers and insurers who never intended to enter the medical malpractice insurance field.¹⁴⁵

Suggested Revisions

Section 3333.1(b) should be revised to restore the lien and subrogation rights that have already been established under federal and state statutes and decisions.¹⁴⁶ If the legislature feels that it cannot completely restore the subrogation rights of the collateral source, a partial restoration can be implemented.

For example, plaintiff's insurance company can recover fifty percent of the damage award from the defendant's insurance carrier. Alternatively, limits can be set within which plaintiff's collateral source and defendant's insurance carrier can negotiate a settlement. If plaintiff's collateral source were guaranteed a twenty-five percent subrogation recovery, but no greater than seventy-five percent, the two parties could, in many cases, successfully negotiate an out of

144. Appellant's Opening Brief at 20, *City of Huntington Park v. Wood*, 37 Cal. 3d 174, 689 P.2d 446, 207 Cal. Rptr. 816 (1984).

145. See *supra* note 82 and accompanying text.

146. CAL. LAB. CODE § 3852 (West 1971) gives to all employers the statutory right to sue a third party tortfeasor. California Civil Code § 3333.1(b) denies the employer his right of action which was established in the Labor Code. While it is true the legislature has the power to abrogate rights it has previously conferred, it is interesting to note that no attempt was made by the legislature to amend the Labor Code section, even though, in implementing the tort reform provisions of MICRA, at least 16 other code sections were amended.

A direct right of action by the United States government against the tortfeasor, as well as provisions for subrogation against the injured malpractice victim is provided in 42 U.S.C. §§ 2651-2653 (1982). California Civil Code § 3333.1(b) will thus create another subclassification consisting of collateral benefit sources who will be able to recover under federal statutes.

The State of California has a lien against any personal injury settlement or judgment for medical expenses paid on behalf of the malpractice victim by the County Welfare Department through the use of a Medi-Cal card or by the California Department of Benefit Payments. This lien is authorized under CAL. WELF. & INST. CODE §§ 14124.70-14124.79 (West 1980).

The private liens of insurance carriers have been upheld in *West v. State Farm Mut. Auto. Ins. Co.*, 30 Cal. App. 3d 562, 106 Cal. Rptr. 486 (1973), and in *Block v. California Physicians Serv.*, 244 Cal. App. 2d 266, 53 Cal. Rptr. 51 (1966).

court settlement. This would cut down on litigation expenses, allow a degree of give and take between the parties, and assure the plaintiff's collateral source of some measure of recovery.

CONCLUSION

There is a medical malpractice problem in California. It is too much medical negligence. The legislature should turn its attention to the root cause of the current malpractice problem: the substantial number of injuries sustained by patients during the course of hospital and medical treatment. Statutes should be enacted which are aimed at improving medical risk control and quality review among health care providers. MICRA seeks to solve the problem by dealing with a symptom—high medical malpractice rates¹⁴⁷—rather than attacking the cause—medical negligence. The result of the Act is that the politically vulnerable group of seriously injured medical malpractice victims is made to bear the burden of bringing down the doctors' insurance rates.

MICRA is an attempt by the California legislature to address issues that are inherent in all personal injury litigation, not merely medical malpractice. These issues, which include the proper degree of compensation for negligently caused injury; the method(s) of compensation that should be employed in personal injury actions; and how plaintiffs' attorneys should be compensated, should not be addressed narrowly by the legislature, affecting only a small class of medical malpractice victims. Logically, MICRA should either be repealed (or at least significantly revised), or all personal injury litigation should be reformed along the same lines.

Most would agree that the latter choice would be a radical and unjustified departure from our common law tradition. The sweeping reforms wrought by MICRA, directed solely at the victims of medical negligence, are likewise unjustified. As James S. Todd, M.D., Diplomate of the American Board of Surgery and a Trustee of the American Medical Association, has said: "[E]fforts directed toward tort reform and legislative relief must be reasonable and not self-serving. Malpractice is a medical problem, not a legal one, and those injured as a result of negligence are entitled to fair and prompt compensation"¹⁴⁸

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147. See *supra* notes 68-71 and accompanying text (demonstrating that medical malpractice insurance rates are not unreasonably high).

148. Goddard, for the PUBLIC AFFAIRS DEP'T, ASS'N OF TRIAL LAWYERS OF AM., THE AMERICAN MEDICAL ASSOCIATION IS WRONG, THERE IS NO MEDICAL MALPRACTICE CRISIS 11 (1985).