

California Western Law Review

Volume 20 | Number 2

Article 6

1-1-1984

Awarding Punitive Damages in Medical Malpractice Arbitration

Paul M. Nussbaum

Follow this and additional works at: <https://scholarlycommons.law.cwsl.edu/cwlr>

Recommended Citation

Nussbaum, Paul M. (1984) "Awarding Punitive Damages in Medical Malpractice Arbitration," *California Western Law Review*: Vol. 20 : No. 2 , Article 6.

Available at: <https://scholarlycommons.law.cwsl.edu/cwlr/vol20/iss2/6>

This Article is brought to you for free and open access by CWSL Scholarly Commons. It has been accepted for inclusion in California Western Law Review by an authorized editor of CWSL Scholarly Commons. For more information, please contact alm@cwsl.edu.

HEINONLINE

Citation: 20 Cal. W. L. Rev. 312 1983-1984



Content downloaded/printed from [HeinOnline](#)

Wed Sep 28 15:32:33 2016

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[Copyright Information](#)

Awarding Punitive Damages in Medical Malpractice Arbitration

INTRODUCTION

The issue of awarding punitive damages in medical malpractice arbitration is of growing concern to the legal community.¹ Arbitration, especially in medical malpractice, has become quite instrumental in disposing of claims and disputes.² Consequently, California, in response to the medical malpractice “crisis,”³ has encouraged the use of arbitration as one means of resolving the “crisis.”⁴

Punitive damages are generally awarded to deter wrongful conduct by punishing a defendant who has acted in a particularly

1. “[T]he issue of whether arbitrators [of medical malpractice disputes] may award punitive damages is rarely confronted and has not been resolved.” Bassis, *Arbitration of Medical Malpractice Disputes—Some Problems*, INS. L.J. 260, 267 (1979) [hereinafter cited as Bassis].

2. The severe problems confronting the medical profession polarized state attention to these medical malpractice issues. Consequently, state legislatures have adopted a variety of programs incorporating both substantive and procedural changes in existing law in order to temper the malpractice crisis. These remedies have included . . . establishing either compulsory or voluntary arbitration plans.

Id. at 263 (footnote omitted).

3. A detailed analysis of the medical malpractice crisis is beyond the scope of this Comment. However, a brief outline of the general aspects attributed to the crisis may be useful.

The basic components of the medical malpractice crisis may be summarized as follows:

1. Drastic increases in medical malpractice claims.
2. Astonishing increases in the size of malpractice jury awards.
3. Heavy increases in insurance premiums for malpractice.
4. Continual withdrawal of medical malpractice insurers.
5. Consequential increases in the cost of medical services to the consumer.
6. Greater incentive for frivolous claims, due to excessive jury awards.
7. Defensive medicine practiced by increasing numbers of physicians.
8. Breakdown of trust and conducive attitude between physician and patients.
9. Congestion in the courts, overloaded dockets.

Butler, Jr., *Arbitration: An Answer to the Medical Malpractice Crisis?*, 9 BEV. HILLS B.J., 41, 67-70 (1975) [hereinafter cited as Butler]; Bassis, *supra* note 1, at 262; Novick, *Medical Malpractice: Arbitrating Disputes* L.A. LAW. March 1979, at 34, [hereinafter cited as Novick].

4. “In the 1975 Extraordinary Medical Malpractice Session of the California Legislature, Assemblyman Keene introduced A.B. 1, which was enacted into law as Chapter 1 of the Extraordinary Session.” Butler, *supra* note 3, at 41 n.3. The bill was signed by the Governor on September 3, 1975, and became effective on December 12, 1975. See CAL. CIV. PROC. CODE § 1295 (West 1982). The various requirements and subsections of § 1295 are not necessary to discuss as per their effect on this Comment.

reprehensible manner.⁵ In California, since punitive damages are permitted by statute,⁶ they are accordingly often awarded in appropriate cases.⁷ However, whether punitive damages may be awarded in medical malpractice arbitration in California is uncertain.

Recently, in *Baker v. Sadick*,⁸ a California Superior Court confirmed a medical malpractice arbitration award which granted the plaintiff \$300,000 in compensatory and \$300,000 in punitive damages. Counsel for the defendant physician is protesting the confirmation, arguing that the punitive damage award should be vacated. An issue on appeal will be whether the arbitrators exceeded the scope of their authority on this matter.⁹ Under California law, an arbitrator who commands an act which is against public policy exceeds his statutory authority.¹⁰ Accordingly, the focus of this Comment will be whether *public policy* in California permits awards of punitive damages in medical malpractice arbitration.¹¹

While California appellate courts have not ruled on this issue, New York has made a decision on the public policy question in commercial arbitration and thus serves as the leading jurisdiction in this area. In *Garrity v. Lyle Stuart Inc.*,¹² the New York Court of Appeals ruled that an arbitrator's award of punitive damages in a dispute arising out of breach of contract was against public policy and therefore invalid.¹³

This Comment will address the countermanding policy considerations California courts should consider when deciding the fate of punitive damage awards in medical malpractice arbitration. A discussion of medical malpractice arbitration will be followed by an analysis of punitive damages. The effect of the *Garrity* decision will then be analyzed. Finally, the conflicting policies in California concerning the role of punitive damages in medical malpractice arbitration will be discussed. This Comment will conclude that an award of punitive damages through medical

5. See *infra* notes 53, 75 and accompanying text.

6. See CAL. CIV. CODE § 3294 (West Supp. 1984).

7. See *infra* notes 47, 67 and accompanying text.

8. *Baker v. Sadick*, *appeal docketed*, No. 486735 (4th Cir. July 24, 1982); L. A. TIMES, June 26, 1982 at 3, part II, col. 1.

9. L.A. Times, June 26, 1982 at 3, part II, col. 1.

10. *American & Nat'l Leagues of Professional Baseball Clubs v. Major League Baseball Players Ass'n*, 59 Cal. App. 3d 493, 498, 130 Cal. Rptr. 626, 629 (Ct. App. 1976).

11. This Comment will only address the issue of public policy. Other issues which may serve to place limitations and barriers on the availability of punitive damages in medical malpractice arbitration are not discussed.

12. 40 N.Y.2d 354, 353 N.E.2d 793, 386 N.Y.S.2d 831 (1976).

13. *Id.* at 356, 353 N.E.2d at 794, 386 N.Y.S.2d at 832.

malpractice arbitration is not contrary to California's public policy.

I. MEDICAL MALPRACTICE ARBITRATION

Binding arbitration¹⁴ is a procedure through which disputing parties agree to submit their controversy to an impartial third party for *final determination*.¹⁵ Arbitration has existed for centuries, but has only recently become a popular mechanism for resolving disputes.¹⁶ One objective in California for the use of arbitration is the remedial role it should play in the medical malpractice crisis.¹⁷

Arbitration may not be appropriate for every malpractice suit. However, it does present several advantages that should be considered.¹⁸ Speed in resolution is a strong attribute of arbitration, which is unquestionably a shorter process than a judicial proceeding.¹⁹ Excluding time for appeal, medical malpractice litigation

14. In common usage "binding arbitration" refers to arbitration that parties contractually agree to employ in resolving a dispute, and there is no appeal from the decision except, essentially, upon grounds of fraud or gross misconduct of the arbitrator. It is to be distinguished from "mandatory arbitration," which is compelled by statute or other governmental regulation (as opposed to contractual agreement) and which may either be binding or advisory.

Butler, *supra* note 3, at 42 n.6.

15. Arbitration is defined as "[t]he reference of a dispute to an impartial (third) person chosen by the parties to the dispute who agree in advance to abide by the arbitrator's award . . ." BLACK'S LAW DICTIONARY 96 (5th ed. 1979).

16. Disputes have been resolved by submission to a respected neutral party in Judeo-Christian societies for centuries and in ancient oriental cultures long before the establishment of English common law. . . . [I]t has lain dormant until the increasing backlog of cases waiting to be heard in the normal judicial system has forced more and more attorneys and clients to turn to this ancient problem solving technique.

Knight, *Private Judging*, 56 CAL. ST. B.J. 108 (1981) [hereinafter cited as Knight].

17. Butler, *supra* note 3, at 41.

18. Some basic comparisons between courtroom litigation and arbitration will be helpful in analyzing California's advocacy of arbitration in medical malpractice actions. Litigation is very formal with several requirements including: formal pleadings, pretrial procedures, trial by judge and jury, strict adherence to procedural requirements and rules of evidence, judgment according to law, right of appeal, and public access. In contrast, an arbitration "hearing" is private. There are no formal pleadings; merely brief statements of dispute by the parties. There are no pretrial procedures. The "hearing" is conducted by arbitrators specifically chosen by the parties. The atmosphere and evidentiary rules are relaxed. The "award" does not necessarily have to conform to the law, but more importantly is rendered according to principles of justice and equity. Finally, there is no right of appeal, thus the award in arbitration is almost always final.

See also Ladimer & Solomon, *Medical Malpractice Arbitration: Laws, Programs, Cases*, 653 INS. LAW. JOUR. 335, 336 (1977) [hereinafter cited as Ladimer & Solomon] (discussing in detail the procedural distinctions between litigation and arbitration).

19. Nocas, *Arbitration of Medical Malpractice Claims*, 13 FORUM 254, 255 (1977) [hereinafter cited as Nocas]; see also Butler, *supra* note 3, at 60-61.

may take from three to five years.²⁰ On the other hand, studies indicate that arbitration of a medical malpractice dispute takes no longer than six months to one year.²¹ Further, there is no time factor for appeals since the arbitrator's decision is generally final.²² In binding arbitration an arbitrator's award is reviewable under very limited circumstances: such as exceeding the scope of their authority, which is generally unlimited.²³

Another attractive characteristic of medical malpractice arbitration is lower cost. Technical procedures, pleadings, and rules of evidence are time-consuming and expensive operations which arbitration eliminates.²⁴ In addition, all other incidental requirements necessary to prepare and execute a case, and the coinciding attorney, court and other related fees, are accordingly reduced in arbitration.²⁵

The absence of a jury and the presence of sophisticated specialists can be very beneficial in settling medical malpractice disputes. In addition to eliminating lengthy and often misunderstood jury instructions, arbitration avoids emotionally stimulated excessive jury awards.²⁶ Furthermore, unjustified claimants who frequently

20. Nocas, *supra* note 19, at 255; Butler, *supra* note 3, at 60.

21. Nocas, *supra* note 19, at 255; Butler, *supra* note 3, at 61.

22. See *supra* note 18.

23. "[B]inding arbitration decisions are virtually unappealable. When the parties have agreed to submit a dispute to binding arbitration, any appeal from that decision is extremely limited. . . . [A]ppeals can be taken from the final arbitrators' decision only on the grounds of fraud and outstanding error." Butler, *supra* note 3, at 66 (footnotes omitted); see also CAL. CIV. PROC. CODE § 1286.2 (West 1982). This section specifically sets out upon what grounds the arbitrators' award may be vacated:

Subject to Section 1286.4, the court shall vacate the award if the court determines that:

- (a) The award was procured by corruption, fraud or other undue means;
- (b) There was corruption in any of the arbitrators;
- (c) The rights of such party were substantially prejudiced by misconduct of a neutral arbitrator;
- (d) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted; or
- (e) The rights of such party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title.

Id.

24. "Of particular relevance to the malpractice area, it is possible in arbitrations to introduce textbook evidence to establish standard procedures and practices, rather than to find appropriate experts, qualify them, obtain their testimony and cross-examine them." Butler, *supra* note 3, at 61.

25. *Id.*; Novick, *supra* note 3, at 40.

26. "The arbitration mechanism, however, certainly permits the use of a highly sophisticated and competent decision maker as opposed to typically unsophisticated

receive favorable judgments from sympathetic juries²⁷ have less of a chance of success in arbitration.²⁸ The injured party with a *legitimate claim* should obtain adequate compensation in either forum. Unwarranted and excessive jury awards, however, ultimately contribute to increased medical costs, and therefore are not in the best interest of the public.²⁹ Although elimination of unjustified and excessive damage awards may not be attractive to the plaintiff, curtailing the sympathetic jury award problem must be viewed as a positive feature.

Similarly, the relaxed procedural and evidentiary rules in arbitration serve to promote a more equitable decision.³⁰ Evidence which ordinarily may be excluded in the courtroom may be permitted in arbitration.³¹ Finally, arbitration proceedings are private. Both parties in a medical malpractice suit will benefit from limiting the public knowledge of personal matters brought out in these actions.³² Whether or not all these advantages to medical malpractice arbitration will in fact solve the “crisis” is hard to say. However, it can be justifiably concluded that arbitration will contribute to the resolution of the problem.

The use of arbitration as a means of settling disputes, especially in medical malpractice, is favored in California law.³³ In addition to the legislative advocacy of arbitration in medical malpractice suits,³⁴ the Supreme Court of California emphasized the functional benefits of arbitration in the landmark case of *Madden v. Kaiser Foundation*.³⁵ In *Madden*, the plaintiffs challenged the validity of a contract allegedly binding them to arbitration for an

juries which may be more susceptible to emotional appeals.” Butler, *supra* note 3, at 62.

27. *Id.*

28. *Id.*

29. “An enlightened consumer of health services should consider whether sympathy verdicts are really in his long run interest when such verdicts increase malpractice insurance rates and are then passed on to him in the cost of health services.” *Id.*

30. [P]roceedings in an arbitration procedure tend to be far more informal and the technical rules of evidence may be relaxed. The atmosphere is generally one more suited to obtain all the facts and assess their import. Frequently criticized and perhaps archaic rules such as the “hearsay evidence rule” or the restrictions required to introduce expert testimony generally have no application in an arbitration proceeding.

Id. at 63.

31. *Id.*; see also *supra* note 24 and accompanying text.

32. “Arbitration avoids adverse publicity for the defendant” Novick, *supra* note 3, at 40.

33. *Hawkins v. Superior Court*, 89 Cal. App. 3d 413, 416, 152 Cal. Rptr. 491, 493 (Ct. App. 1979); *Wheeler v. St. Joseph Hosp.*, 63 Cal. App. 3d 345, 355-56, 133 Cal. Rptr. 775, 782 (Ct. App. 1976).

34. The “Keene Bill” became law in 1975; see CAL. CIV. CODE § 1295 (West 1982).

35. 17 Cal. 3d 699, 552 P.2d 1178, 131 Cal. Rptr. 882 (1976).

action in medical malpractice. The court upheld the contract on several grounds.³⁶ Of utmost importance was the court's conclusion that arbitration is a preferable means of settling disputes.³⁷ As the court stated, "We observe the growing interest in, and use of arbitration to cope with the increasing volume of medical malpractice claims."³⁸

The decision by the *Madden* court upholding the arbitration agreement for medical malpractice is an important one. Not only did it serve to secure the validity of medical malpractice arbitration agreements, but more importantly, it served as a benchmark for the policy of California to favor such agreements.³⁹

In support of the *Madden* decision and the state legislature's encouragement of binding arbitration in medical malpractice,⁴⁰ the California courts maintain a "strong public policy" favoring its implementation.⁴¹ It therefore seems that the California courts will insure the viability of arbitration in the field of medical malpractice. However, these courts may soon be faced with a challenge to the power of arbitrators in medical malpractice cases, which may hinder its attractiveness. At issue will be the ability of claimants to obtain punitive damages through arbitration.⁴²

II. PUNITIVE DAMAGES

A. Punitive Damages in General

Punitive damages have a peculiar presence in the civil adversary system in this country. In contrast to a criminal prosecution, where punishment of the culpable party is the goal, the purpose of

36. [T]he court rejected plaintiff's three contentions: that the agent did not have the authority to agree to arbitration, that the contract was one of adhesion, and that the agreement to arbitrate was invalid since the parties had not expressly waived their right to a jury trial.

Note, *An Agent's Authority to Bind A Principle to Arbitration*, 65 CALIF. L. REV. 355 (1977).

37. *Madden*, 17 Cal. 3d at 708, 552 P.2d at 1184, 131 Cal. Rptr. at 888.

38. *Id.*

39. *Hawkins v. Superior Court*, 89 Cal. App. 3d 413, 416-17, 152 Cal. Rptr. 491, 493 (Ct. App. 1979); *Wheeler v. St. Joseph Hosp.*, 63 Cal. App. 3d 345, 355-56, 133 Cal. Rptr. 775, 782 (Ct. App. 1976).

40. "The Legislature has also acknowledged arbitration to be proper, if not a desirable, method of resolving medical malpractice claims . . ." *Hawkins*, 89 Cal. App. 3d at 416, 152 Cal. Rptr. at 493 (citations and footnote omitted); "This policy also finds expression in recent legislation (Code Civ. Pro. §§ 1141.10, 1295)." *Beynon v. Garden Grove Medical Group*, 100 Cal. App. 3d 698, 704 n.4, 161 Cal. Rptr. 146, 149 n.4 (Ct. App. 1980).

41. *Beynon*, 100 Cal. App. 3d at 704, 161 Cal. Rptr. at 149; see also *supra* note 39 and accompanying text.

42. See *supra* notes 8-9 and accompanying text.

civil litigation is to compensate the plaintiff for his injuries.⁴³ Exemplary damages, however, are awarded as a “punishment” aspect of tort actions in courts throughout the nation.⁴⁴ Such damages are granted in addition to general damages which fully compensate the plaintiff for his injuries.⁴⁵ These damages have been justified as a means of satisfying society’s inherent disapproval of outrageous and intolerable conduct.⁴⁶ Thus, the courts vent society’s objection to unacceptable conduct by attempting to punish the guilty party and further, to deter him and others from engaging in similar conduct.⁴⁷

Although this principal function for awarding punitive damages is recognized uniformly, there are additional reasons given for awards of punitive damages.⁴⁸ The various purposes include “revenge,”⁴⁹ “public justice and providing incentives for private civil

43. A criminal prosecution is not concerned in any way with compensation of the injured individual against whom the crime is committed, and his only part in it is that of an accuser and a witness for the state. So far as the criminal law is concerned, he will leave the courtroom empty-handed.

W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 2, at 7 (4th ed. 1971) [hereinafter cited as PROSSER]. Reasoning this out, Prosser states: “The purpose of such a proceeding is to protect and vindicate the interests of the public as a whole, by punishing the offender” He then goes on to say: “The civil action for a tort, on the other hand, is commenced and maintained by the injured person himself, and its purpose is to compensate him for the damage he has suffered, at the expense of the wrongdoer.” *Id.*

44. “Punitive damages, although often criticized, are nonetheless strongly entrenched in almost all of the jurisdictions in this country.” Note, *Punitive Damages and Liability Insurance: Theory, Reality and Practicality*, 9 CUM. L. REV. 487, 488 (1978) (footnotes omitted) [hereinafter cited as Note, *Punitive Damages*]. “Currently, all but four states permit awards of punitive damages in appropriate situations. And of these four states, all have numerous statutory exceptions to the proscription on this practice.” Belli, *Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society*, 49 UMKC L. REV. 1, 4-5 (1980) (footnote omitted) [hereinafter cited as Belli]; “Despite such denunciations the great majority of states retain the doctrine of exemplary damages in full force.” Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 518 (1957) (footnote omitted) [hereinafter cited as Note, *Exemplary Damages*].

45. PROSSER, *supra* note 43, § 2 at 9.

46. *Id.*; Mallor & Roberts, *Punitive Damages: Toward A Principled Approach*, 31 HASTINGS L. J. 639, 641 (1980) [hereinafter cited as Mallor & Roberts]; Note, *Punitive Damages*, *supra* note 44, at 487-88.

47. PROSSER, *supra* note 43, § 2 at 9; RESTATEMENT (SECOND) OF TORTS § 908(1) (1977); C. MCCORMICK, *HANDBOOK ON THE LAW OF DAMAGES* 275 (1935); T. SEDGWICK, *A TREATISE ON THE MEASURE OF DAMAGES* § 347 (9th ed. 1913); Note, *Punitive Damages*, *supra* note 44, at 488.

48. “[D]ifferent rationales have been advanced in support of punitive damages. Close examination of the cases reveals that these rationales are not used independently, rather they usually are found concurrently, with two or more being given by courts to explain the desirability in allowing these damages.” Belli, *supra* note 44, at 5.

49. “Exemplary damages may also constitute a kind of public revenge by reflecting the jury’s indignation at the defendant’s conduct.” Note, *Exemplary Damages*, *supra* note 44, at 522 (footnote omitted); “The fact remains, however, that courts and

enforcement,"⁵⁰ and "additional compensation."⁵¹ These objectives are often considered to run "concurrently" when interpreting the usefulness of granting exemplary damages.⁵²

Regardless of the different purposes attributed to punitive damages, they may not be awarded unless the defendant has acted with the requisite "state of mind" warranting a punitive sanction.⁵³ Something more than the mere commission of a tort is required.

In California, punitive damages are allowed when the defendant has committed a tort with oppression, fraud, or malice.⁵⁴ Other states have restricted or expanded the required "state of mind," using other standards of conduct.⁵⁵

The variation between states on the functional purposes of punitive damages, and the necessary "state of mind" required can be attributed to public policy.⁵⁶ There are several public policy arguments made against the availability of punitive damages.

legal scholars continue to cite it [revenge] as a possible rationale for the promulgation of punitive damages." Belli, *supra* note 44, at 5 (footnote omitted).

The fact that punitive damages are also known as vindictive damages gives hint of still another rationale used to support the doctrine. Such awards are said to offer an element of revenge both to the injured party and to society as a whole. The theory is that punitive damages award will cool the wrath and heal the wounded sense of honor of the injured party and, hopefully, dissuade him from taking justice into his own hand.

Long, *Punitive Damages: An Unsettled Doctrine*, 25 DRAKE L. REV. 870, 877 (1976) (footnotes omitted) [hereinafter cited as Long].

50. Many of the writings and cases on punitive damages hold that the major reason behind punitive damages is that public justice may be served by awarding such damages to individual plaintiffs. . . . Under this theory, referred to as the "private attorney general" approach, allowance of punitive damages acts to persuade the injured victim to pursue his claim and also acts to entice counsel to accept the case.

Belli, *supra* note 44, at 5-6 (footnote omitted).

All serious misdeeds cannot possibly be punished by government prosecution. For one thing, not all misconduct is punishable as a crime or a civil violation; for another, limited judicial and prosecutorial resources permit prosecution for only a fraction of the crimes and violations committed. For these reasons, individual members of society must play a significant role in instituting actions to impose sanctions for serious misconduct.

Mallor & Roberts, *supra* note 46, at 649.

51. "Some courts, for example, have allowed the jury to consider attorneys' fees and litigation expenses in fixing the amount of exemplary damages. Although others reject this procedure, as a practical matter exemplary damages always serve to compensate the plaintiff for these expenses." Note, *Exemplary Damages*, *supra* note 44, at 521 (footnotes omitted); see also Belli, *supra* note 44, at 6; Long, *supra* note 49, at 875; PROSSER, *supra* note 43, § 2 at 11.

52. See *supra* note 48.

53. Belli, *supra* note 44, at 8; see also PROSSER, *supra* note 43, § 2 at 9-10.

54. Egan v. Mutual of Omaha Ins. Co., 24 Cal. 3d 809, 819, 598 P.2d 452, 457, 157 Cal. Rptr. 482, 487 (1979).

55. Long, *supra* note 49, at 880-81.

56. Belli, *supra* note 44, at 7.

Several critics of punitive damages have condemned them based upon the central function they serve—punishment.⁵⁷ It has been argued that punitive damages are criminal in nature and in the absence of procedural safeguards, function contrary to the protection of constitutional rights.⁵⁸ Punitive damages have also been criticized as being a “windfall” for the plaintiff who, in civil litigation, should receive only just compensation.⁵⁹ It has also been contended that punitive damages, assessed for punishment purposes, should be paid to the government and not the injured party.⁶⁰

An additional criticism is that the award of punitive damages is totally subjective and therefore opens the door for unfair prejudice.⁶¹ Furthermore, punitive damages have been censured for subjecting the defendant to punishment in two arenas. The defendant may be susceptible to both criminal and civil actions. The possibility of punitive damages in the latter and fines in the former raises the specter of “double punishment.”⁶² Finally some have argued that punitive damages have not been an effective deterrent.⁶³ Therefore, since deterrence is a primary objective of punitive damages, there is no justification for the continued presence of punitive damages in the civil judicial system.

B. *Punitive Damages in California*

An evaluation of California’s policy towards punitive damages is required to determine their availability in medical malpractice arbitration. California permits punitive damage awards when warranted.⁶⁴ Since 1872, California has statutorily allowed punitive damages.⁶⁵ As such, California courts consistently have en-

57. PROSSER, *supra* note 43, § 2 at 9; Belli, *supra* note 49, at 8; D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* § 3.9 (1973) [hereinafter cited as DOBBS].

58. “They have been condemned [because lacking are the] . . . usual safeguards thrown about criminal procedure, ‘such as proof of guilt beyond a reasonable doubt, the privilege against self-incrimination, and even the rule against double jeopardy’” PROSSER, *supra* note 43, at 11 (footnote omitted); “[b]ecause punitive damages serve to punish, they must be considered penal; fundamental constitutional criminal safeguards therefore must be applied fully.” Belli, *supra* note 44, at 8 (footnote omitted); *see also* DOBBS, *supra* note 57, at 219.

59. DOBBS, *supra* note 57, at 219; PROSSER, *supra* note 43, at 11; *see also* Morris, *Punitive Damages in Tort Cases*, 44 *HARV. L. REV.* 1173, 1206 (1931) [hereinafter cited as Morris].

60. Belli, *supra* note 44, at 8; Note, *Exemplary Damages*, *supra* note 44, at 523; PROSSER, *supra* note 43, § 2 at 11.

61. DOBBS, *supra* note 57, at 219.

62. Note, *Exemplary Damages*, *supra* note 44, at 524-25; Mallor & Roberts, *supra* note 46, at 645; PROSSER, *supra* note 43, § 2 at 11.

63. DOBBS, *supra* note 57, at 200.

64. CAL. CIV. CODE § 3294 (West Supp. 1984).

65. “In an action for breach of an obligation not arising from contract, where the

forced the application of punitive damages.⁶⁶

The major purpose of punitive damages in California is to punish the defendant, and in so doing, to deter him and others who may engage in similar conduct.⁶⁷ It is important to note, that as well as the exemplary purpose directed at others, deterrence of the specific defendant is emphasized.⁶⁸ This is evident from the judicial practice of granting awards proportionate to the wealth of the particular defendant.⁶⁹ However, it is evident that to justify their continued application, in light of constant challenge, the courts promote the dual purpose of general and specific deterrence.⁷⁰

While California justifies the award of punitive damages, they are not unconditionally approved.⁷¹ The California courts have made it quite clear that punitive damages are not favored in the

defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." CAL. CIV. CODE § 3294a (West Supp. 1984).

66. *Peterson v. Superior Ct.*, 31 Cal. 3d 147, 642 P.2d 1305, 181 Cal. Rptr. 784 (1982).

67. "[T]he purpose of punitive damages is to penalize wrongdoers in a way that will deter them and others from repeating the wrongful conduct in the future." *Wyatt v. Union Mortgage Co.*, 24 Cal. 3d 773, 790, 598 P.2d 45, 55, 157 Cal. Rptr. 392, 402 (1979) (citation omitted); "[T]he principal purpose of punitive damages is to deter and punish . . ." *Rosener v. Sears, Roebuck & Co.*, 110 Cal. App. 3d 740, 750, 168 Cal. Rptr. 237, 243 (Ct. App. 1980); "The primary purpose of punitive damages is 'to penalize wrongdoers in a way that will deter them and others from repeating the wrongful conduct in the future.'" *Peterson*, 31 Cal. 3d at 155, 642 P.2d at 1309, 181 Cal. Rptr. at 788 (quoting *Wyatt v. Union Mortgage Co.*, 24 Cal. 3d 773, 790, 598 P.2d 45, 55, 157 Cal. Rptr. 392, 402 (1979)).

68. *Peterson*, 31 Cal. 3d at 156, 642 P.2d at 1309, 181 Cal. Rptr. at 788; *Wyatt*, 24 Cal. 3d at 790, 157 Cal. Rptr. at 402, 598 P.2d at 55.

69. "Since the principal purpose of punitive damages is to deter and punish, the wealth of the defendant is always a proper consideration." *Rosener*, 110 Cal. App. 3d at 750, 168 Cal. Rptr. at 243 (citation omitted); "Likewise applicable is the principle that, the purpose of punitive damages being to punish the defendant and make an example of him, 'the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective.'" *Zhadan v. Downtown L.A. Motors*. 66 Cal. App. 3d 481, 496, 136 Cal. Rptr. 132, 140 (Ct. App. 1976) (quoting *Bertero v. National Gen. Corp.*, 13 Cal. 3d 43, 65, 529 P.2d 608, 624, 118 Cal. Rptr. 184, 200 (1974)).

70. *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal. 3d 809, 598 P.2d 452, 157 Cal. Rptr. 482 (1979); *Wyatt v. Union Mortgage Co.*, 24 Cal. 3d 773, 598 P.2d 45, 157 Cal. Rptr. 392 (1979); *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (Ct. App. 1981); *Schomer v. Smidt*, 113 Cal. App. 3d 828, 170 Cal. Rptr. 662 (Ct. App. 1980); *Miller v. Elite Ins. Co.*, 100 Cal. App. 3d 739, 161 Cal. Rptr. 322 (Ct. App. 1980).

71. "[W]e must be guided by the well-established principle that punitive damages are not favored in the law." *Rosener*, 110 Cal. App. 3d at 750, 168 Cal. Rptr. at 243 (citations omitted); "Such damages are never awarded as a matter of right; they are not favored by the law and they should be granted with the greatest of caution; they will be allowed only in the clearest of cases." *Henderson v. Security Nat. Bank*, 72 Cal. App. 3d 764, 771, 140 Cal. Rptr. 388, 392 (Ct. App. 1977) (citations omitted).

law.⁷² California has appraised punitive damages as possible excessive compensation for the injured party,⁷³ thus providing a “windfall” to the plaintiff making for an unappealing remedy.⁷⁴ They continue, however, to be supported in proper cases.⁷⁵

Although California manifestly authorizes the application of punitive damages, approval is not without reluctance. In determining whether punitive damages will be permitted in medical malpractice arbitration, California’s prudent posture on these damages will play a significant role.

III. PUNITIVE DAMAGES IN MEDICAL MALPRACTICE ARBITRATION IN CALIFORNIA—THE CONFLICT

Under California law, an arbitrator’s award which commands an act against public policy will be vacated because it exceeds the scope of his authority.⁷⁶ Therefore, the issue in determining if an arbitrator can award punitive damages is whether public policy⁷⁷

72. *Rosener v. Sears, Roebuck & Co.*, 110 Cal. App. 3d at 750, 168 Cal. Rptr. at 243; *Henderson v. Security Nat. Bank*, 72 Cal. App. 3d at 771, 140 Cal. Rptr. at 392.

73. *See supra* note 59 and accompanying text.

74. *Wolfsen v. Hathaway*, 32 Cal. 2d 632, 647-48, 198 P.2d 1, 11 (1948); *Rosener*, 110 Cal. App. 3d at 750, 168 Cal. Rptr. at 242; *Henderson*, 72 Cal. App. 3d at 771, 140 Cal. Rptr. at 392; *Beck v. State Farm Mut. Auto. Ins. Co.*, 54 Cal. App. 3d 347, 355, 126 Cal. Rptr. 602, 607 (Ct. App. 1976); *Ferraro v. Pacific Fin. Corp.*, 8 Cal. App. 3d 339, 355, 87 Cal. Rptr. 226, 236 (Ct. App. 1970).

75. *Wolfsen v. Hathaway*, 32 Cal. 2d 632, 647-48, 198 P.2d 1, 11 (1948); *Rosener*, 110 Cal. App. 3d at 750, 168 Cal. Rptr. at 242; *Henderson*, 72 Cal. App. 3d at 771, 140 Cal. Rptr. at 392; *Beck v. State Farm Mut. Auto. Ins. Co.*, 54 Cal. App. 3d 347, 355, 126 Cal. Rptr. 602, 607 (Ct. App. 1976); *Ferraro v. Pacific Fin. Corp.*, 8 Cal. App. 3d 339, 355, 87 Cal. Rptr. 226, 236 (Ct. App. 1970).

76. *American & Nat’l Leagues of Players Baseball Clubs v. Major League Baseball Players Ass’n*, 59 Cal. App. 3d 493, 498, 130 Cal. Rptr. 626, 628 (1976); *See also Viola, Inc. v. Santa Barbara High School Dist.*, 276 Cal. App. 2d 425, 427, 80 Cal. Rptr. 784, 786 (Ct. App. 1969).

77. This Comment only addresses the issue of whether “public policy” prohibits awards of punitive damages in medical malpractice arbitration. The concept of public policy is not inherently subject to precise definition. *Safeway Stores v. Retail Clerks Int’l. Ass’n*, 41 Cal. 2d 567, 575, 261 P.2d 721, 726 (1953). Generally public policy directly corresponds to and encompasses social practice. F. FROHOCK, PUBLIC POLICY SCOPE AND LOGIC § 1, at 11-12 (1979) [hereinafter cited as FROHOCK]. Public policy is a patterned attempt to resolve conflicting claims or provide incentives to achieve agreed upon goals. *Id.* The range of public policy is enormous, encompassing both material and ethical issues. *Id.* Public policy concerns that which benefits and improves the social, moral, and physical condition of the community. *S & V. R.R. Co. v. City of Stockton*, 41 Cal. 147, 175 (1871). If an activity does not promote the general welfare or has a negative effect on social betterment, it is against public policy. In other words, that which contravenes good morals or the conventional interests of society will be against public policy. *Glenn v. Clearman’s Golden Cock Inn, Inc.*, 192 Cal. App. 2d 793, 796, 13 Cal. Rptr. 769, 771 (1961).

The public policy of any state may be found in its constitution, the acts of its legislature and decisions of its courts. *Building Service Employees Int’l. Union v. Gazdam*, 339 U.S. 532, 537 (1950); *Safeway Stores v. Retail Clerk Int’l. Ass’n*, 41 Cal. 2d 567, 574, 261 P.2d 721, 725 (1953). The determination of public policy is primarily for

prohibits him from doing so. This section will examine the crucial policy considerations the California courts will face in determining the availability of punitive damages in medical malpractice arbitration.

A. The New York Rule—Punitive Damages in Arbitration

1. *Garrity v. Lyle Stuart Inc.*—The case of *Garrity v. Lyle Stuart Inc.*,⁷⁸ involved a commercial suit in which arbitrators awarded \$45,000 in compensatory damages and \$7,500 in punitive damages.⁷⁹ The conflict concerned a defendant publisher who, among other wrongful acts, maliciously withheld royalties owed to the plaintiff author. The publishing agreement contained an arbitration clause, which in turn brought the dispute to arbitration. The arbitrators awarded plaintiff both compensatory and punitive damages pursuant to plaintiff's request. After several appeals the case reached New York's highest court. The New York Court of Appeals, in a four to three decision, held the arbitrators had no power to award punitive damages.⁸⁰ The court held the award of punitive damages would exceed the arbitrator's authority, even if the parties had specifically provided in their agreement for punitive damages.⁸¹ The majority based its conclusion upon a strong *state public policy* disfavoring punitive damages in arbitration.⁸²

When determining why this form of award in arbitration contravenes public policy, the majority stated several concerns. The most critical of these concerns dealt with the purpose of punitive damages in the civil judicial process. The court reasoned punitive

the legislature of the state. *Id.* However, in the absence of legislation, courts must define public policy. *Id.* See also A. CORBIN, CONTRACTS § 1374 (1952) [hereinafter cited as CORBIN]. The determination will reflect those values which represent the court's interpretation of what benefits the public welfare. Wells & Grossman, *The Concept of Judicial Policy-Making: A Critique*, 15 JUR. PUB. L. 286, 293-94 (1966). Often the courts must make a decision when prevailing political, social and economic views are in flux. CORBIN, *supra* note 77, at 1374-75. Thus, the final determination as to what is, or is not, against public policy will entail a weighing of the considerations and a subjective calculation of effect.

78. The leading case authority on the issue of punitive damages awards in arbitration is *Garrity v. Lyle Stuart Inc.*, 40 N.Y.2d 354, 353 N.E.2d 793, 386 N.Y.S.2d 831 (1976). Labor is an additional field in which the issue of punitive damages in arbitration has controversy surrounding it. Since labor law and arbitration have peculiar issues within that specific field, discussion of the controversy therein will be excluded in this Comment. For a summary analysis of punitive damages in labor arbitration, see Travers, *Arbitrator's Power to Award Punitive Damages*, Annot. 83 ALR 3d 1037.

79. *Garrity*, 40 N.Y.2d at 355, 353 N.E.2d at 794, 386 N.Y.S.2d at 832.

80. *Id.* at 356, 353 N.E.2d at 794, 386 N.Y.S.2d at 832.

81. *Id.*

82. *Id.*

damages were appropriate where the defendant's conduct was so reprehensible that the damages not only punish, but more importantly deter the defendant and others from engaging in similar conduct in the future.⁸³ Since punitive damages function primarily as a "social exemplary remedy," they should not be applied as a "private compensatory remedy."⁸⁴ Therefore, since arbitration is purely a private proceeding,⁸⁵ a remedy of punitive damages in arbitration would not be in furtherance of the social purpose of these damages. Although not determinative, the majority also expounded the generally accepted policy against punitive damage awards in breach of contract actions.⁸⁶ This policy is based on the theory that in an action for breach of contract, the parties seek relief from a "private wrong" as opposed to a "public right."⁸⁷

The *Garrity* court also discussed the impact punitive damages might have upon the function and purpose of arbitration. That purpose being the speedy, inexpensive, and final resolution of disputes. The court reasoned that since there is only limited judicial review of arbitration rulings, a serious injustice might result regarding the imposition of punitive damage awards.⁸⁸ The *Garrity* court was concerned because manipulation of the arbitrator by a party with superior bargaining power might influence the application of these damages.⁸⁹ Therefore, judicial review would eventually be imperative, and the purpose of having an arbitration hearing would be defeated.⁹⁰

The majority in *Garrity* concluded that an award of punitive damages in arbitration is against public policy and exceeds the authority of the arbitrator. Thus, the court modified the award, vacating the imposition of punitive damages.⁹¹

The dissent in *Garrity* warrants consideration.⁹² The dissent stated that courts should only intrude upon arbitration awards where the interests of the public clearly outweigh the concerns of

83. *Id.* at 358, 353 N.E.2d at 795, 386 N.Y.S.2d at 833.

84. *Id.*

85. *See supra* note 32 and accompanying text.

86. "Punitive damages awards are of growing importance in tort litigation. Traditionally, however, punitive damages are not awarded in contract actions, no matter how malicious the breach." J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 14:3 at 520 (1977) (footnote omitted) [hereinafter cited as CALAMARI & PERILLO]; *see also Garrity*, 40 N.Y.2d at 358, 353 N.E.2d at 795, 386 N.Y.S.2d at 833.

87. *Garrity*, 40 N.Y.2d at 358, 353 N.E.2d at 795, 386 N.Y.S.2d at 833 (1976).

88. "In the usual case, the court stops only to inquire if the award is authorized by the contract; is complete and final on its face; and if the proceeding was fairly conducted." *Id.* at 358-59, 353 N.E.2d at 796, 386 N.Y.S.2d at 834.

89. *Id.* at 358, 353 N.E.2d at 796, 386 N.Y.S.2d at 833-34.

90. *Id.* at 358-59, 353 N.E.2d at 796, 386 N.Y.S.2d at 834.

91. *Id.* at 360, 353 N.E.2d at 797, 386 N.Y.S.2d at 835.

92. *Id.* at 360, 353 N.E.2d at 797, 386 N.Y.S.2d at 835 (Gabielli, J., dissenting).

the parties to the arbitration.⁹³ The dissent noted an absence of legislation even alluding to a notion disfavoring punitive damages in arbitration.⁹⁴ Further, the dissenting opinion stressed the strong public policy favoring resolution of disputes through arbitration.⁹⁵ Hence, the dissenters would have held that regardless of any disapproval of punitive damages in arbitration, such disfavor was insufficient to warrant judicial intervention.⁹⁶

The New York court's majority and dissenting opinions in *Garrity* each strongly state convincing arguments. Therefore, although a ruling by a California court on this issue will depend on additional concerns and policies,⁹⁷ as a benchmark, the *Garrity* decision will provide a basis upon which California courts may proceed.

2. *The Effect of Garrity.*—The *Garrity* ruling is influential for two reasons. *Garrity* will be persuasive because New York is recognized for having developed an abundance of case law and expertise in the field of arbitration.⁹⁸ Further, as the only state whose courts have specifically ruled upon the public policy of punitive damages in arbitration,⁹⁹ it must be considered. Absent a difference in public policy, it would be easier for California to adopt rather than reject the New York Court of Appeals reasoning.

However, there are some important facts about *Garrity* which may diminish its influence when considered by California courts. Of considerable significance is the split in the New York court in deciding *Garrity*. The majority opinion was backed by only four of the seven justices.¹⁰⁰ The dissenting opinion urged a very strong argument supporting punitive damages in medical malpractice arbitration. What the dissent presented was a “hands-off” policy to arbitration interference.¹⁰¹ The dissent argued that unless the interests of the public clearly outweighed the relations of the parties, interference would not be justified.¹⁰² They reinforced their position claiming the state's strong public policy

93. *Id.* at 365, 363 N.E.2d at 800, 386 N.Y.S.2d at 838.

94. *Id.* at 363, 353 N.E.2d at 799, 386 N.Y.S.2d at 837.

95. *Id.*

96. *Id.*

97. Further elaboration on relevant distinctions between the *Garrity* decision, and the issue of medical malpractice arbitration awards of punitive damages in California will be covered in more detail in the section *infra* on “The Effect of *Garrity*.”

98. Note, *Damages in Arbitration*, LAW ARB. LETTER Sept. 1978 at 193, 196 (1978) [hereinafter cited as Note, *Damages in Arbitration*].

99. *Id.*

100. See *supra* notes 80, 92 and accompanying text.

101. See *Garrity*, 40 N.Y.2d at 365, 353 N.E.2d at 800, 386 N.Y.S.2d at 838 (Gabrielli, J., dissenting).

102. See *supra* note 93 and accompanying text.

favoring arbitration was not outweighed by the policy against punitive damages. Hence, there should not be a public policy against the award of punitive damages in arbitration.¹⁰³ California, too, has a strong public policy favoring resolution of disputes through “private judging,”¹⁰⁴ especially in medical malpractice arbitration.¹⁰⁵ Therefore, the dissenting opinion in *Garrity* may be more persuasive to California courts than that of the majority.

An additional factor affecting the influence of *Garrity* in California is the differing degree of importance arbitration in medical malpractice has in California as compared to New York. Unlike California, the New York legislature has not encouraged arbitration as a means of resolving the medical malpractice crisis.¹⁰⁶ This indicates that in the resolution of such disputes, California’s public policy favoring arbitrated settlements is stronger than New York’s.

The subject matter of the *Garrity* case will also play a role in determining its influence. Although in *Garrity* there was wrongful conduct sufficient to warrant punitive damages, the controversy centered on a breach of contract.¹⁰⁷ Clearly there is a distinction to be made between commercial arbitration and arbitration of tortious conduct. The adherence of courts in both New York and California to the rule that punitive damages have no place in contract is not disputed.¹⁰⁸ Punitive damages, however, are considered appropriate when independent tortious conduct accompanies the breach of contract.¹⁰⁹ Even then, courts are reluctant to provide punitive damages in the area of contract, regardless of the presence of conduct warranting punitive sanctions.¹¹⁰ In *Garrity*, the court was forced to deal with public policy on punitive damages in *both* a breach of contract case and arbitration. This is a significant factor to be considered by California’s courts, especially since in medical malpractice the issue is negligence, not breach of contract.

103. See *supra* notes 93, 95-96 and accompanying text.

104. Knight, *supra* note 16, at 108.

105. See *supra* notes 39-41 and accompanying text.

106. At present thirteen states, excluding New York, specifically support medical malpractice arbitration. They are: Alabama, Alaska, California, Georgia, Illinois, Louisiana, Maine, Michigan, North Dakota, Ohio, South Dakota, Vermont, and Virginia. Bassis, *supra* note 1, at 264 n.23.

107. *Garrity v. Lyle Stuart*, 40 N.Y.2d 354, 353 N.E.2d 793, 386 N.Y.S.2d 831 (1976).

108. See *supra* note 103 and accompanying text; *Mayer v. Sturdy Northern Sales, Inc.*, 91 Cal. App. 3d 69, 82, 154 Cal. Rptr. 43, 52 (Ct. App. 1979); *Walker v. Signal Cos., Inc.*, 84 Cal. App. 3d 982, 996, 149 Cal. Rptr. 119, 126 (Ct. App. 1978).

109. CALAMARI & PERILLO, *supra* note 86, § 14-3 at 520-21.

110. *Id.* at 520.

B. The Balance of Interests—Punitive Damages and Arbitration

A decision by California courts on punitive damages in medical malpractice arbitration will affect the principles behind both punitive damages and arbitration. This section will address possible public policy arguments regarding the justification for allowing punitive damages in medical malpractice arbitration.

California adheres to a conservative application of punitive damages insisting that they should be awarded primarily for a social exemplary purpose.¹¹¹ Arbitration “hearings” are private and not matters of public record.¹¹² A strong argument can be made that since the public is not aware of matters in arbitration, the community does not benefit by application of punitive damages in these totally private proceedings. As noted by the *Garrity* court, punitive damages function almost entirely as a “social exemplary remedy”; they should not serve as a “private compensatory remedy.”¹¹³

Two arguments, however, may answer this objection. First, there has been much criticism of the “exemplary” and “deterrent” effect of punitive damages.¹¹⁴ Some legal scholars argue that punitive damages have not effectively deterred the conduct of others.¹¹⁵ Arguably something more than mere deterrence is served by assessing punitive damages.¹¹⁶ Although California courts have not directly recognized any alternative purposes for punitive damages,¹¹⁷ authorities in the field have recognized that courts must look to “concurrent” purposes of such an award.¹¹⁸ This is due to the questionable effectiveness of the deterrence function. Second, in addition to “concurrent” functions, the “penal” function of punitive damages remains intact in medical malpractice arbitration.

California’s recognized purpose of punitive damages is to *penalize wrongdoers* in a way that will *deter them* as well as others from repeating the wrongful conduct in the future.¹¹⁹ When interpreting this language, two distinct aims can be extrapolated. Aside from setting an example for others in society, the chastisement

111. *Rosener v. Sears, Roebuck & Co.*, 110 Cal. App. 3d 740, 750, 168 Cal. Rptr. 237, 243 (1980); *see also supra* notes 72-74 and accompanying text.

112. *See supra* note 32 and accompanying text.

113. *See supra* notes 83-85 and accompanying text.

114. *See supra* note 63 and accompanying text.

115. *Id.*

116. *See supra* notes 49-51 and accompanying text.

117. *See supra* note 67 and accompanying text.

118. *See supra* notes 49-52 and accompanying text.

119. *Peterson v. Superior Ct.*, 31 Cal. 3d 147, 155, 642 P.2d 1305, 1309, 181 Cal. Rptr. 784, 788 (1982).

and deterrence of the specific wrongdoer is promulgated as well.¹²⁰ The California courts stress the importance of penalizing and effectively deterring the specific wrongdoer by assessing an amount of damages which will sufficiently punish the defendant.¹²¹ This is done to insure that the defendant suffers the consequences of his reprehensible conduct to a degree that will deter *him*.¹²² Therefore, in arbitration the penal function of punitive damages will be effective, at least against the specific wrongdoer.

California courts would also consider the interrelation between punitive damages and medical malpractice arbitration. The court should focus on the protection of arbitration as a viable forum and its salutary role in the medical malpractice crisis.¹²³ California has a strong public policy favoring arbitration of medical malpractice cases.¹²⁴ The California courts have noted emphatically the benefits that arbitration of medical malpractice disputes provides to both the community and the judicial system.¹²⁵ Also, California's legislature has exhibited approval of arbitration in medical malpractice.¹²⁶

The California courts have interpreted the legislative guidelines for arbitration as granting almost unrestricted authority to the arbitrators.¹²⁷ The entire statutory framework in California was designed to give the arbitrator the "broadest possible powers."¹²⁸ Thus, an argument can be made that the power to award punitive damages should not be denied to arbitrators. Prohibiting arbitrators from awarding punitive damages would contradict the strong public policy favoring uninhibited use of arbitration in medical malpractice. The unavailability of punitive damages in medical malpractice arbitration would become a "strategic factor" for parties choosing between this mechanism and courtroom litigation.¹²⁹ A limitation of punitive damages, which could result in large re-

120. *See id.* at 155-56, 642 P.2d at 1309, 181 Cal. Rptr. at 788.

121. *Zhadan v. Downtown L.A. Motors*, 66 Cal. App. 3d 481, 496, 136 Cal. Rptr. 132, 140 (1976); *see also supra* note 69 and accompanying text.

122. *Zhadan v. Downtown L.A. Motors*, 66 Cal. App. 3d 481, 496, 136 Cal. Rptr. 132, 140 (1976); *see also supra* note 69 and accompanying text.

123. *See supra* notes 3, 4 and accompanying text.

124. *See supra* note 40 and accompanying text.

125. "There is a strong judicial policy in this state favoring arbitration over litigation as a means of settling disputes, including disputes arising out of medical malpractice claims, because arbitration is less expensive and more expeditious than litigation and moreover relieves court congestion." *Hawkins v. Superior Ct.*, 89 Cal. App. 3d 413, 416, 152 Cal. Rptr. 491, 493 (Ct. App. 1979) (citations omitted).

126. *See supra* note 4 and accompanying text.

127. *Marcus v. Superior Ct.*, 75 Cal. App. 3d 204, 210, 141 Cal. Rptr. 890, 892-93 (Ct. App. 1977).

128. *Id.*

129. *Bassis, supra* note 1, at 267.

coveries,¹³⁰ may lead claimants to refuse to agree to arbitration.¹³¹

Regardless of the strong policy favoring arbitration, the argument can be made that this policy does not justify circumventing the main purpose behind punitive damages.¹³² Further, arbitration is not a panacea; it has faults and problems that have not gone unnoticed.¹³³ To unnecessarily grant additional power to arbitrators may undermine the desired general effect of arbitration. Of particular relevance is the potential for subjecting arbitration decisions to judicial review. If punitive damages are allowed in arbitration, judicial supervision may eventually be needed.¹³⁴ Judicial review would undermine the finality, speed, and inexpensiveness of arbitration.¹³⁵ Therefore, allowance of punitive damages may impair the very functional existence of arbitration.

The issue of whether to permit awards of punitive damages in medical malpractice arbitration will be decided by weighing these and similar competing policy considerations. The courts must determine whether the policy favoring arbitration or that disfavoring punitive damages will control. In other words, they must decide which will be most beneficial to the general public.¹³⁶

CONCLUSION

Judicial determination of public policy is subjective in nature.¹³⁷ It is not possible to determine precisely whether California courts will permit punitive damages in medical malpractice arbitration; however, a calculated prediction may be made.

The statutory framework in California for arbitration is designed to give the arbitrator the "broadest possible powers."¹³⁸ Despite the liberal nature of procedural and evidentiary require-

130. *Bertero v. Nat'l. Gen. Corp.*, 13 Cal. 3d 43, 529 P.2d 608, 118 Cal. Rptr. 184, (1974); *Zhadan v. Downtown L.A. Motors*, 66 Cal. App. 3d 481, 136 Cal. Rptr. 132 (1976).

131. Bassis, *supra* note 1, at 267.

132. *Garrity v. Lyle Stuart*, 40 N.Y.2d 354, 356, 353 N.E.2d 793, 794, 386 N.Y.S.2d 831, 832 (1976).

133. "Emphatically, arbitration is not a panacea. It does not magically preclude liability. It is not appropriate for every situation. It may even create problems if implemented improperly or without provisions tailoring a wide variety of possible procedures and mechanisms to particular clients' requirements." Butler, *supra* note 3, at 42; "[A]rbitration of medical malpractice disputes has not been without its faults, thus presenting legitimate problems for resolution." Bassis, *supra* note 1, at 265 (footnote omitted).

134. See *supra* notes 89, 90 and accompanying text.

135. *Id.*

136. See *supra* note 77 and accompanying text.

137. See generally FROHOCK, *supra* note 77.

138. *Marcus v. Superior Ct.*, 75 Cal. App. 3d 204, 210, 141 Cal. Rptr. 890, 892 (Ct. App. 1977).

ments in arbitration, the “hearing” is conducted as though it were a judicial proceeding. The arbitrators function as judge and jury, pursuant to the wishes of the parties. The arbitrators have the authority to pass on any legal or factual issue which is part of the controversy involved.¹³⁹ Unless the parties specifically provide that punitive damages shall not be within the authority of the arbitrator,¹⁴⁰ there does not seem to be cause to restrict their application. The arbitrator’s award is totally within his discretion.¹⁴¹ The final award granted by the arbitrator is almost always confirmed, regardless of the amount considered adequate.¹⁴² The mere fact that a portion of the award is annexed punitive damages should not be repugnant.

Further, when punitive damages *are justified*, it seems illogical that an award of such would go unquestioned had the parties litigated in court, rather than arbitrate. Procedural safeguards still exist for the defendant in arbitration. If the defendant can show that fraud, substantial error, or an excess of jurisdiction was present in the arbitration decision, an appeal will be permitted.¹⁴³

In addition, the punishment and deterrent aspects of punitive damages will remain intact in arbitration. The defendant in arbitration is punished by the application of punitive damages. If punitive damages actually serve to deter future conduct, the defendant is not likely to repeat his wrongful acts. It should not make a difference how many individuals are deterred, so long as the defendant himself is inhibited from engaging in the same conduct in the future.

Finally, the possible detriment to the viability of arbitration by forbidding punitive damages outweighs the general purpose of the social exemplary stigma. If potential arbitration recovery is severely limited by the absence of punitive damages in arbitration, plaintiffs are unlikely to heed legislative encouragement to resort to this mechanism. To inhibit the use of arbitration, especially in medical malpractice cases, is simply illogical. *Incentives, not deterrents*, are required if arbitration is to prove at all helpful in the mitigation of the medical malpractice crisis.

Therefore, given the relative degree of infringement upon the principal purpose of punitive damages, and the relative emphasis on the need for arbitration, the California courts should not fol-

139. *Id.* at 210, 141 Cal. Rptr. at 892-93.

140. *See* *Delta Lines, Inc. v. Int’l Bhd. of Teamsters*, 66 Cal. App. 3d 960, 966, 136 Cal. Rptr. 345, 349 (1977).

141. *See supra* note 23 and accompanying text.

142. *Butler, supra* note 3, at 66.

143. *See supra* note 23 and accompanying text.

low the lead of the New York courts on this issue. California will probably rule that punitive damage awards in medical malpractice arbitration are *not* against public policy.

*Paul M. Nussbaum**

* I dedicate this publication to my parents, Dr. & Mrs. Arnold Nussbaum whose love, support and encouragement has enabled me to believe in myself, and achieve beyond my wildest expectations.