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Notes and Comments

*67 DISPARATE OUTCOMES AMONG MEDICAL MALPRACTICE VICTIMS: A NEW LOOK AT AN EQUAL PROTECTION CHALLENGE TO MICRA

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I. Introduction

In 1855, the California Supreme Court proclaimed that "[a] drunken man is as much entitled to a safe street, as a sober one," and then whimsically added, "and much more in need of it." [FN1] Likewise, medical malpractice victims are just as entitled to fair compensation for their losses as any other tort victim and--considering that medical malpractice cases require more work, are more expensive, are more risky, and result in a plaintiff's verdict in only twenty-two percent of trials, compared to fifty-three percent for other tort victims--have an even greater need for the complete recovery of their entire award once a jury has actually deliberated in their favor. [FN2] Unfortunately, for more than thirty years now, the California Legislature's heavy hand, as manifested in the Medical Injury Compensation Reform Act (MICRA) [FN3] of 1975, has caused just the opposite.

In 1985, after more than 100 years of progressive tort reform since the "drunken man" proclamation, the California Supreme Court crippled the rights and remedies of medical malpractice victims (and their attorneys) in California when it held that the most severe and prejudicial provision of MICRA, California Civil Code section 3333.2, passed constitutional scrutiny in Fein v. Permanente Medical Group. [FN4] Fein marked the end of a string of MICRA provision cases where the California Supreme Court repeatedly determined that the Legislature was within its constitutional purview to single out medical malpractice ***68** victims and limit their rights and remedies within the California courts. [FN5]

Today, over twenty years after the decision in Fein and over thirty years since its enactment, MICRA continues to cripple medical malpractice victims, while flying under the radar of most Californians who have not suffered injury as a result of medical malpractice. If you attempt to explain to medical malpractice victims today that their maximum recovery for pain, suffering, and death is 250,000 dollars--an amount set in 1975 when the average movie ticket cost about two dollars [FN6]--you will be met with suspicion and disappointment. Further, try to explain to medical malpractice victims why the California courts consider their pain and suffering less worthy of full recompense than the pain and suffering of other tort victims, and you will lack the words and reasoning necessary to adequately assuage the deep injustice they feel. Victims' inability to acquire just and complete compensation has left medical malpractice attorneys almost as disillusioned as the victims they represent, causing an "exodus from the practice area" in California. [FN7] Since MICRA's enactment, medical malpractice plaintiff's attorneys fees have dropped sixty percent in medical malpractice cases, [FN8] causing many California firms to avoid the cases altogether. [FN9]

While this is problematic for the attorneys, the result it imposes on medical malpractice victims is far more harmful, as victims with bona fide valid claims struggle to find representation because of the decreasing number of attorneys willing to take their cases. [FN10] This problem should be viewed as an unconstitutional inequality between medical malpractice victims and other tort victims that should be addressed through an Equal Protection Challenge before the California Supreme Court. While this issue merits consideration, it is beyond the scope of this analysis. This comment instead seeks to address a problem created by MICRA that is ripe for constitutional scrutiny.

***69** In the time since MICRA's enactment and the holding in Fein, the California courts' statutory interpretations of MICRA's provisions have resulted in unconstitutional inequality and unfairness within the class of medical malpractice victims. [FN11] Through logical, but differing interpretations of the meaning of "professional negligence," a statutory term within the provisions of MICRA, California courts have created great disparity among medical malpractice victims in the application of MICRA to their awards. [FN12] For example, the victim of an unauthorized breast augmentation was permitted to retain her entire award for 1,030,000 dollars in pain and suffering, while a bereft mother whose child died as a result of a physician's failure to provide treatment saw her award for pain and suffering reduced from 1,350,000 dollars to 250,000 dollars. [FN13] The inconsistent and often conflicting applications of MICRA's provisions lead to significant inequities in the awards for noneconomic damages rendered to medical malpractice victims, thereby perpetuating unconstitutional classes among these victims, such that "'persons similarly circumstanced"' are not treated alike. [FN14] When such an inequality arises among similarly situated persons, the California courts have traditionally found any statute causing such treatment to be unconstitutional as an Equal Protection Clause violation. [FN15] Thus, this comment will address a "new" Equal Protection ***70** Challenge to MICRA, based on the disparities created among medical malpractice victims through the California courts' statutory interpretations of the term "professional negligence" in MICRA, by comparing the disparate outcomes in three seemingly similar cases --Perry v. Shaw, [FN16] Flores v. Natividad Medical Center, [FN17] and Barris v. County of Los Angeles. [FN18]

II. Historical Perspective of MICRA

A. MICRA 's Enactment

In the early-1970s, the California Legislature felt the rising cost of medical malpractice insurance posed, and would continue to pose, a serious problem for the California health care system. [FN19] The average malpractice premiums in California rose from 400 dollars in 1960 to 2,600 dollars in 1974--an increase of 550 percent. [FN20] Believing that the rising health care costs were resulting in a shortage of insured doctors and decreased health care availability, the Legislature perceived a "crisis" emerging. [FN21] In response, some doctors passed the cost on to patients through increased fees, while others went "bare" (practicing without malpractice insurance), stopped providing certain high-risk procedures and treatment, or left the state altogether. [FN22]

***71** While the causes of the problem have been debated, many commentators--especially doctors and insurers--believe the "crisis" was precipitated by increases in the number of malpractice claims filed and in the amounts awarded to plaintiffs. [FN23] This belief, coupled with the lobbying power of doctors and insurers, brought about the creation of MICRA through a special 1975 session of the Legislature. [FN24] In convening this session, Governor Jerry Brown proclaimed, 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. [FN25]

MICRA is made up of numerous provisions "affecting doctors, insurance companies and malpractice plaintiffs." [FN26] While some provisions attempt to ensure doctors are held accountable for deviations from the appropriate standard of care, [FN27] other provisions in MICRA accomplish the opposite: Relieving physicians of full financial responsibility for their actions and requiring more for medical malpractice victims to be able to bring a cause of action to court. [FN28] In enacting MICRA, the Legislature claimed its intent was:

> "to provide an adequate and reasonable remedy for the major health care crisis . . . 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 ***72** physicians such as to substantially worsen the quality of health care available to citizens of this state." [FN29]

Thus, in hope of reducing these "skyrocketing" premiums, the tort reform provisions in MICRA seriously curtailed the rights and remedies of medical malpractice victims: Placing limits on the collateral source rule; [FN30] shortening the statute of limitations in many instances; [FN31] providing increased protection for arbitration provisions in contracts for medical services; [FN32] requiring notice of intent to file suit; [FN33] allowing for periodic payments of future damages; [FN34] and, perhaps most controversially, capping the amount of noneconomic damages at 250,000 dollars. [FN35]

Each of these provisions provides for differential treatment towards medical malpractice victims, thereby creating classifications between medical malpractice victims and other tort victims, among ***73** medical malpractice victims, and between those with more than 250,000 dollars in noneconomic damages and those with smaller losses. [FN36] For example, a medical malpractice victim will be able to retain 100 percent of an award of 250,000 dollars for noneconomic damages; whereas, a medical malpractice victim will only be able to retain fifty percent of a jury award of 500,000 dollars for noneconomic damages, because it will be reduced to 250,000 dollars by a post-verdict motion under California Civil Code section 3333.2. [FN37] These distinct classifications have caused disparate, unfair and unequal treatment among medical malpractice victims, while medical malpractice tortfeasors have received profitable and beneficent treatment. [FN38] This paradoxical result prompted the California Supreme Court to address equal protection challenges against several of MICRA's provisions. [FN39]

B. Equal Protection Clause Challenges to MICRA

1. Initial Challenges to MICRA's Limitations

The first significant equal protection challenge to MICRA arose in American Bank & Trust Co. v. Community Hospital of Los Gatos-Saratoga, Inc. [FN40] In that case, the plaintiff attacked California Code of Civil Procedure section 667.7, which permits a medical malpractice plaintiff's award for "future damages" of 50,000 dollars or more to be paid periodically over the expected course of time when the plaintiff will incur the loss, rather than in a lump sum at the time of the judgment, as is traditional. [FN41] Plaintiff argued that the section "violates ***74** the state and federal constitutional guarantees of due process, equal protection, and the right to

jury trial." [FN42]

In determining that section 667.7 passes constitutional scrutiny under each of these challenges, the Court held that "the provision [was] rationally related to a legitimate state interest." [FN43] The Court noted that Legislative history indicated one of the factors contributing to the increased malpractice premiums "was the need for insurance companies to retain large reserves to pay out sizeable lump sum awards," and concluded that the Legislature could have rationally decided "that a procedure that provides for the periodic payment of future damages will further the fundamental goal of matching losses with compensation" and the objective of reducing insurance costs. [FN44]

On the coattails of American Bank, in Barme v. Wood, [FN45] the California Supreme Court upheld California Civil Code section 3333.1, subdivision (b); a MICRA provision that bars a "collateral source" from obtaining reimbursement from a medical malpractice defendant. [FN46] In affirming the trial court's decision to bar the recovery from a collateral source under section 3333.1, the California Supreme Court again relied on its reasoning from American Bank and held that the Legislature did not violate equal protection because the section is "clearly intended to alleviate those same problems" addressed in American Bank. [FN47]

The third constitutional rejection came in Roa v. Lodi Medical Group, [FN48] where the California Supreme Court upheld the constitutionality of California Business and Professions Code section 6146, which limits plaintiff attorney's contingency fees. [FN49] In that case, plaintiffs challenged section 6146 after asking the court to award their counsel twenty-five percent of their child's net recovery from a negotiated settlement, per their contingency agreement. [FN50]

***75** The Court rejected the plaintiff's argument that section 6146 impermissibly infringes on the rights of medical malpractice victims to retain counsel by limiting the recoverable amount of attorneys' fees and thereby dissuading attorneys from handling such cases. Instead, the Court held that the limits: (1) Bore a rational relationship to the objectives of MICRA, and (2) were not unusually low so as to render the statute unconstitutional on its face. [FN51] The Court reasoned that the Legislature could have believed the statute would "[permit] an attorney to take only a smaller bite of a settlement," thereby allowing a plaintiff to agree to a lower settlement, "since he will obtain the same net recovery from the lower settlement"; and, "[deter] attorneys from either instituting frivolous suits or encouraging their clients to hold out for unrealistically high settlements." [FN52] As such, the Court concluded that section 6146 withstood constitutional scrutiny. [FN53]

While MICRA has an arguably enormous impact on medical malpractice victims and their ability to recover their losses, this line of cases did not require the Court to analyze the constitutionality of the section that prevents medical malpractice victims from fully recovering the damages that the trier of fact determined was just.

2. Challenging MICRA's Cap on Noneconomic Damages

California Civil Code section 3333.2 created the most significant and, as the California Court of Appeal called it, "Draconian" limitation in MICRA. [FN54] It is particularly severe as it requires that the courts, "as a matter of legislative fiat . . . reduce awards of noneconomic damages to $250,000 without regard to the result of a health care provider's negligence-- notwithstanding brain damage, paralysis, and other equally devastating injury." [FN55] Thus, when the long-awaited constitutional challenge to section 3333.2 finally came--ten years after MICRA's enactment--it was, in the end, greatly disappointing for hopeful medical malpractice victims. [FN56]

In Fein, the jury awarded the plaintiff 500,000 dollars in noneconomic damages, finding that the defendant hospital was ***76** negligent in failing either to diagnose plaintiff's impending heart attack or to provide adequate treatment to prevent or lessen the residual effects. [FN57] Thereafter, the trial court reduced plaintiff's noneconomic damages to 250,000 dollars pursuant to section 3333.2. The plaintiff then challenged the reduction under the Due Process and Equal Protection Clauses of the Constitution. [FN58]

Relying greatly on its reasoning from American Bank, the California Supreme Court applied a toothless rational relationship test to the legislation, simply concluding: "It appears obvious that this section--by placing a ceiling of $250,000 on the recovery of noneconomic damages--is rationally related to the objective of reducing the costs of malpractice defendants and their insurers." [FN59] In justifying this conclusion, the Court reasoned that the Legislature could have concluded it was in the public interest to place a cost-saving limit on noneconomic damages after being "[f]aced with the prospect that, in the absence of some cost reduction, medical malpractice plaintiffs might as a realistic matter have difficulty collecting judgments for any of their damages." [FN60] Additionally, the Court asserted that if the Legislature had eliminated the medical malpractice cause of action altogether, it would not result in unconstitutional discrimination; thus, the limit imposed by section 3333.2 "does not amount to an unconstitutional discrimination." [FN61] Finally, the Court likened its decision in American Bank to Werner v. Southern California Associated Newspapers, [FN62] where it applied a rational relationship test "in dismissing a due process attack on a statute-- Civil Code section 48a--which . . . largely eliminat[ed] the traditional right to obtain 'general damages' that such a plaintiff had enjoyed before the statute." [FN63]

While it seemed to recognize that section 3333.2 actually resulted in unequal treatment of medical malpractice victims, the California Supreme Court concluded that the noneconomic damages cap was ***77** rationally related to accomplishing a legitimate state interest. [FN64] Thus, the Court passed the buck to the Legislature, claiming that "'[t]he forum for the correction of ill-considered legislation is a responsive legislature.'" [FN65]

III. The Majority Failed to Apply a True Rational Relationship Analysis in Fein, Allowing MICRA to Cause Disparate Outcomes among Similarly Circumstanced Medical Malpractice Victims

In analyzing these equal protection challenges, the California Supreme Court, most effectively for its purposes, first addressed the less prejudicial MICRA provisions--sections 667.7, 3333.1, and 6146--so that it could rely on the reasoning in those cases as precedent when it finally approached section 3333.2, the most controversial and prejudicial provision in MICRA. [FN66]

This process began in American Bank, when the Court removed what little legislative oversight initially existed in the rational relationship test. [FN67] Chief Justice Bird's dissent declaimed this move as improperly "reduc[ing] the rational relationship test to a rubber stamp." [FN68] The Chief Justice insisted that the rational relationship test must still consider the "actual impact of the challenged legislation" and take into account "both the character of the burdened class and the nature of the interest at stake." [FN69]

In Fein, the dissent reminded the majority of the rational relationship test previously used by the Court in cases like Brown v. Merlo, [FN70] which stated that each statutory classification "'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" [FN71] Nonetheless, under the rational relationship ***78** test used by the majority, no analysis was given to the character of the burdened class of medical malpractice victims, or to their relevant interests. [FN72] The majority limited its analysis to the relationship between MICRA and its purpose,

and summarily concluded that there was a rational relationship between the two. [FN73] In framing the analysis so narrowly, the majority indicated that the Legislature could even eliminate malpractice victims' remedies altogether, as long as doing so was intended to reduce malpractice premiums. [FN74]

Under such a narrow test, seemingly any legislative act would pass constitutional scrutiny, rendering the rational relationship test utterly meaningless. The Chief Justice in American Bank insisted that the majority's position invalidated the traditional purpose of the rational relationship test, which was "to put a check on the power of the Legislature to impose harmful burdens on politically defenseless groups." [FN75] Medical malpractice victims are the epitome of a "politically defenseless group," in that the victims do not join the group until they have already been wronged by a physician's tortious conduct; at which point, legislative reform is no longer useful to the new member of the group. [FN76] In addition, because the individuals who would be part of the group at the time MICRA was enacted were unaware MICRA would eventually affect them, the dissent explains that they had "no incentive to engage in coalition building or lobbying" in their defense. [FN77] Thus, while physicians have enormous lobbying groups fighting for their interests, the medical malpractice victim remains largely unrepresented within the Legislature. Unfortunately, the majority gave no attention to the defenseless nature of the medical malpractice victim in its analysis; instead, seizing these most crucial constitutional challenges to remove what little oversight the courts retained over the legislature through the rational relationship test. [FN78]

***79** By adopting this new, "toothless," version of the rational relationship test for its analysis of the noneconomic damages cap in Fein, the majority side-stepped any serious discussion of the devastating and prejudicial effect MICRA has on the particular medical malpractice victims it arbitrarily classifies as those who must suffer the burden. [FN79] The medical malpractice victims that are the most severely injured under section 3333.2--those tending to have the largest awards of noneconomic damages--are targeted to provide the majority of the relief that the Legislature seeks through MICRA. [FN80] Arbitrarily singled out, this small group is forced to shoulder the burden of an entire industry. In defending this legislative decision, the majority in Fein highlighted the nobility in the Legislature's decision to permit medical malpractice victims to recover all of their economic damages from a health care provider:

> It is worth noting, however, that in seeking a means of lowering malpractice costs, the Legislature placed no limits whatsoever on a plaintiff's right to recover for all of the economic, pecuniary damages--such as medical expenses or lost earnings--resulting from the injury, but instead confined the statutory limitations to the recovery of noneconomic damages, and--even then--permitted up to a $250,000 award for such damages. [FN81]

How noble indeed. While medical malpractice victims are undoubtedly grateful they are still "permitted" to recover for their actual economic losses, the majority's cold calculations lack compassion and casually avoid consideration of the medical malpractice plaintiffs who have little or no economic damages because of the nature of their claim. Not all medical malpractice plaintiffs have identifiable economic damages. Some have only noneconomic damages for which they can seek recompense, despite being just as harmed through medical negligence as any other medical malpractice victim and having the same cause of action. In Fein, Chief Justice Bird recognized that, just as a medical malpractice victim who has been disfigured through physician negligence might only be able to claim noneconomic damages to alleviate his lifelong humiliation, "[f]or a child who has been paralyzed from the neck down, the only ***80** compensation for a lifetime without play comes from noneconomic damages." [FN82]

The passage of time has undeniably supported this reasoning. A recent study by the Rand Institute for Civil Justice illustrated that MICRA has "disproportionately impacted children: plaintiffs less than a year old had

awards capped 71 percent of the time, compared with 41 percent for all other plaintiffs with nonfatal injuries." [FN83] In addition, the study determined that the most severe MICRA reductions, those of 2.5 million dollars or more, "usually involved newborns and young children with very critical injuries." [FN84] These statistics represent the embodiment of persons unconstitutionally classified and chosen to shoulder the burden of the healthcare industry through MICRA.

When the New Hampshire Supreme Court was faced with a statute almost identical to MICRA, [FN85] it focused on the inequitable burden that a limitation on noneconomic damages places on the most severely injured medical malpractice victims. [FN86] There, the Court addressed all of its provisions at once, including periodic payments for future damages, limiting attorneys' fees, and a 250,000 dollar cap on non-economic damages. [FN87] The Court ultimately held that the legislation was "an unreasonable exercise of the legislature's police power and violates the State's equal protection guarantees." [FN88] The majority opined: "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." [FN89] In failing to apply a true rational relationship test, as previously established by the California Supreme Court, [FN90] the majority ***81** in Fein missed, or side-stepped, the opportunity that the New Hampshire Supreme Court seized: To ensure that the statute had a reasonable effect on medical malpractice victims, rather than a mere rational relation to its objectives. [FN91]

While this statute was clearly prejudicial when enacted in 1975, it creates an even more unjust, unfair, and uneven burden on medical malpractice victims today. Even though the Legislature determined 250,000 dollars to be a fair cap for a victim's pain and suffering at the time of MICRA's enactment, today the value of 250,000 dollars awarded to a seriously injured victim who may face a lifetime of pain and suffering is utterly insignificant. Chief Justice Bird recognized the inadequacy of the 250,000 dollar cap for many victims in 1985, noting that

> [M]ost large recoveries come in cases involving permanent damage to infants or to young, previously healthy adults. Spread out over the expected lifetime of a young person, $250,000 shrinks to insignificance. Injured infants are prohibited from recovering more than three or four thousand dollars per year, no matter how excruciating their pain, how truncated their lifespans, or how grotesque their disfigurement. [FN92]

He further cautioned that "[e]ven this small figure will gradually decline as inflation erodes the real value of the allowable compensation." [FN93] Proved wise and true with the passage of time, 250,000 dollars in 1975 is equivalent to only "$64,000 in today's economy." [FN94]

These issues were ripe the moment MICRA was enacted and at the time Fein was determined. The passage of time and the ever-growing impact of MICRA's noneconomic damages cap have allowed a ripe issue to become pregnant with need for review. Thus, it is crucial that the judiciary renew its constitutional inquiry into MICRA's statutes; this time applying a true rational relationship test, conducting a serious and sensitive investigation into the nature of the legislation, and addressing the actual impact it has on all similarly circumstanced ***82** medical malpractice victims. Unless the Court can find a "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" within the actually stated purposes of the legislation, MICRA is an unconstitutional violation of equal protection guarantees and cannot pass constitutional scrutiny. [FN95]

IV. Statutory Interpretations of "Professional Negligence" in MICRA Cause Disparate and Prejudicial Outcomes for Similarly Circumstanced Medical Malpractice Victims

MICRA has had a disparate impact on similarly circumstanced persons since its enactment and its impact has become greater and more visible with time. As a result of several key decisions regarding the statutory interpretation of the term "professional negligence" within MICRA, the California Supreme Court has created certain classes of medical malpractice victims that are similarly circumstanced, but treated disparately; thereby raising a valid constitutional challenge to MICRA that the Court has yet to address.

A. Statutory Interpretations of "Professional Negligence"

1. Determining the Meaning of "Professional Negligence" in MICRA

Before the California courts could even address the constitutionality of MICRA in 1985, they were forced to determine the meaning and applicability of "professional negligence" in the statutes in Hedlund v. Superior Court of Orange County. [FN96] In Hedlund, the Court faced the question of whether the statute of limitations section of MICRA, Code of Civil Procedure section 340.5, governs a cause of action brought against a psychiatrist for injuries inflicted on the plaintiff by the psychiatrist's patient. [FN97] Thus, the Court needed to determine whether a violation of the duty created in Tarasoff v. Regents of the University of California, [FN98] the professional duty to warn a ***83** potential victim of a threat made by a therapist's patient, constituted "professional negligence" under MICRA. [FN99]

Like all other provisions of MICRA, section 340.5 defines "professional negligence" as:

> [A] negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that 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. [FN100]

In Hedlund, the Court determined that the plaintiff's action was a breach of the "duty to predict, or diagnose, dangerousness, and to warn of a danger posed by a therapist's patient." They held that the "warning aspect" of the Tarasoff duty was "inextricably interwoven with the diagnostic function." [FN101] Therefore, because the Tarasoff duty is part of the professional service expected of a licensed psychologist, a negligent failure in this regard constitutes "professional negligence" within MICRA. [FN102]

Several years later, at the same time that the California Supreme Court was determining the constitutionality of MICRA, the Court also chose to limit and narrow the applicability of MICRA in some cases. In Waters v. Bourhis, [FN103] Barbara Waters filed an action against her former attorney, Ray Bourhis. He had represented her in a suit against her psychiatrist who she claimed induced her into sexual conduct as part of her therapy. She thus alleged, "(1) negligence, (2) breach of duty of good faith, and (3) intentional or reckless infliction of emotional distress." [FN104] The psychiatrist's insurer agreed to settle the claim at the policy limit of 200,000 dollars. [FN105] Bourhis disregarded the requirements of California Business and Professions Code section 6146 and retained forty percent of Waters's recovery in accordance with their contingency fee agreement, but informed Waters of the statute and advised her, if she had questions, to consult an independent ***84** attorney about the applicability of the statute. [FN106] After obtaining recovery, Waters chose to consult an attorney and brought this action, "alleging that [Bourhis] had obtained fees in excess of $18,000 greater than the fees to which he was entitled under section 6146." [FN107]

Section 6146's limitations on attorney fees only apply to "actions which are 'based upon [the provider's] alleged professional negligence.'" [FN108] Therefore, the Court was required to determine if the theories of liability plead by Waters were based upon professional negligence. [FN109] While reiterating that Hedlund demonstrated "that MICRA's reference to actions based on 'professional negligence' is not strictly limited to classic sponge-in-the-patient medical malpractice actions," the Court found Hedlund was not on point here because Waters alleged both professional negligence and intentional tort theories in her complaint. [FN110] Waters's suit settled before it could be determined under which theory recovery was available, so the Court was left to determine upon which theories Waters could have recovered. [FN111] Turning to previous cases of therapist-patient sexual abuse, the Court reasoned that in a case like this, "the psychiatrist has breached both the duty imposed on everyone to refrain from intentionally injuring another and the special duty that a psychiatrist owes to his patient to use due care for the patient's health in the conduct of the therapist-patient relationship." [FN112] Thus, there was "little justification for limiting [Waters] solely to an intentional tort" theory and excluding a professional malpractice theory. [FN113]

Recognizing that MICRA does not address how such "hybrid" actions should be treated, the Court also noted that the legislative history contains no indication that "the Legislature intended either to require a plaintiff to make an election between two viable theories of recovery--one MICRA and one non-MICRA--or to prohibit such a plaintiff from joining MICRA and non-MICRA causes of action in a ***85** single proceeding." [FN114] While ruling that section 6146 would not apply to this situation, the Court also broadened its ruling to all "hybrid" claims, reasoning that "when a plaintiff knowingly chooses to proceed on both non-MICRA and MICRA causes of action, and obtains a recovery that may be based on a non-MICRA theory, the limitations of section 6146 should not apply." [FN115]

While this decision clearly indicated that a "hybrid" claim combining MICRA and non-MICRA theories is not limited by MICRA, the court did not define what types of theories are non-MICRA causes of action. [FN116] Although the non-MICRA action in Waters was for an intentional tort, the Court did not indicate whether it was defining non-MICRA theories as intentional torts or torts resulting from non-professional motives or conduct. [FN117] Nonetheless, the lower courts have given more definition to the meaning of non-MICRA in their decisions. [FN118]

In Noble v. Superior Court of Los Angeles County, [FN119] the plaintiff's cause of action alleged "medical malpractice, lack of informed consent, battery, negligence, and negligent infliction of emotional distress," after the defendant, while performing an authorized lymph node biopsy, performed an unauthorized procedure on a major sensory nerve in the plaintiff's neck, causing her to suffer serious pain. [FN120] In assessing whether Code of Civil Procedure section 364 applied, the Court reasoned that MICRA's use of more limiting terms like "'professional negligence' and 'negligent act or omission to act"' indicates the Legislature's deliberate choice to further its "goal of reducing the number of medical malpractice actions filed." [FN121]

Thus, the Court determined that applying section 364 to an action for battery would be "inconsistent with the spirit, if not the letter, of ***86** MICRA." [FN122] While the Court in Noble did not clearly state MICRA was inapplicable to all intentional torts, it concluded the Legislature would not have limited MICRA to "professional negligence" if it had intended MICRA to cover battery. [FN123] Nonetheless, in the years since Noble, California courts have interpreted MICRA's applicability to intentional torts in many different ways. [FN124]

Waters and Noble mark the reasoning California courts have generally used when dealing with medical battery and other intentional torts. Bellamy v. Superior Court of Kings County [FN125] illustrates the type of reas-

oning the courts have taken when considering acts of general negligence by health care providers. [FN126] The plaintiff in Bellamy alleged general negligence and premises liability after she was left unattended on an unsecured rolling X-ray table and she fell off onto her head. [FN127] The lower court determined her action was "non-MICRA" because the act of negligence by the hospital was one of general negligence and, therefore, not within the meaning of "professional negligence." [FN128]

In overruling the lower court, the court of appeal held an act of negligence is within the meaning of "professional negligence" as it pertains to MICRA, when the negligent act occurs "'in the rendering of professional services.'" [FN129] As it pertained to Bellamy, the Court reasoned that the "negligent omission . . . to set a brake on [a] rolling X-ray table," which is an act that requires no "particular skill, training, experience or exercise of professional judgment," is one of the many ***87** acts performed by an X-ray technician as part of his services. [FN130] Thus, the court in Bellamy held that any negligence or negligent omission in one of the acts that are part of the services rendered, regardless of the degree of skill and judgment required, is an act of "professional negligence." [FN131]

Bellamy seems to broaden the meaning of "professional negligence" in MICRA and as it applies to many other claims. However, it did not overrule Waters or Noble, as the two lines of reasoning deal with different types of alternative theories in medical malpractice claims. Nonetheless, the meaning of "professional negligence" has broadened in its application to statutes enacted subsequent to MICRA.

2. Applying the Meaning of "Professional Negligence" in MICRA to Section 425.13(a)

California Code of Civil Procedure section 425.13, subsection (a)--a statute enacted after MICRA--prevents a claim for punitive damages in actions "arising out of the professional negligence of a health care provider," unless a special court order has been issued to allow a claim for punitive damages in the pleading. [FN132] While the meaning of "health care provider" is defined in subsection (b) of the statute, there is no subsection defining the meaning of "professional negligence." [FN133] Nonetheless, "professional negligence" is defined repeatedly throughout MICRA's provisions and courts have consistently presumed that in omitting the definition from section 425.13, "the Legislature was familiar with existing statutory definitions" and intended those definitions to apply to this section. [FN134]

In Central Pathology v. Superior Court of Los Angeles County, [FN135] the California Supreme Court addressed whether an action for fraud by a physician or hospital could fall within the definition of "professional ***88** negligence" under section 425.13. [FN136] After suing Central Pathology for "negligent medical practices," the plaintiffs added two claims based on intentional tort theories so they could claim punitive damages under those intentional torts. [FN137] Relying on Bommareddy v. Superior Court of Merced County, [FN138] which held that "professional negligence" in section 425.13 is a "term of art" used in MICRA and its specific meaning excludes intentional torts, the trial court and court of appeal determined section 425.13 was inapplicable to the plaintiff's prayer for punitive damages because it was based on intentional tort theories. [FN139]

The California Supreme Court criticized the analysis of section 425.13 found in Bommareddy, reasoning that it was erroneous because it focused on the relationship between professional negligence and intentional torts. [FN140] Whether the MICRA definition of professional negligence "includes intentional torts is not the question. Rather, the trial court must determine whether a plaintiff's action for damages is one 'arising out of the professional negligence of a health care provider.'" [FN141] In addition, the Court believed the resulting outcome from the Bommareddy court's interpretation of section 425.13(a) "undermine[d] the Legislature's intent to pro-

tect health care providers from unsubstantiated punitive damage claims." [FN142] The Court in Central Pathology thus created a new interpretation for the application of section 425.13, holding that section 425.13 applied whenever the claim is "for an injury that is directly related to the professional services provided by a health care provider acting in its capacity as such." [FN143]

Previously, in cases like Noble, where part of the plaintiff's claim was predicated on a "medical battery" or unauthorized procedure, [FN144] the courts had found MICRA inapplicable because a medical battery ***89** does not constitute professional negligence under MICRA. [FN145] In Central Pathology, the Court expressly stated the converse:

> [A] cause of action against a health care provider for battery predicated on treatment exceeding or different from that to which a plaintiff consented is governed by section 425.13 because the injury arose out of the manner in which professional services are provided. [FN146] Nonetheless, Central Pathology distinguished that an action for sexual battery would usually not be governed by section 425.13, because a health care provider's sexual conduct is considered independent from the professional services he provides. [FN147]

As this new interpretation of "professional negligence" was applied in Central Pathology, the Court held the claim for fraud was "directly related to the manner in which defendants provided professional services" because the claim was based on the "manner in which defendants performed and communicated the results of medical tests." [FN148] Therefore, the Court found that section 425.13 governed the plaintiffs' fraud claim. [FN149]

Just two years later, in Williams v. Superior Court of San Diego County, [FN150] the court of appeal further clarified how a court could determine whether a claim is directly related to the professional services of a health care provider; stating "'the test is whether the negligent act occurred in the rendering of services for which the health care provider is licensed.'" [FN151] In Williams, the defendant contended that the plaintiff was a non-patient, non-employee phlebotomist that was "injured while drawing blood from a violent patient" at the defendant institute; therefore, her action constituted general negligence--not professional negligence--which is not governed by ***90** section 425.13. [FN152] When the court of appeal applied the statute to the plaintiff's action, it held that the test for section 425.13 is not based on the level of skill required, but "whether the injuries arose out of the rendering of professional services." [FN153]

3. The California Supreme Court Chose Not to Apply Central Pathology Reasoning to MICRA Cases

The different MICRA provisions state that their respective statutes apply to actions "based on professional negligence" or "based upon professional negligence." [FN154] Thus, the California Supreme Court could have used the same reasoning it applied in Central Pathology when interpreting the "arising out of professional negligence" language to broaden the scope of MICRA's provisions to include causes of action predicated on intentional tort theories when the injury occurred in the rendering of professional services.

In a subsequent opinion, the court of appeal urged the Supreme Court to adopt a Central Pathology analysis for all MICRA provisions, which would thereby overrule Noble, Waters, and their progeny. [FN155] Even so, the Supreme Court rejected the court of appeal's proposal and refused to apply its analysis from Central Pathology to MICRA cases, despite the fact that the Court had considered the meaning of "professional negligence" in the two statutes to be the same. [FN156] Since then, the Court has continued to refuse to apply Central Pathology, opting instead to apply its interpretation of "professional negligence" found in Noble and Waters when considering MICRA provisions. [FN157]

There is no distinguishable difference between "arising out of" and "based upon," and the Court has not made any distinctions on this issue. [FN158] The Court could easily apply a Central Pathology reasoning ***91** to MICRA and broaden its scope to all medical malpractice cases, thereby capping even more causes of action and making the statutes even more effective in their stated purpose of lowering medical malpractice insurance premiums. Nonetheless, the Court has chosen to remain on its initial path, closing MICRA off from certain causes of action and certain malpractice victims. [FN159] In effect, the only distinction between these medical malpractice victims and those whose noneconomic damages are capped is their ability to plead a few select medical malpractice theories.

In a footnote in Waters, the Court noted the practical implications of its decision: "We recognize, of course, that many malpractice actions will be pursued both on MICRA and non-MICRA theories, in the hopes of circumventing MICRA's provisions." [FN160] In avoiding applying Central Pathology reasoning to MICRA, the Court has knowingly created loopholes within MICRA's application that cause inequalities and unfairness in the outcomes that are forced upon medical malpractice victims with very similar causes of action.

B. Illustrating How Statutory Interpretations of "Professional Negligence" Have Caused Disparate and Prejudicial Outcomes for Three Similarly Circumstanced Medical Malpractice Victims

A comparison of three cases --Perry v. Shaw, [FN161] Flores v. Natividad Medical Center, [FN162] and Barris v. County of Los Angeles, [FN163]-- illustrates how different legal labels placed upon a health care provider's tortious actions can significantly change the damages available to medical malpractice victims, though the nature and extent of the victims' pain and suffering remains the same. There is no rational or logical reason why some medical malpractice victims are singled out to bear the burden of MICRA and others are not. Therefore, this disparate treatment among similarly circumstanced medical malpractice victims creates an unconstitutional classification that lacks a "'fair and substantial relation to the object of the legislation,"' ***92** thereby requiring the immediate renewal of constitutional scrutiny to this issue. [FN164]

In Perry, the plaintiff, Sandra Perry, claimed both medical negligence and medical battery against the defendant-physician. She awoke from a skin removal procedure to discover that the defendant had "substantially augmented her breasts (from a 34B to a 40DD)" even after she repeatedly told him she did not want a breast augmentation as part of the procedure. [FN165] After Perry was awarded 1,030,000 dollars in noneconomic damages for her surgically enlarged breasts, the defendant moved to reduce the noneconomic damages to 250,000 dollars. The trial court denied the motion pursuant to the requirements of California Civil Code section 3333.2. [FN166] The court of appeal upheld the trial court's decision, determining that the jury had found the defendant liable for "one item of damage with two concurrent and legally overlapping causes--negligence and battery." [FN167] The distinction between a medical battery claim (which is based on an unauthorized touching during a medical procedure) and a medical negligence claim (which is based on a lack of informed consent) is minute, and both claims can be supported using the same facts. Nevertheless, the California Supreme Court has determined that the resulting outcome and required standard of proof are sufficient reason to warrant a distinction between them. [FN168] Applying Waters, the court of appeal reasoned that Perry's medical battery claim was a non-MICRA theory and that section 3333.2 should not apply when a plaintiff "'knowingly chooses to proceed on both non-MICRA and MICRA causes of action, and obtains a recovery that may be based on a non-MICRA theory."' [FN169] Thus, Perry kept both her unwanted, enlarged breasts and the 1,030,000 dollars in noneconomic damages. [FN170]

Additionally, the court showed support for the limitations placed on MICRA in Waters and Noble in claiming that when the courts are ***93** required to follow a legislative fiat as "Draconian" as section 3333.2, "the scope of that fiat must be limited to its terms." [FN171] In rejecting the defendant's argument that Perry was awarded separate items of compensable damages that should be apportioned by the jury among the two legal theories, the Court reasoned: "The legal label placed on [the defendant's] wrong does not affect the nature or extent of Ms. Perry's distress or pain or suffering." [FN172] Thus, as it supported the underlying rationale in Waters, the Court restated the most unconstitutional aspect of all MICRA statutes, which requires the courts to reduce the available recovery for a victim's pain and suffering because the legal label placed on the tortfeasor's wrong falls within "professional negligence." Nonetheless, the Court avoided further discussion of the constitutionality or prejudice of MICRA and affirmed the trial court's ruling, thereby allowing Perry to retain the entire noneconomic damages award. [FN173]

In Flores, Samuel Flores, the plaintiff and a state prisoner, was awarded 550,000 dollars in general noneconomic damages, which the trial court reduced to 250,000 dollars pursuant to section 3333.2. [FN174] At trial, Flores sought recovery on theories of failure to summon medical aid and medical negligence, alleging that the defendants "'knew or should have known that plaintiff was in need of immediate medical care and they failed to take reasonable action to provide such care"; and, "were negligent in their diagnosis and treatment of the plaintiff." [FN175]

In its analysis, the court of appeal--on the premise that MICRA should not apply to a failure to summon medical aid cause of action under Government Code section 845.6--noted the similarities between this case and cases like Waters, in that the manner in which Flores was injured permitted him to make a hybrid claim like the plaintiffs in those cases. [FN176] Even though Flores argued the defendants were negligent and liable for medical malpractice, he also claimed they were liable for failing to transfer him sooner from the prison care facilities to the ***94** hospital. [FN177] In response, the defendants argued that the jury's award was actually based on medical negligence because the special verdict form utilized by the jury "used the term 'negligent' with respect to the State's liability." [FN178] Nonetheless, the court of appeal determined it was clear Flores' case was based in substantial part on a claim for failure to summon medical aid. [FN179]

In presenting his case to the jury on both the medical negligence and failure to summon medical aid claims, Flores, like Perry, created a hybrid action, "where both viable MICRA and non-MICRA theories were pursued and where recovery could have been based on the non-MICRA theory." [FN180] Therefore, the court of appeal determined MICRA should not have been applied to Flores' judgment and reversed the reduction imposed by the trial court. [FN181]

Ironically and sadly, in an action based on a defendant's conduct very similar to that in Flores, the California Supreme Court affirmed a MICRA reduction. In Barris v. County of Los Angeles, [FN182] the Court upheld the judgment of the court of appeal, finding the County of Los Angeles liable for the death of Dawnelle Barris's daughter, Mychelle, under the Emergency Medical Treatment and Active Labor Act (EMTALA), [FN183] for transferring the child to another hospital "without providing treatment required to stabilize her emergency medical condition." [FN184] At trial, the plaintiff was awarded 1,350,000 dollars in noneconomic damages for the premature and unnecessary loss of her daughter. [FN185] The superior court and court of appeal concluded that section 3333.2 applied to the plaintiff's EMTALA claim and reduced her award of noneconomic damages from 1,350,000 dollars to 250,000 dollars. [FN186]

On the night of Mychelle's death, Barris took her daughter to the pediatric emergency room of Martin Luther

King/Drew Medical ***95** Center. [FN187] At the time, Mychelle had a temperature of 106.6 degrees and symptoms consistent with sepsis. [FN188] Mychelle's physician concluded that a complete blood culture was necessary to confirm a suspected differential diagnosis of sepsis, but did not order the culture "because he believed that he had to obtain authorization from Kaiser," the plaintiff's H.M.O. provider. [FN189] Mychelle's physician called Kaiser's on-call physician, discussed her condition, explained the need to perform the blood cultures at King/Drew, and requested authority to do so. [FN190] Unfortunately, Kaiser's physician repeatedly instructed King/Drew to refrain from performing any tests and to transfer Mychelle to Kaiser. [FN191] Shortly thereafter, Mychelle suffered a seizure; King/Drew treated her seizure and other symptoms, but did not administer antibiotics for the suspected sepsis. [FN192] Mychelle was transferred to Kaiser just one hour later, but she "suffered a cardiac arrest and was pronounced dead" within fifteen minutes of her arrival. [FN193] Through an autopsy, sepsis, "which is readily treatable by antibiotics," was determined as the cause of death. [FN194]

The jury awarded Mychelle's mother 3,000 dollars in economic damages for funeral expenses and 1,350,000 dollars in noneconomic damages on claims of professional negligence and failure to stabilize under EMTALA. [FN195] In affirming the superior court's application of section 3333.2 to reduce the plaintiff's noneconomic damage award to 250,000 dollars, the court of appeal relied on Central Pathology's broad interpretation in order to apply section 3333.2 to the EMTALA claim. [FN196] Despite the court of appeal's urging, the Supreme Court refused to apply a Central Pathology rationale to MICRA's provisions, but it agreed that here MICRA applied to the plaintiff's EMTALA claim. [FN197] Reasoning that a claim for failure to stabilize a patient ***96** "involves 'a negligent . . . omission to act by a health care provider in the rendering of professional services,"' the Court determined a claim under EMTALA is "necessarily 'based on professional negligence' within the meaning of MICRA." [FN198]

Although it did not rely on Central Pathology's holding, the Court applied a Central Pathology-like analysis by broadening the meaning of "professional negligence" in MICRA through its explicit recognition of the meaning of "based on." [FN199] While this decision was not used to broaden the meaning of "professional negligence" in Perry--which came two years later and still applied Noble's interpretation [FN200]--the broadened application here significantly affected the outcome for Mychelle's mother. [FN201]

The claim under EMTALA by Mychelle's mother is substantively similar to the claim for failure to summon medical aid made by Flores. [FN202] Just as the non-MICRA claim in Flores was based on the defendants' failure to recognize Flores's need for medical treatment, the claim in Barris was based on the defendant's failure to recognize Mychelle's need for additional medical attention before her transfer to a Kaiser facility. [FN203] In both cases, professional services were being rendered by the defendants. [FN204] Further, in both cases, the negligent act by the defendants occurred in their omission to act or provide a needed service. [FN205] Even though these plaintiffs relied on similar negligent actions committed by the defendants, they were treated disparately, unfairly and unconstitutionally by the California courts.

As stated earlier, for legislation to pass constitutional scrutiny under the Equal Protection Clause, it must have a rational relationship "'to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."' [FN206] Thus, if the ***97** California Supreme Court were to analyze these disparate outcomes under a proper rational relationship test, it would logically be compelled to determine that "'all persons similarly circumstanced"' are not treated alike under MICRA. [FN207]

These cases also indicate the enormous problems California Civil Code section 3333.2 causes by placing the burden for solving the so-called medical malpractice crisis almost entirely on noneconomic damages. For a

mother like Barris, who has lost her child, there are no significant economic damages to be recovered beyond burial expenses. The only form of just recompense she can seek for the lost love, companionship, and affection of her daughter comes from the noneconomic damages a jury feels are necessary to compensate her for that loss. As it turned out, these damages were reduced by more than seventy-five percent, or 1,100,000 dollars, as the "Draconian" side effect of section 3333.2. Awarding a plaintiff only twenty-five percent of what is fair and just necessarily results in awarding seventy-five percent injustice. Barris, and others like her, are the few to shoulder the burden of fixing the entire health care industry's medical malpractice crisis so that insurance providers, like those that actually prevented Mychelle from getting the care she needed, are relieved of much of their financial responsibility for their insured's wrongful actions. This is not right and cannot pass constitutional scrutiny.

The comparison of the disparate treatment given to plaintiffs Barris, Flores, and Perry, with their distinctly different outcomes, evidences that similarly circumstanced medical malpractice victims who have plead similar causes of action on similar legal theories are being treated differently and inequitably under the provisions of MICRA. Thus, not only is renewed constitutional inquiry necessary, but it should lead to the reversal of Fein and a determination that at least one section of MICRA, California Civil Code section 3333.2, is unconstitutional.

V. Conclusion

Medical malpractice victims are a politically defenseless class that must rely entirely on judicial oversight through constitutional inquiry for protection of their rights. In 1985, these victims petitioned ***98** the California Supreme Court for the same protection that the California Constitution provided for all other tort victims, but their petition was denied. [FN208] On the grounds that similarly circumstanced medical malpractice plaintiffs were treated the same under MICRA's provisions and those provisions were reasonably related to MICRA's goal of lowering malpractice insurance premiums, the Court in Fein crushed the victims' hopes of constitutional protection. This decision has loomed over medical malpractice victims and their attorneys for more than twenty years, reaching so far as to affect plaintiffs even before they are able to bring their claim to court.

The broad majority of medical malpractice victims like Barris are unable to fit within the loopholes in MICRA created by Noble and Waters. Consequently, medical malpractice attorneys are leaving the practice area in California in such great numbers that plaintiffs are struggling to find adequate legal representation for meritorious claims. [FN209] Far from elevating the standard of medical practice provided to patients, MICRA's provisions seem to have had a deleterious effect on the quality of the practice of medicine in California. A HealthGrades Quality study from April 2006 "shows California ranked in the bottom 10 states for patient safety," indicating that the limits on damages granted to physicians and hospitals under MICRA create little incentive for doctors to elevate their standard of care. [FN210] After all, as one California plaintiff's attorney now leaving the practice area put it: "'If I told you the penalty for driving in the carpool lane was $10, what would you do?"' [FN211]

From the beginning, MICRA has caused disparate treatment, prejudicing the most severely injured medical malpractice victims much more than others. Through the holdings in Waters and Noble, the California courts have created loopholes in MICRA's application that were not considered in Fein and that have caused significantly different financial outcomes in the cases of very similarly situated medical malpractice plaintiffs. While the Court is admittedly aware of these loopholes, it has consistently refused to reconcile this conflict through a Central Pathology reasoning, which would essentially open up MICRA's provisions to all medical malpractice

claims.

***99** The purpose of this comment is not to argue that the problem created through the disparate treatment experienced by similarly circumstanced medical malpractice plaintiffs should by remedied by applying a Central Pathology analysis to MICRA. Rather, the purpose is to point out that the California Supreme Court already had an opportunity to do so and it chose not to. Perhaps the Court's unwillingness to apply Central Pathology to MICRA demonstrates its distaste for MICRA and its draconian effects on medical malpractice victims. After all, how could any reasonable court logically believe that a 250,000 dollar cap on noneconomic damages established in 1975 is still just in 2008, given the inflationary factors experienced over the last thirty-three years? In 1975, 250,000 dollars would buy a beachfront estate in California; today it won't buy a hovel. Given this factual backdrop, it is time for the Court to take the next step and rid all medical malpractice victims of these burdens, as the legal avenue to do so is available.

Regardless of the Court's purposes for avoiding a Central Pathology analysis in MICRA, the result remains the same and clearly means that similarly circumstanced medical malpractice victims are being treated differently under MICRA. This discrepancy in their treatment has no logical or rational relationship to the objectives of MICRA and, therefore, cannot survive constitutional scrutiny. It is imperative that the California Supreme Court renew its constitutional inquiry into MICRA's provisions, especially California Civil Code section 3333.2, and the prejudicial treatment they have caused.

[FN1]. Robinson v. Pioche, Bayerque & Co., 5 Cal. 460, 461 (1855).

[FN2]. Susan McRae, State Malpractice Awards Drop: Plaintiffs' Attorney Fees Fall 60 Percent, Rand Study Says, 117 L.A. Daily J. 1, 5 (July 13, 2004).

[FN3]. 1975 Cal. Stat. vol. 2, 2d Ex. Sess., ch. 1-2, 3949-4007.

[FN4]. Fein v. Permanente Med. Group, 695 P.2d 665, 684 (Cal. 1985).

[FN5]. See Roa v. Lodi Med. Group, 695 P.2d 164, 170-72 (Cal. 1985); Barme v. Wood, 689 P.2d 446, 451 (Cal. 1984); Am. Bank & Trust Co. v. Community Hosp. of Los Gatos-Saratoga, 683 P.2d 670, 677-80 (Cal. 1984).

[FN6]. National Association of Theatre Owners, Movie Theatre Statistics, Average U.S. Ticket Prices, http://www.natoonline.org/statisticstickets.htm (accessed Oct. 10, 2008).

[FN7]. Rebecca Beyer, Seeing Their Ship Sinking, Med-Mal Attorneys Jump Off, 120 L.A. Daily J. 1, 8 (Oct. 2, 2007).

[FN8]. McRae, supra n. 2, at 1.

[FN9]. Beyer, supra n. 7, at 8 [¶¶ 12-16, 57].

[FN10]. Id. at 8 [¶¶ 50, 54].

[FN11]. See Roa v. Lodi Med. Group, 695 P.2d 164, 170-72 (Cal. 1985); Barme v. Wood, 689 P.2d 446, 451 (Cal. 1984); Am. Bank & Trust Co. v. Community Hosp. of Los Gatos-Saratoga, 683 P.2d 670, 677-80 (Cal.

1984); see also Paul Lin, Student Author, Is California's MICRA a Valid Constitutional Basis for Federal Health Care Liability Reform? Reviving an Equal Protection Challenge, 25 Whittier L. Rev. 463, 491-93 (2003) (citing and quoting City of Cleburn v. Cleburn Living Ctr., Inc., 473 U.S. 432, 452 (1985) (Stevens, J. & Burger, C.J., concurring); U.S. v. Carolene Prods. Co., 304 U.S. 144, 152 n. 4 (1938); Coburn v. Agustin, 627 F. Supp. 983, 993-95 (D. Kan. 1985); Am. Bank & Trust Co., 683 P.2d at 695 (Bird, C.J., dissenting); Cooper v. Bray, 582 P.2d 604, 605 (Cal. 1978); Brown v. Merlo, 506 P.2d 212, 216 (Cal. 1973)).

[FN12]. Cal. Civ. Code §§ 3333.1-3333.2 (West 1997); Barris v. Co. of L.A., 972 P.2d 966 (Cal. 1999) (quoting Cal. Civ. Code § 3333.2(a), (c)(2); C. Pathology Serv. Med. Clinic v. Super. Ct. of L.A. Co., 832 P.2d 924, 931 (Cal. 1992)); Flores v. Natividad Med. Ctr., 238 Cal. Rptr. 24, 28, 30 (App. 1st Dist. 1987) (quoting Cal. Civ. Code § 3333.2(c)(2)); Perry v. Shaw, 106 Cal. Rptr. 2d 70, 72-74 (App. 2d Dist. 2001) (quoting Barris, 972 P.2d at 976 (quoting C. Pathology, 832 P/2d at 931)).

[FN13]. Compare Perry, 106 Cal. Rptr. at 72, 79; with Barris, 972 P.2d at 968.

[FN14]. Fein v. Permanente Med. Group, 695 P.2d 665, 690 (Cal. 1985) (Bird, C.J., dissenting) (quoting Brown, 506 P.2d at 216 (quoting Reed v. Reed, 404 U.S. 71, 76 (1971))).

[FN15]. See Brown, 506 P.2d at 216 (citing Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 173 (1972); Eisenstadt v. Baird, 406 U.S. 438, 446-47 (1972); Reed, 404 U.S. at 75-76 (quoting Royster Guano Co. v. Commw. of Va., 253 U.S. 412, 415 (1920)); Rinaldi v. Yeager, 384 U.S. 305, 308-09 (1966); Hayes v. Super. Ct. of San Bernardino Co., 490 P.2d 1137 (1971)).

[FN16]. Perry, 106 Cal. Rptr. 2d 70.

[FN17]. Flores 238 Cal. Rptr. 24.

[FN18]. Barris, 972 P.2d 966.

[FN19]. Fein, 695 P.2d at 680.

[FN20]. Todd M. Kossow, Student Author, Fein v. Permanente Medical Group: Future Trends in Damage Limitation Adjudication, 80 Nw. U. L. Rev. 1643, 1649 (1986) (citing Albert Lipson, Medical Malpractice: The Response of Physicians to Premium Increases in California 1 (Rand 1976) (citing Booz, Allen Consulting Actuaries, California Medical Malpractice Insurance Study, in Off. of Auditor Gen. to Jt. Legis. Audit Comm., The Medical Malpractice Insurance Crisis in California, Rpt. 265.2, at 16 (Dec. 17, 1975))).

[FN21]. Fein, 695 P.2d at 680; Kossow, supra n. 20, at 1648-49 (citing Johnson v. St. Vincent Hosp., Inc., 404 N.E.2d 585, 589 (Ind. 1980); Pendergast v. Nelson, 256 N.W.2d (Neb. 1977) (quoting Taylor v. Karrer, 244 N.W.2d 204 (Neb. 1976))).

[FN22]. Am. Bank & Trust Co. v. Community Hosp. of Los Gatos-Saratoga, 683 P.2d 670, 678 (Cal. 1984); Kossow, supra n. 20, at 1649-50 (citing Lipson, supra n. 20, at 55-64).

[FN23]. Lin, supra n. 11, at 466 (citing Fein, 695 P.2d at 680; Mark A. Finkelstein, Student Author, California Civil Section 3333.2 Revisited: Has It Done Its Job?, 67 S. Cal. L. Rev. 1609, 1610 (1994)).

[FN24]. Id. (citing Finkelstein, supra n. 23, at 1609 (citing Hoffman v. U.S., 767 F.2d 1431, 1434 (9th Cir.

1985))).

[FN25]. 1975 Cal. Stat. vol. 2, 2d Ex. Sess. 3947 (Governor's Proclamation to Legislature (May 19, 1975)).

[FN26]. Fein, 695 P.2d at 680.

[FN27]. See Cal. Bus. & Prof. Code Ann. §§ 656, 2558, 3527 (West 2003).

[FN28]. See Cal. Civ. Code Ann. § 3333.2 (West 1997); Cal. Code Civ. Proc. Ann. § 364 (West 2006); Cal. Code Civ. Proc. Ann. § 667.7 (West 1987), Cal. Code Civ. Proc. Ann. § 1295 (West 2007).

[FN29]. Hedlund v. Super. Ct. of Orange Co., 669 P.2d 41, 45 (Cal. 1983) (quoting 1975 Cal. Stat. vol. 2, 2d Ex. Sess., ch. 2, § 12.5, 4007).

[FN30]. Cal. Civ. Code Ann. § 3333.1 (West 1997).

[FN31]. Cal. Code Civ. Proc. Ann. § 340.5 (West 2006).

[FN32]. Cal. Code Civ. Proc. Ann. § 1295 (West 2007).

[FN33]. Cal. Code Civ. Proc. Ann. § 364 (West 2006).

[FN34]. Cal. Code Civ. Proc. Ann. § 667.7 (West 1987).

[FN35]. Cal. Civ. Code Ann. § 3333.2 (West 1997).

Section 3333.2 provides:

(a) In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage.

(b) In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars ($250,000).

(c) For the purposes of this section:

(1) "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;

(2) "Professional negligence" means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that 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.

[FN36]. See Cal. Civ. Code Ann. §§ 3333.1-3333.2; Cal. Code Civ. Proc. Ann. §§ 340.5, 364, 667.7.

[FN37]. Cal. Civ. Code Ann. § 3333.2(b).

[FN38]. See Fein v. Permanente Med. Group, 695 P.2d 665, 669 (Cal. 1985); Roa v. Lodi Med. Group, 695 P.2d

164, 164-65 (Cal. 1985); Barme v. Wood, 689 P.2d 446, 447 (Cal. 1984); Am. Bank & Trust Co. v. Community Hosp. of Los Gatos-Saratoga, 683 P.2d 670, 672 (Cal. 1984).

[FN39]. Fein, 695 P.2d at 682; Roa, 695 P.2d at 164-65, 170; Barme, 689 P.2d at 451; Am. Bank & Trust Co., 683 P.2d at 672 (citing Cal. Civ. Proc. Code Ann. § 667.7).

[FN40]. Am. Bank & Trust Co., 683 P.2d at 676.

[FN41]. Cal. Code Civ. Proc. Ann. § 667.7; Am. Bank & Trust Co., 683 P.2d at 676.

[FN42]. Am. Bank & Trust Co., 683 P.2d at 672.

[FN43]. Id. at 676.

[FN44]. Id. at 676, 678-79.

[FN45]. Barme v. Wood, 689 P.2d 446 (Cal. 1984).

[FN46]. Id. at 447.

[FN47]. Id. at 451 (citing Am. Bank & Trust Co., 683 P.2d at 677-78 (quoting Williamson v. Lee Optical, 348 U.S. 483, 489 (1955); Werner v. S. Cal. Associated Newsp., 216 P.2d 825, 832 (1950))).

[FN48]. Roa v. Lodi Med. Group, 695 P.2d 164 (Cal. 1985).

[FN49]. Id. at 165.

[FN50]. Id. at 165-66.

[FN51]. Id. at 168-70.

[FN52]. Id. at 170-71.

[FN53]. Id. at 172.

[FN54]. Perry v. Shaw, 106 Cal. Rptr. 2d 70, 77 (App. 2d Dist. 2001).

[FN55]. Id.

[FN56]. See Fein v. Permanente Med. Group, 695 P.2d 665, 669, 679-84 (Cal. 1985).

[FN57]. Id. at 670.

[FN58]. Id. at 679, 682.

[FN59]. Id. at 680.

[FN60]. Id. at 681.

[FN61]. Id. at 683.

[FN62]. Werner v. S. Cal. Associated Newsps., 216 P.2d 825 (Cal. 1950).

[FN63]. Fein, 695 P.2d at 680 (citing Werner, 216 P.2d at 830).

[FN64]. Id. at 686.

[FN65]. Id. at 684 (quoting Werner, 216 P.2d at 831 (quoting Daniel v. Fam. Sec. Life Ins. Co., 336 U.S. 220, 224 (1949))).

[FN66]. See id.; Barme v. Wood, 689 P.2d 446 (Cal. 1984); Am. Bank & Trust Co. v. Community Hosp. of Los Gatos-Saratoga, 683 P.2d 670 (Cal. 1984).

[FN67]. See Am. Bank & Trust Co., 683 P.2d at 696 (Bird, C.J., dissenting).

[FN68]. Id. at 696.

[FN69]. Id.

[FN70]. Brown v. Merlo, 506 P.2d 212 (Cal. 1973).

[FN71]. Fein, 695 P.2d at 690 (Bird, C.J., dissenting) (quoting Brown, 506 P.2d at 216 (quoting Reed v. Reed, 404 U.S. 71, 76 (1971))).

[FN72]. See Fein, 695 P.2d at 683-84.

[FN73]. Id. (quoting Cooper v. Bray, 582 P.2d 604, 612 (Cal. 1978) (quoting Newland v. Bd. of Gov., 566 P.2d 254, 258 (Cal. 1977))).

[FN74]. Id. at 683-84.

[FN75]. Am. Bank & Trust Co., 683 P.2d 665, 670, 696 (Cal. 1984) (Bird, C.J., dissenting).

[FN76]. Id. at 696.

[FN77]. Id. at 695.

[FN78]. Id. at 695-96.

[FN79]. Fein, 695 P.2d at 687 (Bird, C.J., dissenting).

[FN80]. Id.

[FN81]. Id. at 680 (majority).

[FN82]. Id. at 689 (Bird, C.J., dissenting).

[FN83]. McRae, supra n. 2, at 1.

[FN84]. Id.

[FN85]. See Carson v. Maurer, 424 A.2d 825 (N.H. 1980); Lin, supra n. 11, at 469-73 (for analysis of several

other state courts that have determined the constitutionality of similar statutes).

[FN86]. Carson, 424 A.2d at 838.

[FN87]. Id. at 829.

[FN88]. Id. at 838.

[FN89]. Id.at 837.

[FN90]. Brown v. Merlo, 506 P.2d 212, 216 (Cal. 1973) (quoting Reed v. Reed, 404 U.S. 71, 76 (1971) (quoting F. S. Royster Guano Co. v. Cmmw. of Va., 253 U.S. 412, 415 (1920) ("[a] classification ... must [have] a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike"))).

[FN91]. Fein v. Permanente Med. Group, 695 P.2d 665, 694 (Mosk, J., dissenting) (citing Carson, 424 A.2d at 831).

[FN92]. Id. at 689.

[FN93]. Id.

[FN94]. Beyer, supra n. 7, at 8 [¶ 17].

[FN95]. Fein, 695 P.2d at 690 (Bird, C.J., dissenting).

[FN96]. See Hedlund v. Super. Ct. of Orange Co., 669 P.2d 41, 43 (Cal. 1983).

[FN97]. Id. at 42.

[FN98]. Tarasoff v. Regents of U. of Cal., 551 P.2d 334 (Cal. 1976).

[FN99]. Hedlund, 669 P.2d at 42 (citing Tarasoff, 551 P.2d at 345).

[FN100]. Cal. Code Civ. Proc. Ann. § 340.5(2) (West 2006).

[FN101]. Hedlund, 669 P.2d at 43, 45.

[FN102]. Id. at 45.

[FN103]. Waters v. Bourhis, 709 P.2d 469 (Cal. 1985).

[FN104]. Id. at 471-72.

[FN105]. Id. at 472-73.

[FN106]. Id. at 473.

[FN107]. Id.

[FN108]. Id. at 473-74 (quoting Cal. Bus. & Prof. Code Ann. § 6146 (West 2003)).

[FN109]. See id. at 474-76.

[FN110]. Id. at 475.

[FN111]. Id. at 477-78.

[FN112]. Id. at 476 (citing Cotton v. Kambly, 300 N.W.2d 627 (Mich. App. 1980); Aetna Life & Cas. Co. v. McCabe, 556 F. Supp. 1342 (E.D. Pa. 1983)).

[FN113]. Id.

[FN114]. Id. at 477.

[FN115]. Id. at 477-78.

[FN116]. See id. at 478.

[FN117]. See id. at 475-76.

[FN118]. See e.g. Noble v. Super. Ct. of L.A. Co., 237 Cal. Rptr. 38, 40-41 (App. 2d Dist. 1987); Bommareddy v. Super. Ct. of Merced Co., 272 Cal. Rptr. 246, 248-50 (App. 5th Dist. 1990) (In both cases, the California Appellate Court construed "professional negligence" as a term of art that does not encompass intentional torts.).

[FN119]. Noble, 237 Cal Rptr. 38.

[FN120]. Id. at 39.

[FN121]. Id. at 40.

[FN122]. Id.

[FN123]. Id. at 41.

[FN124]. See Nelson v. Gaunt, 178 Cal. Rptr. 167, 174 n. 6 (App. 1st Dist. 1981) (plaintiff's cause of action for fraud, an intentional tort, was not within the meaning of "professional negligence" in MICRA section 340.5); Baker v. Sadick, 208 Cal. Rptr. 676, 680-81 (App. 4th Dist. 1984) (California Code of Civil Procedure section 1295, which authorizes arbitration for medical malpractice issues, was applied to plaintiff's intentional tort claim); Herrera v. Super. Ct. of L.A. Co., 204 Cal. Rptr. 553, 554-55 (App. 2d Dist. 1984) (patient's actions for both intentional tort and negligence were subject to arbitration under California Code of Civil Procedure section 1295).

[FN125]. Bellamy v. App. Dept. of Super. Ct. of Kings Co., 57 Cal. Rptr. 2d 894 (App. 5th Dist. 1996).

[FN126]. See id.

[FN127]. Id. at 895.

[FN128]. Id.

[FN129]. Id. at 899-900 (quoting Cal. Code Civ. Proc. Ann. § 340.5(2) (West 2006)).

[FN130]. Id. at 900.

[FN131]. Id. at 900-01.

[FN132]. Cal. Code Civ. Proc. Ann. § 425.13(a) (West 2004).

[FN133]. Id. at § 425.13.

[FN134]. C. Pathology Serv. Med. Clinic v. Super. Ct. of L.A. Co., 832 P.2d 924, 928 (Cal. 1992) (citing Bailey v. Super. Ct. of Kern Co., 568 P.2d 394, 398 n. 10 (Cal. 1977)).

[FN135]. Id.

[FN136]. Id. at 926-27.

[FN137]. Id. at 926.

[FN138]. Bommareddy v. Super. Ct. of Merced Co., 272 Cal. Rptr. 246 (App. 5th Dist. 1990).

[FN139]. C. Pathology, 832 P.2d at 927 (citing Bommareddy, 272 Cal. Rptr. at 249-50).

[FN140]. Id. at 930.

[FN141]. Id. (quoting Cal. Code Civ. Proc. Ann. § 425.13(a) (West 2004) (emphasis added by Central Pathology Court)).

[FN142]. Id.

[FN143]. Id. at 931.

[FN144]. Noble v. Super. Ct. of L.A. Co., 237 Cal. Rptr. 38, 39 (App. 2d Dist. 1987).

[FN145]. See Cobbs v. Grant, 502 P.2d 1, 8 (Cal. 1972) (discusses the distinction between "medical battery" and "informed consent" actions).

[FN146]. C. Pathology, 832 P.2d at 931.

[FN147]. Id.

[FN148]. Id.

[FN149]. Id.

[FN150]. Williams v. Super. Ct. of San Diego Co., 36 Cal. Rptr. 2d 112 (App. 4th Dist. 1994).

[FN151]. Id. at 116 (quoting Murillo v. Good Samaritan Hosp., 160 Cal. Rptr. 33, 57 (App. 4th Dist. 1979)).

[FN152]. Id. at 113.

[FN153]. Id. at 116.

[FN154]. Cal. Civ. Code Ann. §§ 3333.1(a), 3333.2(a) (West 1997); Cal. Code Civ. Proc. Ann. §§ 340.5, 364(a) (West 2006).

[FN155]. See Barris v. Co. of L.A., 972 P.2d 966, 975 (Cal. 1999).

[FN156]. Id. at 976.

[FN157]. See Delaney v. Baker, 971 P.2d 986, 1001 (Cal. 1999) (Brown, J., concurring) (citing C. Pathology Serv. Med. Clinic v. Super. Ct. of L.A. Co., 832 P.2d 924 (Cal. 1992)); Flores v. Natividad Med. Ctr., 238 Cal. Rptr. 24 (App. 1st Dist. 1987); Perry v. Shaw, 106 Cal. Rptr. 2d 70 (App. 2d Dist. 2001).

[FN158]. Delaney, 971 P.2d at 997 n. 7 (quoting C. Pathology, 832 P.2d at 928 n. 3).

[FN159]. See id. at 989.

[FN160]. Waters v. Bourhis, 709 P.2d 469, 478 n. 13 (Cal. 1985).

[FN161]. Perry v. Shaw, 106 Cal. Rptr. 2d 70 (App. 2d Dist. 2001).

[FN162]. Flores v. Natividad Med. Ctr., 238 Cal. Rptr. 24 (App. 1st Dist. 1987).

[FN163]. Barris v. Co. of L.A., 972 P.2d 966 (Cal. 1999).

[FN164]. Fein v. Permanente Med. Group, 695 P.2d 665, 690 (Cal. 1985) (Bird, C.J., dissenting) (quoting Brown v. Merlo, 506 P.2d 212, 216 (Cal. 1973) (quoting Reed v. Reed, 404 U.S. 71, 76 (1971))).

[FN165]. Perry, 106 Cal. Rptr. 2d at 72.

[FN166]. Id. at 72-73.

[FN167]. Id. at 78-79 (citing Flores, 238 Cal. Rptr. at 29).

[FN168]. See id. at 73-74 (citing Cobbs v. Grant, 502 P.2d 1, 8 (Cal. 1972)).

[FN169]. Perry, 106 Cal. Rptr. 2d at 78 (quoting Waters v. Bourhis, 709 P.2d 469, 478 (Cal. 1985)).

[FN170]. Id. at 79.

[FN171]. Id. at 77-78.

[FN172]. Id. at 78 (footnote omitted).

[FN173]. Id. at 79.

[FN174]. Flores v. Natividad Med. Ctr., 238 Cal. Rptr. 24, 25 (App. 1st Dist. 1987).

[FN175]. Id. at 26 (quoting Pl.'s Compl. Sept. 23, 1980).

[FN176]. Id. at 29 (citing Waters v. Bourhis, 709 P.2d 469, 477 (Cal. 1985)).

[FN177]. Id. at 27.

[FN178]. Id. at 29.

[FN179]. Id.

[FN180]. Id. (citing Waters, 709 P.2d at 478).

[FN181]. Id. at 31.

[FN182]. Barris v. Co. of L.A., 972 P.2d 966, 968, 976 (Cal. 1999).

[FN183]. 42 U.S.C. § 1395dd (2006).

[FN184]. Barris, 972 P.2d at 968.

[FN185]. Id.

[FN186]. Id. at 970.

[FN187]. Id. at 969.

[FN188]. Id.

[FN189]. Id.

[FN190]. Id.

[FN191]. Id.

[FN192]. Id.

[FN193]. Id.

[FN194]. Id.

[FN195]. Id. at 970.

[FN196]. Id.; see C. Pathology Serv. Med. Clinic v. Super. Ct. of L.A. Co., 832 P.2d 924, 928-31 (Cal. 1992).

[FN197]. Id. at 976.

[FN198]. Id. at 972 (quoting Cal. Civ. Code Ann. §§ 3333.2(a), (c)(2) (West 1997)).

[FN199]. Id. at 974-76 (quoting Cal. Civ. Code Ann. § 3333.2(c)(2) (West 1997); C. Pathology, 832 P.2d at 928, 932 (citing Waters v. Bourhis, 709 P.2d 469 (Cal. 1985))).

[FN200]. Perry v. Shaw, 106 Cal. Rptr. 2d 70, 72 (App. 2d Dist. 2001).

[FN201]. Barris, 972 P.2d at 976.

[FN202]. Compare id. at 969; with Flores v. Natividad Med. Ctr., 238 Cal. Rptr. 24, 26 (App. 1st Dist. 1987).

[FN203]. Flores, 238 Cal. Rptr. at 26; Barris, 972 P.2d at 969.

[FN204]. Flores, 238 Cal. Rptr. at 27; Barris, 972 P.2d at 969.

[FN205]. Flores, 238 Cal. Rptr. at 27; Barris, 972 P.2d at 969.

[FN206]. Fein v. Permanente Med. Group, 695 P.2d 665, 690 (Cal. 1985) (Bird, C.J., dissenting) (quoting Brown v. Merlo, 506 P.2d 212, 216 (Cal. 1973) (quoting Reed v. Reed, 404 U.S. 71, 76 (1971))).

[FN207]. Id. (quoting Brown, 506 P.2d at 216 (quoting Reed, 404 U.S. at 76)).

[FN208]. Fein, 695 P.2d at 679, 684.

[FN209]. Beyer, supra n. 7, at 1.

[FN210]. Id. at 8 [¶ 44].

[FN211]. Id. at 8 [¶ 45, 54-57].

[FNa1]. J.D. candidate 2009, Whittier Law School; B.A. in English, minor in Editing, minor in Philosophy, Brigham Young University, 2006. This article is dedicated to my father, Doug, who remains my standard after more than 20 years of advocacy for medical malpractice plaintiffs. Thank you to my mother, Rae, for her unfaltering sweetness, support, and love. Thank you to my brother, Travis, for an example that makes me want to be better everyday. And finally, thank you to all my other family members who lovingly support and uplift me.

30 Whittier L. Rev. 67

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