September 1985

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THE MEDICAL MALPRACTICE “CRISIS”: THE CONSTITUTIONALITY OF DAMAGE LIMITATIONS


2. See, e.g., Cunningham and Lane, supra, at 150. A claimant submits the case to the panel before or after filing suit and the findings of the panel concerning liability are admissible to the jury. See Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657, 666 (1977); Note, Medical Malpractice Mediation Panels: A Constitutional Analysis, 46 Fordham L. Rev. 322, 324-27 (1977). The majority of courts faced with a constitutional inquiry have held
limitation of the collateral source rule and shortening the relevant statutes of limitation. The most controversial provisions of the medical malpractice legislation have been those which limit screening panels valid. See, e.g., DiAntonio v. Northampton-Accomack Memorial Hosp., 628 F.2d 287, 291 (4th Cir. 1980) (upheld panel as promoting meaningful settlement); Woods v. Holy Cross Hosp., 591 F.2d 1164, 1175 (5th Cir. 1979) (panel constitutional); Eastin v. Broomfield, 116 Ariz. 576, 570 P.2d 744, 749 (1977) (panel upheld); Everett v. Goldman, 559 So. 2d 1256, 1271 (La. 1978) (panel upheld as constitutional); Prendergast v. Nelson, 199 Neb. 256 N.W.2d 657, 672 (1977) (panel a valid means of review). Some courts, however, have declared screening panels invalid under state constitutions. See, e.g., State ex rel. Cardinal Glennon Memorial Hosp. v. Gaertner, 583 S.W.2d 107, 110 (Mo. 1979) (limited access to courts violates state constitution); Mattos v. Thompson, 491 Pa. 385, 421 A.2d 190, 196 (1980) (panels violate state constitution). The Supreme Court of Pennsylvania in Mattos found that the panels had actually delayed claims. See id.

4. See Cal. Bus. & Prof. Code § 6146 (Deering Supp. 1985). California limits contingency fees to 40% of the first $50,000 recovered; one-third of the second $50,000 recovered; 25% of the next $100,000 recovered; and 10% of any amount of recovery which exceeds $200,000. Id. The Supreme Court of California has upheld this provision, and the U.S. Supreme Court has recently dismissed an appeal on the case. See Roa v. Lodi Medical Group, Inc., 37 Cal. 3d 920, 695 P.2d 164, 172, 211 Cal. Rptr. 77, 85 (1985), appeal dismissed, 54 U.S.L.W. 190, 196 (U.S. Nov. 18, 1985) (No. 85-216). Some states which have limited contingency fees have set ceilings on the percentage an attorney may collect. See ch. 294, § 15 [1985] N.Y. Laws 726-27 (standard one-third arrangement in New York is replaced by a sliding scale recovery); HEW, supra note 1, at 32-33. With the contingency fee arrangement a claimant can obtain legal counsel for little or no charge if the case is decided against him, and if he wins, the contingent fee may range between one-third and one-half of the total recovery. Id. at 32.

5. See, e.g., Cal. Civ. Code § 3333.1 (Deering 1984). The California statute allows the defendant in a personal injury action to introduce evidence that the plaintiff will receive money from another source to compensate for his injury. See id. This provision of California's malpractice act has been held constitutional. See Barme v. Wood, 37 Cal. 3d 174, 689 P.2d 446, 451, 207 Cal. Rptr. 816, 821 (1984). See generally M. McCafferty & S. Meyer, Medical Malpractice: Bases of Liability 139 (1985) (discussing changes in collateral source rule); Redish, supra note 1, at 763-64 (discussing state approaches to the collateral source rule).

damages for malpractice victims.

These damage "caps" either limit the total recovery an injured malpractice plaintiff can be awarded, or place ceilings on noneconomic damages such as pain and suffering. The damage caps have been challenged as violative of the fourteenth amendment's Equal Protection Clause on the ground that separating medical malpractice victims from other tort or personal injury plaintiffs is discriminatory. In the most recent decisions in this area, Hoffman v. United States and Fein v. Permanente Medical Group, the Court of Appeals for the Ninth


8. See, e.g., NEB. REV. STAT. § 44-2825 (1984) (total recovery limit of $500,000 before Dec. 31, 1984 and $1,000,000 afterwards); N.D. CENT. CODE § 26-40-11 (1978) ($1,000,000 maximum recovery); OHIO REV. CODE ANN. § 2507.45 (Page 1981) (limit of $200,000 recovery when death not involved).

9. See CAL. CIV. CODE § 3333.2 (Deering 1984). The California provision states: "[T]he injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other none pecuniary damage [but in no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars ($250,000)]." Id.

10. See U.S. CONST. amend. XIV, § 1. The fourteenth amendment provides, in part, that "No state shall . . . deny to any persons within its jurisdictions the equal protection of its laws." Id. See infra notes 37-65 and accompanying text.

11. See id.; Carson v. Maurer, 120 N.H. 95, 424 A.2d 825, 835 (1980). The Constitution requires that those who are similarly situated be similarly treated, but it does not demand absolute equality. See F.S. Royster Guano Co. v. Virginia, 255 U.S. 412, 415 (1920); Abraham, Medical Malpractice Reform: A Preliminary Analysis, 36 Md. L. REV. 489, 490 (1977); Harper, Which Equal Protection Standard for Medical Malpractice Legislation?, 8 HARV. CIV. LAW SYMPOS. 125, 151-58 (1981); Tussing and Tenbrook, The Equal Protection of the Laws, 37 CAL. L. REV. 341, 343-44 (1949); Note, A Constitutional Perspective on the Indiana Medical Malpractice Act, 51 IND. L.J. 143, 163 (1975); Comment, Recent Medical Malpractice Legislation - A First Check Up, 50 Tul. L. REV. 655, 667-70 (1976). Medical malpractice plaintiffs have been discriminated against in two ways under recovery caps: first, they are treated differently from other tort or personal injury plaintiffs, and, second, they are treated differently depending on whether their injuries are valued above or below the statutory limit. See Carson v. Maurer, 424 A.2d at 830.

12. 767 F.2d 1431 (9th Cir. 1985). The plaintiff in Hoffman suffered brain damage as a result of the negligent administration of anesthetic. Id. at 1435. The district court entered judgment for the plaintiff for $3,179,100 in economic damages and $1,000,000 in noneconomic damages, holding California's cap unconstitutional. Id. The Court of Appeals for the Ninth Circuit reversed, holding the provision constitutional and limiting the recovery for noneconomic damages to $250,000. Id. at 1437.

13. 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985), appeal dismissed, ___ U.S. ___, 106 S. Ct. 214 (1985). In Fein, the plaintiff was injured by the defendant's failure to diagnose an impending heart attack. 695 P.2d at 669, 211 Cal. Rptr. at 373. The
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Circuit and the Supreme Court of California, respectively, have upheld the medical malpractice damages caps.\(^\text{1}\)

It is submitted, however, that both Hoffman and Fein were wrongly decided, and that the malpractice caps do unconstitutionally discriminate against medical malpractice victims. This article will suggest a more correct constitutional analysis of the legislation by first examining the medical malpractice "crisis" that has spurred recovery limitation legislation. It will then consider and recommend the proper level of scrutiny for equal protection challenges in the area, and analyze the legislation accordingly. Finally, the article will discuss the implications and ramifications of the Supreme Court's recent dismissal on appeal of the Fein case.

I. THE MEDICAL MALPRACTICE CRISIS

Any analysis of the validity of malpractice legislation must begin with an examination of the reasons for which it was passed.\(^\text{16}\) There indeed was a substantial increase in the number of malpractice actions filed in the late 1960's and early 1970's.\(^\text{6}\) In Northern California, for example, the number of claims more than doubled from 11.8 per 100 physicians in 1968 to 25 per 100 physicians in 1974.\(^\text{17}\) The reason for the increase, and whether it reached crisis jury found for the plaintiff in the amount of $24,733 for wages lost during the trial, $65,000 for future medical expenses, $700,000 for lost future wages, and $500,000 damages for pain and suffering. 695 P.2d at 670, 211 Cal. Rptr. at 573. The trial court modified the pain and suffering judgment in accordance with the California Civil Code, 695 P.2d at 671, 211 Cal. Rptr. at 374, and the decision was affirmed by the California Supreme Court. 695 P.2d at 686, 211 Cal. Rptr. at 387.

14. Hoffman, 767 F.2d at 1456; Fein, 695 P.2d at 680, 211 Cal. Rptr. at 386. In upholding the cap's constitutionality, the courts concluded that the classifications of malpractice victims were rationally related to a legitimate state interest in stemming the medical malpractice crisis. Hoffman, 767 F.2d at 1455; Fein, 695 P.2d at 680, 211 Cal. Rptr. at 376.


16. See HEW, supra note 1, at 6-12; P. Danzon, The Frequency and Severity of Medical Malpractice Claims 4-9 (1982). The largest medical malpractice insurance company in the U.S. reported that in 1969 it received one claim for every 25 doctors it insured, and that by 1974 the ratio had risen to one in every ten, representing a 139% rise in claim incidence. See Abraham, Medical Malpractice Reform: A Preliminary Analysis, 36 Md. L. Rev. 489, 490 n.3 (1977). See also Note, Medical Malpractice - Constitutionality of Limits of Liability, 78 W. Va. L. Rev. 581, 583 (1976) (40% increase in claims between 1965 and 1975). Between 1967 and 1977, however, there was not only an increase in medical malpractice litigation but in all civil litigation filed in district courts. See Administrative Office of the U.S. Courts: A Pictorial Summary 12 (Wash. D.C. 1977).

17. See Keene, California's Medical Malpractice Crisis, in A Legislature's Guide to the
proportions, however, has been debated.\textsuperscript{18} Physicians and insurance companies argued that the increase in actions resulted from attorneys' encouragement of non-meritorious claims,\textsuperscript{19} and media coverage of malpractice suits,\textsuperscript{20} since the increase in actions was accompanied by larger jury verdicts.\textsuperscript{21} Those who believed that the crisis was greatly exaggerated argued that the increase in claims filed was caused by increased medical negligence,\textsuperscript{22} and decreased confidence in doctors.\textsuperscript{23} Commentators have accused insurance companies of creating the panic as an excuse for raising malpractice premiums to compensate for their bad investments.\textsuperscript{24}

MALPRACTICE ISSUE 27, 27 (Watten & Merritt ed. 1976).

18. \textit{See} HEW, \textit{supra} note 1, at 27-37 (no one cause for the crisis); Aitken, \textit{supra} note 1, at 30; Blaut, \textit{The Medical Malpractice Crisis - Its Causes and Future}, 44 INS. COUNS. J. 114, 115 (1977); Note, \textit{supra} note 1, at 848-53.


20. \textit{See} Byrnes, \textit{The Media and Medical Malpractice} in HEW, \textit{supra} note 1, at 653-57. The media can magnify the medical malpractice problem in a way that is unfavorable towards the physician and the quality of health care in general. HEW, \textit{supra} note 1, at 18.

21. \textit{See} HEW, \textit{supra} note 1, at 10. In California, for example, the average claim in 1969 was $5000, but in 1975 it increased to $12,000. \textit{See} Mill, \textit{Malpractice Litigation: Are Solutions in Sight?}, 232 J. A.M.A. 359, 361 (1975). In California there has also been an increase in awards over $300,000. \textit{See} Waxman, \textit{Spiraling Costs: A Health Care Slide}, 11 TRIAL 23, 25 (May/June 1975). In 1969 there were three such awards and in 1974, there were 24. \textit{Id.} at 25. Physicians have maintained that large jury awards are attributable, in part, to juries' inability to understand complex medical cases, and to members' sympathetic reactions to injured plaintiffs. \textit{See} R. GOTS, \textit{The Truth About Medical Malpractice} 121-74 (1975).


23. \textit{See} HEW, \textit{supra} note 1, at 67-81. A suit may result from a lack of communication and a breakdown of the doctor-patient relationship. \textit{Id.} at 68.

24. \textit{See} Aitken, \textit{supra} note 1, at 54-55; Baldwin, \textit{The Phony Medical Malpractice Crisis}, 21 TRIAL 4, 4 (Apr. 1985); Oster, \textit{Medical Malpractice Insurance}, 45 INS. COUNS. J. 228, 231 (1978). Insurance companies have been accused of underwriting losses when determining malpractice rates. \textit{See} Baldwin, \textit{supra}, at 4. The insurance companies exaggerated future predicted claims which became the basis for the "losses" and then increased rates. \textit{Id.} Between 1960 and 1970 premiums for physicians rose 540.8\% and for surgeons 942.2\%. \textit{See} HEW, \textit{supra} note 1, at 13. Faced with these higher premiums physicians began to practice defensive medicine. \textit{See} HEW, \textit{supra} note 1, at 14. In practicing defensive medicine, the physician takes extra precautions, resulting in higher medical care costs for the patient. \textit{See} Note, \textit{The Medical Malpractice Threat: A Study of Defensive Medicine}, 1971 DUKE L.J. 959, 942 & n.6. There were claims that physicians were also being faced with the unavailability of insurance. \textit{See}, e.g., St. Paul Fire and Marine Ins. Co. v. Insurance Comm'r, 339 A.2d 291, 300 (Md. 1975) (upheld insurance company's right to withdraw from the medical malpractice market); Oregon Medical Ass'n v. Rawls, No. 421-429, slop op. at 1 (Or. Cir. Ct. May 4, 1976) (medical malpractice insurance carriers decreased from 85 to five), rev'd on other
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It is suggested that despite the arguments of those who disputed that the crisis existed, physicians and insurance companies were successful in pressuring state legislatures to react to the perceived malpractice insurance crisis. Between 1975 and 1977, forty-nine states enacted legislation aimed at stabilizing medical insurance markets. Generally, legislation has been directed at three areas: the medical profession, the insurance industry, and the tort system. Only a few states passed statutes affecting physicians directly, and these statutes largely changed the jurisdiction of health care licensing agencies. In the insurance industry, the most common response was the creation of Joint Underwriting Associations (JUA's). JUA's were designed to force insurance companies into providing malpractice insurance and to pool losses.

California enacted a comprehensive statute in 1975 to stem the so-called crisis. In the California statute, the tort system of recovery received the greatest attention by the legislature, and a major provision included a limitation on recovery for non-economic losses. The California courts, as well as courts in a

grounds, 276 Or. 1101, 557 P.2d 664 (1976). As of May 1975, the Argonaut Company cancelled policies of large numbers of doctors in New York and did not renew some 4000 California policies. See Taylor & Shields, The Limitation on Recovery in Medical Negligence Cases in Virginia, 16 U. Rich. L. Rev. 799, 807 (1982). But see Aitken, supra note 1, at 29-30 (average doctor paid proportionately less of his income for malpractice insurance than average citizen does for car insurance). See also Goddard, The American Medical Association is Wrong - There is No Medical Malpractice Crisis, Los Angeles Daily Journal, May 17, 1985, at 14, col. 2. (average American physician pays about 2.9% of income for malpractice insurance).


27. See FLA. STAT. ANN. § 627.35(4) (West. 1984); IOWA CODE ANN. §§ 519A.1-.13 (West Supp. 1985).

28. See supra notes 3-7.

29. See CAL. BUS. & PROF. CODE § 2100 (Deering Supp. 1985). The licensing agency was changed from the Board of Medical Examiners to the Board of Medical Quality Assurance. Id. § 2100.2. Its responsibilities included reviewing the quality of medical practice carried out by physicians and surgeons, as well as administering and handling disciplinary actions. Id. § 2100.6.


32. See supra note 2.

33. CAL. CIV. CODE § 3333.2 (limiting recovery to $250,000 for noneconomic damages);
number of other states with similar statutes, were asked to determine the constitutionality of this legislation. Unlike California, the legislation has been found unconstitutional in several states. In examining the legislation, courts have differed on the standard of review to apply, a confusion which has led to the differing results.

II. EQUAL PROTECTION ANALYSIS

Medical malpractice damages caps create a classification of plaintiffs based on the incidence of malpractice for equal protection analysis purposes. The majority of courts, including the California courts, that have reviewed the malpractice damage limitations have not used a strict scrutiny analysis on this classification, reasoning that the right to recover in a tort action is not fundamental and that medical malpractice plaintiffs are not a suspect class.

CAL. CIV. CODE § 3333.1 (change in collateral source rule); CAL. BUS. & PROF. CODE § 6146 (changing the contingency fee arrangement).

34. See, e.g., Hoffman v. United States, 767 F.2d at 1435 (sole issue on appeal is constitutional validity of damages cap); Carson v. Maurer, 424 A.2d at 829 (plaintiffs challenge constitutional validity of the medical malpractice statute); Fein v. Permanente Medical Group, 695 P.2d at 697, 211 Cal. Rptr. at 570 (deciding constitutionality of damages limitation).

35. See, e.g., Wright v. Central DuPage Hospital Ass'n, 63 Ill. 2d 919, 347 N.E.2d 756, 741-43 (1976) (held damages cap unconstitutional under Illinois state constitution); Carson v. Maurer, 424 A.2d at 836-37 (damages limitation unconstitutional under both state and federal constitutions).


37. See Carson, 424 A.2d at 835. The damages cap legislation classifies plaintiffs differently from both other tort plaintiffs and other medical malpractice plaintiffs. Id. See generally Kovnat, Medical Malpractice Legislation in New Mexico, 7 N.M.L. REV. 1, 25 (1977); Note, supra note 1, at 841.

38. See infra notes 39-40. In a strict scrutiny analysis, the challenged legislation must serve a compelling state interest and it must be narrowly drawn to achieve this interest. See Shapiro v. Thompson, 394 U.S. 618, 634 (1969); J. Nowak, R. Rotunda, & J. Young, CONSTITUTIONAL LAW 591 (3rd ed. 1983). Under the strict scrutiny analysis the legislation will almost always be found unconstitutional. See Gunther, The Supreme Court 1971 Term Forward: In Search of Evolving Doctrine On a Changing Court: A Model For a Newer Equal Protection, 86 HARV. L. REV. 1, 8 (strict scrutiny is "strict in theory, fatal in fact"). The Supreme Court has rarely upheld the constitutionality of legislation under the strict scrutiny test. See Korematsu v. United States, 323 U.S. 214, 225 (1944) (upheld internment of people of Japanese ancestry during World War II).

39. See, e.g., Hoffman v. United States, 767 F.2d at 1435 ("right to recovery of tort damages is not a fundamental right"); Jones v. State Bd. of Medicine, 97 Idaho 859, 555
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classification. Instead, they have applied either a rational basis or intermediate scrutiny analysis to the legislation.

The California courts, and others which have applied the rational basis test, have typically found malpractice damages caps constitutionally valid. One court in holding a cap constitutional reasoned that, "[i]t is enough that the state's action be rationally based," and that there is a rational relationship between the legislation and the desired effect of reducing malpractice insurance premiums. It is suggested that recovery limitations may be unconstitutional even if the rational basis test is applied. The question to be asked is whether the legislative response to the so-called


41. See infra notes 42-44 and 64-68.

42. See, e.g., Hoffman v. United States, 767 F.2d at 1431 (California legislature had "plausible reason" to believe recovery limits would stem malpractice insurance crisis); Fein v. Permanente Medical Group, 695 F.2d at 680, 211 Cal. Rptr. at 583 (damages cap rationally related to objective of reducing malpractice insurance costs), appeal dismissed, ___ U.S. ___, 106 S. Ct. 214; Johnson v. St. Vincent's Hosp., 404 N.E. 2d at 599 (limitation on recovery bears rational relation to preserving health care); Sibley v. Board of Supervisors of La. State Univ. 462 So. 2d 149, 156 (La. 1985) (rational relation exists for damage limitation); Prendergast v. Nelson, 256 N.W.2d at 662 (finding legislative enactment rationally related to continued availability of health care). All legislation must pass the minimum scrutiny test, but, unlike the strict scrutiny approach, legislation reviewed under a rational basis test will almost always pass constitutional muster. See Mc Gowan v. Maryland, 366 U.S. 420, 425-26 (1961); Gunther, supra note 38, at 8.


44. Id.
medical malpractice crisis was reasonable in light of the fact that the evidence of a crisis was often contradictory or unsubstantiated. Commentators questioning the crisis have suggested that physicians' claims of astronomical insurance premiums were exaggerated. They have also asserted that there was never any shortage of quality medical care.

It is also submitted, however, that the rational basis analysis should not be applied in the constitutional review of damages caps. A state may have a legitimate interest in reducing medical malpractice insurance premiums, but this interest must be balanced against the rights of the medical malpractice plaintiffs. These plaintiffs are politically powerless compared with the physicians and insurance carriers supporting malpractice legislation and as such should be protected against discrimination. Their rights to full compensation for tortious injury, although not fundamental, approach a fundamental level requiring a higher scrutiny than the rational basis analysis. It is submitted that limiting the compensation a medical malpractice plaintiff can receive is analogous to a deprivation of property without due process. Courts have upheld the statutory modification of this common law right of

45. See Jones v. State Bd. of Medicine, 555 P.2d at 411-16, Boucher v. Sayeed, 459 A.2d 87, 92 (R.I. 1983). The court in Jones found no data that there was a malpractice insurance crisis in Idaho. Jones v. State Bd. of Medicine, 555 P.2d at 412. The case was remanded for a factual determination of the extent of a crisis. 555 P.2d at 414-15. In Boucher, the court applied a rational basis test, deciding that since there was no longer a medical malpractice crisis the legislation was not rationally related to stemming any crisis. Boucher v. Sayeed, 459 A.2d at 92. It is suggested, therefore, that state legislatures may have acted hastily in enacting damages limitations without looking deeper into the problems of the medical malpractice insurance industry.

46. See supra note 25.

47. See Kelner and Kelner, Medical Malpractice: Is There A Crisis?, 191 N.Y.L.J. 1 (1984). In New York between 1974 and 1983 there was a 25% increase in the number of physicians despite a decrease in the overall population. Id.

48. See Hoffman v. United States, 767 F.2d at 1435.

49. See Carson v. Maurer, 424 A.2d at 851.


51. See Carson v. Maurer, 424 A.2d at 829. In Carson, the court stated that the right to recover in tort is an important substantive right although not fundamental. Id.

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plaintiffs, but only when a reasonable substitute for the plaintiff has been provided.

Although the Supreme Court has usually applied the intermediate standard of review to cases involving gender, illegitimacy, and indigency, some state courts have used it when reviewing malpractice limitations. The Supreme Court has also used the intermediate scrutiny analysis when an important, but not necessarily fundamental, right was involved. The right to recover in tort is an important one and medical malpractice plaintiffs should not be denied this right unless the state can show an important objective for the classification. In reviewing damages caps under an intermediate review, courts have declared them arbitrary as not having a “fair and substantial” relation to the objective of the legislature and therefore unconstitutional. These

55. See Craig v. Boren, 429 U.S. 190, 197 (1976); Frontiero v. Richardson, 411 U.S. 677, 680 (1973); Reed v. Reed, 404 U.S. 71, 76-77 (1971). The intermediate review standard was first used in gender discrimination cases because the traditional two-tiered approach of equal protection analysis often led to inflexible results. See Gunther, supra note 38, at 8. Under an intermediate scrutiny the classification must be “substantially related” to an “important governmental objective.” Craig v. Boren, 429 U.S. at 197. See also J. Nowak, R. Rotunda & J. Young, supra note 38, at 593.
58. See Carson v. Maurer, 424 A.2d at 830. The recovery limitation challenged in Carson was modeled after the California statute, but was found unconstitutional requiring a “more rigorous judicial scrutiny than a rational basis.” Id. The court in Carson also reasoned that the legislation created arbitrary damage limits and thus denied the most seriously injured plaintiffs equal protection. 424 A.2d at 836. In a North Dakota case, the court required a “close correspondence between the statutory classification and the legislative goals.” Arneson v. Olson, 270 N.W.2d 125, 133 (N.D. 1978).
59. See, e.g., Turner v. Dep’t of Employment Sec., 423 U.S. 44, 46 (1975) (when basic human needs involved, legitimate means must meet a higher level); Stanley v. Illinois, 405 U.S. 645, 652 (1972) (father’s interest in retaining custody of biological children “important” right); Bell v. Burson, 402 U.S. 555, 559 (1971) (license may be essential and therefore requiring heightened scrutiny).
60. See Carson v. Maurer, 424 A.2d at 829.
61. See id. at 830.
62. See id. at 831; Arneson v. Olson, 270 N.W.2d at 135-36. The court in Arneson stated that the limitation precluded recovery by those plaintiffs most seriously injured. Arneson, 270 N.W.2d at 135-36. A Texas court has held the damages limitation unconstitutional.
courts have also found that patients with meritorious claims are denied adequate compensation due to the recovery limitations. In *Carson v. Maurer,* the New Hampshire Supreme Court found the correlation between limitations placed on malpractice recoveries and reduced malpractice insurance premiums weak. It is submitted that this intermediate review standard should be used when determining the constitutionality of damages limitation legislation.

**A. Application of Intermediate Scrutiny**

By using the intermediate standard in reviewing *Hoffman* and *Fein,* it is submitted that those courts would have found the provisions of the California statute limiting damages unconstitutional. It is true that there existed in California an increase in malpractice claims, larger jury awards and thus higher insurance rates. However, the legislation is arbitrary and unfair because "the actual cost [of not recovering] to many malpractice plaintiffs is simply too high." Pain and suffering damages may be the only compensation a malpractice plaintiff receives for physical injury or impairment. In addition, under a damages limitation, it is suggested that the physician who causes the injury is not held responsible for the full extent of his negligence. The important deterrence aspect of tort law is being modified, and it is submitted that this will actually foster medical malpractice.

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63. See *Arneson v. Olson,* 270 N.W.2d at 135-36. The objective of the legislation does not have a close correspondence with the classification because physicians are encouraged to enter or remain in practice at the expense of the most seriously injured plaintiffs. *Id.*

64. 120 N.H. 95, 424 A.2d 825 (1980).

65. 424 A.2d at 836.


68. *See* *Carson v. Maurer,* 424 A.2d at 836.

69. *See id.* at 837.

70. *See* W. PROSSER, LAW OF TORTS 899 (3d ed. 1983).
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B. Ramifications of the Dismissal of Fein

The Supreme Court, through its dismissal of the appeal of Fein, has upheld the application of a minimum standard of review to damages cap legislation.\(^7\) Although the Court did not give an opinion with the dismissal, it is considered to be on the merits of the case and has precedential value.\(^7\) It has been suggested, that the caps require a higher scrutiny than rational basis, an issue which was not addressed by the Court.\(^7\) The majority of states deciding the issue have declared such legislation unconstitutional,\(^7\) while others have not enacted similar legislation for fear of it being declared unconstitutional.\(^7\) These states, however, may decide to implement such limitations in the wake of the Fein decision, unless they violate individual state constitutions.\(^7\)

The Supreme Court's decision may, in part, have been based on its decision upholding the Price-Anderson Act.\(^7\) That Act limits

\(^7\) Id. The Fein appeal was an appeal as of right because the California Supreme Court upheld the constitutionality of the damages cap. See 28 U.S.C. § 1257(2) (1982). This provision provides that the question of the validity of a state statute will be reviewed by the Supreme Court. Id. The dismissal in Fein was for "want of a substantial federal question." Id. Dismissals of appeals for want of a substantial federal question apply to state court decisions, and have been held to be an adjudication on the merits. See Hicks v. Miranda, 422 U.S. 322, 343-45 (1975). See generally C. Wright, LAW OF FEDERAL COURTS § 108 (4th ed. 1983); S. Wasylyk, THE SUPREME COURT IN THE FEDERAL JUDICIARY SYSTEM 154 (2nd ed. 1984); Hellman, The Business of the Supreme Court Under the Judiciary Act of 1925: The Plenary Docket in the 1970's, 91 HARV. L. REV. 1709, 1721-22 (1978). But see J. Nowak, R. Rotunda & J. Young, supra note 38, at 34-36 (stating that Supreme Court has often used dismissal of an appeal as a denial of certiorari). It is suggested that since the distinction may be blurred there remains room for the question of the constitutionality of medical malpractice caps.
\(^7\) See, e.g., Wright v. Central DuPage Hospital Ass'n., 63 Ill. 2d 313, 347 N.E.2d 736, 743 (1976) (damage limitation an unconstitutional denial of equal protection under state statute); Carson v. Maurer, 120 N.H. 95, 424 A.2d 825, 836 (1980) (damage limitation unconstitutional under both the state and federal constitution); Arneson v. Olson, 270 N.W.2d 125, 135-36 (N.D. 1978) (damage limitation denial of equal protection under the U.S. Constitution); Baptist Hosp. of Southeast Texas v. Baber, 672 S.W.2d 296, 500 (Tex. Ct. App. 1984) (damage limitation unconstitutional).
\(^7\) See HEW, supra note 1, at 33.
\(^7\) See, e.g., Wright v. Central DuPage Hosp. Ass'n., 63 Ill. 2d at 313, 347 N.E.2d at 743. The Supreme Court of Illinois declared the $500,000.00 limitation unconstitutional under the state constitution stating, "We are of the opinion that limiting recovery only in malpractice actions . . . is arbitrary and constitutes a special law in violation of . . . [the] Constitution." Id.
damages resulting from a nuclear accident and in turn limits the defenses which may be raised by the power plant operator.\textsuperscript{79} In reviewing that Act, the Court applied a minimum standard, stating that the legislation was rationally related to encouraging the development of the nuclear power industry.\textsuperscript{79} The recovery fund for nuclear accident victims required by the Act was found to provide a reasonable substitute for the abrogation of the common law right to bring an action.\textsuperscript{80} Under damages limitation legislation, the medical malpractice plaintiff is provided with no such substitute, leaving him with the potential of being undercompensated or even uncompensated.\textsuperscript{81}

It is also submitted that in deferring the damages limitation issue to the states, the Supreme Court is paving the way for state legislatures to limit damages in related tort areas. To justify their actions, states would need only show a legitimate state interest in limiting litigation.\textsuperscript{82} For example, damages limitations have been proposed in the area of hazardous substances.\textsuperscript{83} Toxic waste victims must rely on state common law tort theories when bringing an action.\textsuperscript{84} These compensation schemes have often been criticized as ineffective and arbitrary.\textsuperscript{85} It is suggested that if pressure is placed on them by the various chemical companies, the state legislatures might consider "capping" damages, as in medical mal-


\textsuperscript{79} Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. at 95-94. The Act limits liability in a nuclear emergency. Id. The Court also refused to decide whether the Due Process Clause requires the legislature to provide a substitute when abrogating common law rights, stating that the Act did this by providing a prompt guaranteed recovery. Id. at 87-93. It is suggested that the Court's decision was also based on the uniqueness of nuclear energy and the unlikelihood of damages above the $560,000,000 limit.

\textsuperscript{80} Id. at 88.

\textsuperscript{81} See Carson v. Maurer, 424 A.2d 835, 836-38.

\textsuperscript{82} See Fein v. Permanente Medical Group, 695 P.2d at 667, 211 Cal. Rptr. at 368.


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practice actions. As with medical malpractice plaintiffs, the most seriously injured toxic tort victims would be left to bear the burden of their injuries.86

IV. CONCLUSION

Damages “caps” have been enacted by state legislatures as a proposed means of stemming the medical malpractice insurance “crisis.” In dismissing an appeal on this issue, the Supreme Court is presuming its constitutionality. It is suggested, however, that damages caps are violative of the Equal Protection Clause. Using an intermediate scrutiny test, the malpractice legislation is neither substantially related to nor furthers an important governmental objective. It is also suggested that even in applying a rational basis test the laws may be invalid. These limitations place the burden of full compensation on those least likely to bear it — the seriously injured plaintiffs. Furthermore, they may lead to even more restrictions on the tort victim’s ability to recover for his injuries.

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86. See Carson v. Maurer, 424 A.2d 825, 837.