

# NOTES

## THE CONSTITUTIONALITY OF THE MASSACHUSETTS MEDICAL MALPRACTICE PAIN AND SUFFERING CAP

### INTRODUCTION

In response to a perceived medical malpractice crisis,<sup>1</sup> the 1986 Massachusetts legislature promulgated An Act Relative to Medical Malpractice,<sup>2</sup> which marks significant changes in the laws governing medical malpractice liability actions.<sup>3</sup> The Act, declared an emergency act by Governor Dukakis,<sup>4</sup> amends a number of existing state medical malpractice and civil procedure laws, and enacts a number of new statutory provisions<sup>5</sup> in an attempt to alleviate the perceived medical malpractice crisis which recently has received much media attention within the Commonwealth<sup>6</sup> and throughout the country.<sup>7</sup> Possibly the most controversial provision of the Act is section 60H of chapter 231 of the

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<sup>1</sup> There is much debate as to whether a medical malpractice crisis actually exists. Many commentators attribute the high cost of medical malpractice insurance to the cyclical nature of the insurance industry and not to deficiencies in the medical malpractice tort system. See Londrigan, *The Medical Malpractice "Crisis": Underwriting Losses and Windfall Profits*, TRIAL, May 1985, at 22; *Medical Malpractice Legislation and the Insurance Industry: Hearings Before the Joint Comm. on Insurance of the Mass. Gen. Court*, March 19, 1986 (statement of Michael R. Lemov, Coalition for Consumer Justice) [hereinafter Coalition for Consumer Justice].

<sup>2</sup> Ch. 351, 1986 Mass. Adv. Legis. Serv. 310 (Law Co-op.).

<sup>3</sup> Medical malpractice has been defined as "the improper treatment or culpable neglect of a patient by a provider of health care." Note, *The Massachusetts Medical Malpractice Statute: A Constitutional Perspective*, 11 SUFFOLK U. L. REV. 1289, 1289, n.1 (1977) (quoting INTERIM REPORT OF THE SPECIAL COMMISSION ESTABLISHED TO MAKE AN INVESTIGATION AND STUDY OF MEDICAL PROFESSIONAL LIABILITY INSURANCE AND THE NATURE AND CONSEQUENCES OF MEDICAL MALPRACTICE, MASS. H.R. REP. NO. 4380, 18 (1976)).

<sup>4</sup> Letter from Governor Michael S. Dukakis to Secretary of State Michael J. Connolly (July 23, 1986) (declaring the "Act Relative To Medical Malpractice" an emergency act) (available at the Boston College Law Review office).

<sup>5</sup> An Act Relative to Medical Malpractice. Ch. 351, 1986 Mass. Adv. Legis. Serv. 310 (1986) (Law. Co-op.). Sections 20 and 21 pertain to medical malpractice tribunals and are codified at MASS. GEN. LAWS ANN. ch. 231, §§ 6F and 60B respectively. Sections 23, 29, and 30 address changes in the statute of limitations and are codified at MASS. GEN. LAWS ANN. ch. 231, § 60D, and ch. 260, § 4. Section 24 outlines the itemization of damages and is codified at MASS. GEN. LAWS ANN. ch. 231, § 60F. Section 25 discusses changes in the collateral source rule and is codified at MASS. GEN. LAWS ANN. ch. 231, § 60G. Section 27 relates to attorneys' fees and is codified at MASS. GEN. LAWS ANN. ch. 231, § 60I. Section 26 addresses limits on pain and suffering awards and is codified at MASS. GEN. LAWS ANN. ch. 231, § 60H.

<sup>6</sup> See, e.g., Boston Globe, Aug. 26, 1985, at 43, col. 6; Boston Globe, March 31, 1985, at A5, col. 1; Boston Globe, Jan. 14, 1985, at 37, col. 1.

<sup>7</sup> See, e.g., Physician's Financial News, Apr. 15, 1985, at 1, col. 4; Boston Globe, Sept. 9, 1985, at 41, col. 6; G. Easterbrook, *The Revolution in Medicine*, NEWSWEEK, Jan. 26, 1987, at 62-63.

Massachusetts General Laws.<sup>8</sup> Section 60H places a cap on awards in medical malpractice liability actions, limiting for the first time the medical malpractice plaintiffs' recovery rights in Massachusetts.<sup>9</sup>

Section 60H provides that in any action for medical malpractice, the court shall instruct the jury to grant full economic damages, but, with the exception of certain severely harmed plaintiffs, to limit the plaintiff's general damages to \$500,000.<sup>10</sup> General damages, also known as noneconomic damages, include such intangible items as pain and suffering, loss of companionship, embarrassment, loss of enjoyment of life, and physical and mental disability.<sup>11</sup> These damages differ from special damages, or economic damages, which compensate plaintiffs for economic losses such as medical expenses, lost wages, and impaired future earning capacity.<sup>12</sup>

Several states have enacted statutes similar to section 60H and the majority of these have received constitutional scrutiny in the courts. The results of this scrutiny have been inconsistent.<sup>13</sup> Some states have upheld statutory limits on a plaintiff's recovery in medical malpractice<sup>14</sup> while others have overturned the statutes on fourteenth amendment and state equal protection grounds.<sup>15</sup> Recently, the United States Supreme Court dis-

<sup>8</sup> See *Boston Globe*, Jan. 14, 1985, at 37, col. 2. The article states:

The most controversial of [the] measures [being considered by the legislature] involves placing a cap on the amount juries can award for pain and suffering in malpractice cases. It is these awards, given to plaintiffs above the amounts they receive to pay for medical care and loss of income, that often inflate cases beyond their worth, [doctors] say.

Lawyers counter, however, by saying that doctors have exaggerated the effects of malpractice suits on medical costs and are seeking to win special protection that would in effect limit their liability in negligence cases — a protection no other segment of society enjoys.

*Id.*

<sup>9</sup> An Act Relative to Medical Malpractice, ch. 351, § 26, 1986 Mass. Adv. Legis. Serv. 310, 336-37, (1986) (Law. Co-op.), codified at MASS. GEN. LAWS ANN. ch. 231, § 60H [hereinafter section 60H].

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See 2 D. LOUISELL & H. WILLIAMS, *MEDICAL MALPRACTICE* § 18.01, at 18-3 (1960). See generally Bauer, *Fundamental Principles of the Law of Damages in Medico-Legal Cases*, 19 TENN. L. REV. 255 (1946).

<sup>13</sup> See Comment, *Limitation on Recovery of Damages in Medical Malpractice Cases: A Violation of Equal Protection?*, U. CIN. L. REV. 1329, 1330 (1986).

<sup>14</sup> State courts have upheld medical malpractice statutes limiting recovery in California, see *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 164, 695 P.2d 665, 684, 211 Cal. Rptr. 368, 387 (statute limiting recovery for general damages to \$250,000 held constitutional under federal and state constitutions), *appeal denied*, 474 U.S. 893, (1985), in Indiana, see *Johnson v. St. Vincent Hosp., Inc.*, 273 Ind. 374, 400, 404 N.E.2d 585, 601 (1980) (statute limiting total recovery for patient injury or death to \$500,000 held constitutional against federal and state challenge), and in Nebraska, see *Prendergast v. Nelson*, 199 Neb. 97, 114, 256 N.W.2d 657, 668-69 (statute limiting total recovery for patient injury to \$500,000, unless patient has previously elected not to come within the act's provisions, held constitutional under federal and state constitutions). A federal circuit court upheld the California statute in *Hoffman v. United States*, 767 F.2d 1431, 1437 (9th Cir. 1985).

<sup>15</sup> Comment, *Limitation on Recovery*, *supra* note 13, at 1330. State courts have overturned medical malpractice statutes limiting recovery in Illinois, see *Wright v. Central DuPage Hosp. Ass'n.*, 63 Ill. 2d 313, 331, 347 N.E.2d 736, 744 (1976) (statute violated federal and state constitutions); North Dakota, see *Arneson v. Olson*, 270 N.W.2d 125, 136 (N.D. 1978) (statute violated federal and state constitutions); New Hampshire, see *Carson v. Maurer*, 120 N.H. 925, 943, 424 A.2d 825, 838 (1980)

missed an appeal of the California Supreme Court's finding that a state statute limiting a malpractice plaintiff's recovery for noneconomic damages to \$250,000 is constitutional,<sup>16</sup> thereby tacitly upholding the constitutionality of that statute.<sup>17</sup> Because statutes similar to the Massachusetts damage limitation provision have been challenged on constitutional grounds in several state and federal courts,<sup>18</sup> and the United States Supreme Court has not yet definitively ruled on the issue,<sup>19</sup> a constitutional challenge to section 60H, based on both state and federal equal protection guarantees, is probable.<sup>20</sup>

This note analyzes the constitutionality of section 60H of the Massachusetts General Laws chapter 231 and assesses its effectiveness as a response to the perceived medical malpractice crisis. Section I briefly traces the evolution of the perceived medical malpractice crisis and comments on its causes and effects.<sup>21</sup> This section also examines the various state legislative responses nationally to the perceived crisis.<sup>22</sup> Section II reviews the legislative responses to an earlier malpractice crisis in Massachusetts and outlines the evolution and severity of the present "crisis" in the state.<sup>23</sup> This section also examines section 60H as a response to the perceived Massachusetts crisis, compares section 60H with similar damage limitation statutes enacted in other states and assesses the statute's effect on the perceived Massachusetts medical malpractice problem.<sup>24</sup> Section III reviews the principles of equal protection analysis<sup>25</sup> and examines the application of these prin-

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(statute violated state and federal constitutions); Ohio, *see* *Graley v. Satayatham*, 74 Ohio Op. 2d 316, 321, 343 N.E.2d 832, 839 (1976) (in dicta, court found statute violated state and federal equal protection guarantees); Texas, *see* *Detar Hosp. v. Estrada*, 694 S.W.2d 359 (Tex. Ct. App. 1985) (statute violated federal and state constitutions).

<sup>16</sup> *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368, *appeal denied*, 474 U.S. 893, (1985) (upholding CAL. CIV. CODE § 3333.2 (West 1975)).

<sup>17</sup> *Fein v. Permanente Medical Group*, 474 U.S. 893, 894. Dissenting in the vote to dismiss the appeal, Justice White noted that because the issue of statutory caps in medical malpractice cases divides the appellate and highest courts in several states, it is worthy of review by the Court: "Given the continued national concern over the 'malpractice crisis,' it is likely that more states will enact similar types of limitations, and that the issue will recur." *Id.*

The case came before the Supreme Court as an appeal rather than on a petition for certiorari and the Court dismissed for lack of a substantial federal question thereby, in effect, affirming the case on its merits. Comment, *Limitation on Recovery*, *supra* note 13, at 1346 (citing *Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975) (summary dismissals for lack of a substantial federal question are decisions on the merits that should be treated as such by lower courts)).

<sup>18</sup> *See supra* notes 14-15 and accompanying text.

<sup>19</sup> *See supra* note 16-17 and accompanying text.

<sup>20</sup> This note evaluates only equal protection challenges to § 60H of chapter 231 of the Massachusetts General Laws. Plaintiffs may also challenge the statute on state and federal due process grounds. For a discussion of the due process challenges to damage limiting statutes similar to § 60H, *see* Redish, *Legislative Responses to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759, 784 (1977). *See generally* Note, *Constitutional Perspective*, *supra* note 3, at 1304.

<sup>21</sup> *See infra* notes 28-51 and accompanying text for a discussion of the history and the various causes and effects of the perceived medical malpractice crisis.

<sup>22</sup> *See infra* notes 52-79 and accompanying text for a discussion of the various state legislative responses to the perceived medical malpractice crisis.

<sup>23</sup> *See infra* notes 80-119 and accompanying text for a discussion of the history and severity of the medical malpractice crisis in Massachusetts.

<sup>24</sup> *See infra* notes 120-42 and accompanying text for a discussion of § 60H, a comparison of § 60H with other states' damage limitation schemes, and an assessment of the effect of these types of statutes in alleviating the perceived medical malpractice crisis.

<sup>25</sup> *See infra* notes 143-69 and accompanying text for a discussion of the principles of equal protection analysis.

ciples to state liability limiting laws similar to that enacted by Massachusetts.<sup>26</sup> Section IV proposes the proper equal protection test for evaluating the Massachusetts legislation and concludes that because it violates state and federal equal protection guarantees, section 60H is unconstitutional.<sup>27</sup>

## I. THE MEDICAL MALPRACTICE "CRISIS"

### A. *The Evolution of the Problem*

Disagreement and confusion regarding the causes of the national medical malpractice crisis plagued the insurance industry and the legal and medical professions in the mid-1970s.<sup>28</sup> As a result, the United States Department of Health, Education and Welfare commissioned a study to investigate the situation.<sup>29</sup> The study found that during the early and mid-1970s, as a consequence of the increasing number of medical malpractice claims, medical malpractice insurance<sup>30</sup> rates increased and the availability of insurance coverage decreased. This precipitated a much publicized<sup>31</sup> medical malpractice crisis.<sup>32</sup> In response to increases in the number of claims, between 1960 and 1970, for example, insurance rates for surgeons rose 949.2 percent; for nonsurgical physicians, 540.8 percent; and for hospitals, 262.6 percent.<sup>33</sup> In several states premiums rose more than 100 percent between 1965 and 1975 alone.<sup>34</sup> Additionally, during this period the number of insurance carriers writing medical malpractice insurance nationally decreased from approximately eighty-five to five.<sup>35</sup> Thus, the malpractice crisis of the mid-1970s was characterized by problems in both the affordability and availability of medical malpractice insurance for health care providers.<sup>36</sup>

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<sup>26</sup> See *infra* notes 170-269 and accompanying text for an examination of the application of equal protection principles to state liability limiting statutes similar to § 60H.

<sup>27</sup> See *infra* notes 270-329 and accompanying text for a discussion and application of the proper standard of equal protection review that the Massachusetts courts should adopt in evaluating the constitutionality of § 60H.

<sup>28</sup> See Ackerman, *Medical Malpractice: A Time for More Talk and Less Rhetoric*, 37 MERCER L. REV. 725, 726-28 (1986).

<sup>29</sup> U.S. DEPT. OF HEALTH, EDUC. & WELFARE, HEW PUB. NO. (OS) 73-88, MEDICAL MALPRACTICE: REPORT OF THE SECRETARY'S COMM'N ON MEDICAL MALPRACTICE (1973) (comprehensive analysis of the precipitating factors and subsequent effects of the medical malpractice crisis) [hereinafter HEW REPORT].

<sup>30</sup> *Id.* at 38. Professional liability insurance indemnifies health care providers, protects their personal and professional assets, and compensates victims of malpractice. *Id.*

<sup>31</sup> See Comment, *Recent Medical Malpractice Legislation — A First Checkup*, 50 TUL. L. REV. 655, 655 n.1 (1976).

<sup>32</sup> U.S. GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, MEDICAL MALPRACTICE: NO AGREEMENT ON THE PROBLEMS OR SOLUTIONS, 12 (1986) [hereinafter GAO REPORT].

<sup>33</sup> HEW REPORT, *supra* note 29, at 13.

<sup>34</sup> Redish, *Constitutional Implications*, *supra* note 20, at 760.

<sup>35</sup> *Id.* at 760 n.4. But cf. HEW REPORT, *supra* note 29, at 38-39 ("The Commission [finds] that malpractice insurance is currently available to health-care practitioners under group plans and the market for such insurance is competitive . . . [A] health-care provider usually can find several companies willing to provide the needed coverage.").

<sup>36</sup> GAO REPORT, *supra* note 32, at 12.

Although the causes of the medical malpractice insurance crisis are many and varied,<sup>37</sup> it is generally agreed that rapid and unanticipated increases in the number and amount of malpractice awards coupled with the financial peculiarities of the insurance industry were the primary factors driving insurance rates up and availability down.<sup>38</sup> For insurance companies underwriting medical malpractice insurance, sustained profitability depends on their ability to estimate potential losses from medical malpractice claims.<sup>39</sup> Because of the delay between the occurrence of a plaintiff's injury and the time she files a claim, it is often difficult for insurers to predict potential losses and set accurate insurance rates.<sup>40</sup> In addition to this inherent industry-wide difficulty, many medical malpractice insurers in the mid-1970s found that they had underestimated their potential claim losses<sup>41</sup> due to "the unpredictability of soaring jury awards and [the] increasing frequency of claims."<sup>42</sup> The increases in claim frequency<sup>43</sup> and severity<sup>44</sup> coupled with the complexities of predicting losses in the medical malpractice insurance industry thus appear to have sparked the perceived malpractice insurance crisis during the mid-1970s.

The malpractice insurance crisis affected physicians, patients, and the entire health care system.<sup>45</sup> Physicians throughout the country experienced greater difficulty in finding coverage<sup>46</sup> and those who were fortunate enough to do so also found dramatic increases in their premiums.<sup>47</sup> Also, in response to their fear of being sued, many physicians began to engage in what has been termed "defensive medicine,"<sup>48</sup> ranging in form from

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<sup>37</sup> The HEW Report states: "[T]here is no uniquely identifiable 'malpractice problem,' but rather, a complex of problems involving interacting medical, legal, sociological, psychological, and economic factors." HEW REPORT, *supra* note 29, at 4.

<sup>38</sup> GAO REPORT, *supra* note 32, at 18.

<sup>39</sup> *Id.* at 12.

<sup>40</sup> *Id.* Medical malpractice insurers offer two types of insurance policies: "occurrence" and "claims made" policies. Occurrence policies cover claims for a year of a physician's practice without regard to when the claims are reported. Thus, a future claim for malpractice is covered by the occurrence policy if it occurred in the year in which the occurrence policy was in effect. For example, a claim brought in 1988 for a 1987 injury would be covered by a 1987 occurrence policy.

Claims made policies cover claims reported in a single year, regardless of when the medical service which constitutes malpractice is rendered. Thus, regardless of the date of occurrence, the physician is covered for any claim in a year in which he or she has a claims made policy. For example, a claim brought in 1988 for a 1987 injury would be covered by a 1988 claims made policy. JUA OF MASSACHUSETTS, MEDICAL MALPRACTICE, 8 (June 1985).

<sup>41</sup> GAO REPORT, *supra* note 32, at 12.

<sup>42</sup> *The Problems of Insuring Medical Malpractice: Hearing Before the Subcomm. on Health of the Senate Comm. on Labor and Public Welfare on Examination of the Continuing Medical Malpractice Insurance Crisis*, 94th Cong., 1st Sess., 183, 185 (1975) (statement of a representative of a major medical malpractice insurance underwriter) [hereinafter *Senate Hearings*].

<sup>43</sup> St. Paul Fire and Marine Insurance Company, a national medical malpractice insurer, reported an increase in the ratio of claims pending per number of doctors insured, from one claim for every twenty-three doctors insured in 1969 to one claim for every ten doctors insured in 1974. *Senate Hearings*, *supra* note 42, at 186.

<sup>44</sup> St. Paul Fire and Marine reported that the average value of a claim rose from \$6,705 in 1969 to \$12,534 in 1974. *Id.*

<sup>45</sup> See Redish, *Constitutional Implications*, *supra* note 20, at 760.

<sup>46</sup> Insurance companies' withdrawal or threatened withdrawal from the medical malpractice insurance market decreased insurance availability in a number of states, including Florida, New York, California, Hawaii, Massachusetts, Nevada, Maryland, Idaho, and Pennsylvania. GAO REPORT, *supra* note 32, at 13. *But cf.* HEW REPORT, *supra* note 29, at 38.

<sup>47</sup> See HEW REPORT, *supra* note 29, at 13.

<sup>48</sup> See *id.* at 14. The Report states: "[D]efensive medicine is the alteration of modes of medical

ordering extensive and costly diagnostic procedures to screening patients to eliminate those persons thought likely to sue.<sup>49</sup> Some physicians avoided high risk specialties or relocated to areas with lower insurance rates, which affected the distribution of available medical services.<sup>50</sup> Those patients still able to obtain desired medical care paid for the insurance crisis in the form of higher costs passed on to them by physicians.<sup>51</sup> Thus, the entire health care system suffered from the effects of the medical malpractice insurance crisis.

### B. Legislative Response to the Crisis

The disruptions in the health care community caused by the crisis prompted the American Medical Association (AMA) to lobby state legislatures intensively<sup>52</sup> to enact remedial legislation aimed at alleviating the insurance availability and affordability problems physicians suddenly faced.<sup>53</sup> In response to these lobbying efforts, a majority of states passed legislation designed to make malpractice insurance available at affordable rates.<sup>54</sup> Twenty-four states, including Massachusetts, adopted statutory provisions establishing short term joint underwriting associations (JUA's).<sup>55</sup> These associations sought to ensure the availability of professional liability coverage by requiring that all private liability insurance carriers in a state join together to supply such coverage as was requested by the state insurance commissioner who oversaw the association and set malpractice insurance rates.<sup>56</sup> The commissioners were empowered to establish JUA's in

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practice, induced by the threat of liability, for the principal purposes of forestalling the possibility of lawsuits by patients as well as providing a good legal defense in the event such lawsuits are instituted." *Id.* Between 50 and 70 percent of physicians polled in a mid-1970s survey reported that they engaged in various forms of defensive medicine. *Id.*

<sup>49</sup> See M. Cooper, *Liability Insurance Squeeze*, EDITORIAL RESEARCH REPORTS, Vol. II, No. 21, at 907 (1985).

<sup>50</sup> See Redish, *Constitutional Implications*, *supra* note 20, at 760.

<sup>51</sup> See HEW REPORT, *supra* note 29, at 12-13 ("[A]pproximately 50 cents of the daily cost to every patient going into the hospital is for the hospital's malpractice insurance.").

<sup>52</sup> See Learner, *Restrictive Medical Malpractice Compensation Schemes: A Constitutional "Quid Pro Quo" Analysis to Safeguard Individual Liberties*, 18 HARV. J. ON LEGIS. 143, 144 (1981).

<sup>53</sup> Some commentators have argued that the purported crisis was grossly exaggerated by physicians and insurers and may be attributed to the insurance companies' need for excess profits to cover stock market losses. For a good discussion concerning the validity of the perceived medical malpractice crisis, see Ackerman, *Less Rhetoric*, *supra* note 28, at 726-28; Aitken, *Medical Malpractice: The Alleged 'Crisis' in Perspective*, 637 INS. L. J. 90 (1976).

<sup>54</sup> See Comment, *First Checkup*, *supra* note 31, at 660-61.

<sup>55</sup> ALA. CODE § 27-26-20 (1986); ARK. STAT. ANN. § 66-5322 (1980); CAL. INS. CODE §§ 11891 (West 1988); 9 Cal. Leg. Serv., 2d Ex. Sess., ch. 2 (Sept. 23, 1975); FLA. STAT. ANN. § 627.351(8) (West 1988); GA. CODE ANN. § 56-512.1 (Supp. 1975); HAW. REV. STAT. § 435C-3 (1985); IDAHO CODE §§ 41-4101-41-4114 (Supp. 1975); ILL. ANN. STAT. ch. 73, §§ 1065.201-221 (Smith-Hurd 1975); IOWA CODE ANN. § 519A.3 (West 1986); ME. REV. STAT. ANN. tit. 24, §§ 2402-14 (Supp. 1975); MD. ANN. CODE art. 48A, §§ 557-64 (Supp. 1975); MASS. GEN. LAWS ANN. ch. 175A, § 5A (1975); MICH. STAT. ANN. §§ 24.12500-24.12517 (Callaghan Supp. 1975); NEV. REV. STAT. § 681A.020(j) (1975); N.H. REV. STAT. ANN. §§ 404-C:1-13 (Supp. 1975); N.Y. INS. LAW §§ 681-95 (McKinney Supp. 1975); OHIO REV. CODE ANN. §§ 3929.71-3929.85 (Baldwin 1975); PA. STAT. ANN. tit. 40, §§ 1301.801-1301.810 (Purdon 1975); S.C. CODE ANN. § 69-21 (Law Co-op. 1976); TENN. CODE ANN. §§ 56-4301-15 (Supp. 1975); TEX. REV. CIV. STAT. ANN. art. 21.49-3 (Vernon Supp. 1975); WIS. STAT. ANN. § 619.01 (West 1975); KAN. STAT. ANN. § 40-273 (1973); R.I. GEN. LAWS ANN. § 42-62-15 (1969). Comment, *First Checkup*, *supra* note 31, at 661 n.37.

<sup>56</sup> Comment, *First Checkup*, *supra* note 31, at 661.

order to provide coverage for a period of two to six years while the state legislatures considered more lasting solutions to the malpractice crisis.<sup>57</sup> JUA's imposed upon the insurance industry the burden of administering the most affordable medical liability insurance programs and, by requiring an advance assessment against the insured to create a stabilization reserve fund, they also worked to protect the industry from suffering financial loss when claims exceeded premiums in a given year.<sup>58</sup> Thus, the JUA's provided short term relief to the availability and affordability problems in a number of states.

In addition to creating state mandated JUA's, virtually every state enacted some type of medical malpractice tort reform legislation designed to provide immediate, long term relief to the malpractice crisis.<sup>59</sup> These tort reform measures wrought major changes in the substantive and procedural rules applicable to the adjudication of medical malpractice actions.<sup>60</sup> The reform proposals included limiting either the amount of a plaintiff's recovery<sup>61</sup> or an individual health care provider's liability,<sup>62</sup> reducing the statute of limitations applicable to medical malpractice actions,<sup>63</sup> abrogating the plaintiff's use of the collateral source rule<sup>64</sup> in medical malpractice actions,<sup>65</sup> requiring medical malpractice plaintiffs to appear before a pretrial screening panel in all medical malpractice cases,<sup>66</sup> limiting the contingent fee amount a plaintiff's attorney may obtain in medical mal-

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Every state except West Virginia enacted some type of tort reform legislation. AMERICAN MEDICAL ASSOCIATION TASK FORCE ON PROFESSIONAL LIABILITY AND INSURANCE, PROFESSIONAL LIABILITY IN THE '80s, REPORT 2, at 13 (1984) (originally published as a supplement to AM. MED. NEWS, Nov. 1984) [hereinafter AMA REPORT 2].

In drafting the reform legislation, legislators combined different approaches. As of July 1985, forty-one states had enacted legislation shortening or modifying the statute of limitations for filing medical malpractice lawsuits; twenty-three states had legislation limiting attorney contingency fees, ten states had specific legislation for awarding costs in cases of frivolous actions; twelve states had legislation limiting health care providers' liability through either compensation funds or caps on damage awards; seventeen states had legislation eliminating or modifying plaintiffs' use of the collateral source rule; thirty-two states had legislation eliminating or modifying the ad damnum clause; eighteen states had legislation allowing for periodic payments of court awards; ten states had legislation either eliminating or modifying plaintiffs' use of the res ipsa loquitur doctrine; ten states had legislation specifying the qualifications of expert witnesses; twenty-five states had legislation creating mandatory pretrial screening panels; and thirteen states had legislation creating medical malpractice arbitration boards. See GAO REPORT, *supra* note 32, at 83.

<sup>60</sup> Redish, *Constitutional Implications*, *supra* note 20, at 761.

<sup>61</sup> See, e.g., CAL. CIV. CODE § 3333.2 (West Supp. 1985). Under the California statute, recovery is limited to \$250,000 for "noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary loss." *Id.*

<sup>62</sup> See, e.g., N.D. CENT. CODE § 26-40.1-11 (1978). The North Dakota statute limits a health care provider's liability to \$300,000 for all claims arising from any one occurrence. *Id.*

<sup>63</sup> See, e.g., MICH. STAT. ANN. § 27A.5838(2) (1986). The Michigan statute reduces the filing period for medical malpractice claims to six months from the time the plaintiff discovers the medically negligent injury. *Id.*

<sup>64</sup> The collateral source rule excludes evidence of collateral compensation, such as insurance benefits paid to the plaintiff. For a general discussion of the collateral source rule, see generally Mocerri & Messina, *The Collateral Source Rule in Personal Injury Litigation*, 7 GONZ. L. REV. 310 (1972).

<sup>65</sup> See, e.g., CAL. CIV. CODE § 3333.1(a) (West Supp. 1985). The California statute abrogates the collateral source rule, thus permitting a medical malpractice defendant to introduce evidence of collateral source benefits received by or payable to the plaintiff. *Id.*

<sup>66</sup> See, e.g., MASS. GEN. LAWS ANN. ch. 231, § 60B (West 1985).

practice suits,<sup>67</sup> and requiring that future damages awards in excess of a certain amount be paid periodically rather than in one lump sum.<sup>68</sup> Legislators presumed that these enactments would reduce both the number and size of medical malpractice claims and awards, thereby allowing the insurance industry to predict more accurately expected pay-outs and thus maintain premiums at affordable rates.<sup>69</sup>

Although most states adopted one or more of these various medical malpractice reform proposals,<sup>70</sup> insurance premiums continued to increase.<sup>71</sup> According to the AMA, between 1975 and 1983, premiums increased by more than eighty percent.<sup>72</sup> Some commentators attributed these continued increases to the insurance industry's and state insurance commissioners' refusal to lower premiums because of the uncertainty of pending litigation challenging the constitutionality of the new reform legislation.<sup>73</sup> Medical malpractice plaintiffs in many states challenged the various reform statutes on both due process and equal protection grounds<sup>74</sup> alleging that the statutes unreasonably restricted or modified their common law rights.<sup>75</sup> Thus, as the number of claims filed<sup>76</sup> and the size of medical malpractice jury awards continued to increase,<sup>77</sup> there remained much disagreement and media attention<sup>78</sup> regarding the perceived medical malpractice insurance crisis.<sup>79</sup>

## II. MASSACHUSETTS' RESPONSE TO THE CRISIS

The mid-1970s Massachusetts malpractice crisis mirrored the national crisis.<sup>80</sup> Following a growing national trend, a major medical malpractice insurer withdrew abruptly

<sup>67</sup> See, e.g., CAL. BUS. & PROF. CODE § 6146 (West Supp. 1987).

<sup>68</sup> See, e.g., CAL. CIV. PROC. CODE § 667.7 (West 1980). Under the California statute, the defendant may pay malpractice judgments for future damages in excess of \$50,000 in installments, rather than in one lump sum. *Id.*

<sup>69</sup> See Redish, *Constitutional Implications*, *supra* note 20, at 761.

<sup>70</sup> For a complete listing of the number of states that have enacted specific medical malpractice reforms, see *supra* note 59 and accompanying text.

<sup>71</sup> See Redish, *Constitutional Implications*, *supra* note 20, at 761-62.

<sup>72</sup> Ackerman, *Less Rhetoric*, *supra* note 28, at 727 ("[I]n some areas of the country, harder hit by more and costlier claims, high risk physicians were being forced to pay annual premiums running \$20,000, \$30,000 and even as high as \$70,000."). The American Trial Lawyers' Association, however, reports that medical malpractice insurance premiums represent less than one-half of one percent of health care costs. *Id.*

<sup>73</sup> See Redish, *Constitutional Implications*, *supra* note 20, at 762 (citing Ludlam, *Malpractice: Funding Emerges as a Critical Issue*, TRUSTEE, Apr. 1976, at 12).

<sup>74</sup> For a breakdown of the different reforms enacted in each state and their status as constitutional, unconstitutional, or repealed as of July 1985, see AMA REPORT 2, *supra* note 59, at 20-21.

<sup>75</sup> Comment, *Medical Malpractice: A Sojourn Through the Jurisprudence Addressing Limitation of Liability*, 30 LOY. L. REV. 119, 120 (1984).

<sup>76</sup> See GAO REPORT, *supra* note 32, at 10. AMA data shows an average of 8.6 claims for every 100 physicians per year during the period 1980-1984. *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> See G. Easterbrook, *The Revolution in Medicine*, NEWSWEEK, Jan. 26, 1987, at 62; AMERICAN MEDICAL ASSOCIATION SPECIAL TASK FORCE ON PROFESSIONAL LIABILITY AND INSURANCE, PROFESSIONAL LIABILITY IN THE '80s, REPORT 3 (1985).

<sup>79</sup> See Londrigan, *Underwriting Losses*, *supra* note 1 at 22; Browning, *Doctors and Lawyers Face Off*, A.B.A. J., July 1, 1986, at 38.

<sup>80</sup> See ANNUAL REPORT OF THE SPECIAL COMMISSION RELATIVE TO MEDICAL PROFESSIONAL LIABILITY INSURANCE AND THE NATURE AND CONSEQUENCES OF MEDICAL MALPRACTICE, MASS. H.R. REP. NO. 5631, at 7 (1978) [hereinafter 1978 MASS. ANNUAL REPORT].



from the Massachusetts insurance market, thus decreasing the availability of insurance.<sup>81</sup> Unprecedented and unanticipated increases in the number of malpractice claims filed,<sup>82</sup> coupled with increases in payments and claims expense, also made it difficult for insurance companies to measure the risk of writing medical malpractice insurance.<sup>83</sup> Consequently, those insurers still writing malpractice policies raised their premiums dramatically.<sup>84</sup> These developments made coverage unavailable or unaffordable for many physicians in the Commonwealth.<sup>85</sup>

Like almost every other state in the country, Massachusetts responded by enacting a comprehensive medical malpractice bill<sup>86</sup> designed to insure the continued availability of affordable medical malpractice insurance.<sup>87</sup> The legislation's immediate objective was accomplished by establishing a Joint Underwriting Association (JUA).<sup>88</sup> It was intended as a "temporary," nonexclusive solution to the impending withdrawal of all major private carriers of medical malpractice coverage from the Massachusetts market in 1975.<sup>89</sup> Since its creation, the JUA has been virtually the sole provider of malpractice coverage for physicians, surgeons, and hospitals in the Commonwealth.<sup>90</sup>

The comprehensive medical malpractice bill<sup>91</sup> also reformed the tort law relating to medical malpractice actions as a long term remedy to the malpractice crisis.<sup>92</sup> The bill established a board of registration and discipline for the state medical profession,<sup>93</sup> set new standards for risk classification by the insurance commissioner,<sup>94</sup> required the elimination of the ad damnum clause in complaints alleging medical malpractice,<sup>95</sup> reduced the statute of limitations for minors,<sup>96</sup> and mandated the plaintiff's appearance before

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<sup>81</sup> *Id.*

<sup>82</sup> From 1970 to 1975 the number of claims filed in the Commonwealth increased from 122 to 476 a year. *Id.* at 37, table 10.

<sup>83</sup> *Id.* at 36.

<sup>84</sup> *Id.* at 7.

<sup>85</sup> *Id.*

<sup>86</sup> 1975 Mass. Acts 362 (1975).

<sup>87</sup> The preamble of the enactment states,

Whereas, the deferred operation of this act would tend to defeat its purpose, which is, in part, to guarantee the continued availability of medical malpractice insurance, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

*Id.*

<sup>88</sup> See ANNUAL REPORT OF THE SPECIAL COMMISSION RELATIVE TO MEDICAL PROFESSIONAL LIABILITY INSURANCE AND THE NATURE AND CONSEQUENCES OF MEDICAL MALPRACTICE, MASS. H.R. REP. NO. 5355, at 5 (1985) [hereinafter 1985 MASS. ANNUAL REPORT] (general description of the JUA's composition); MASS. GEN. LAWS ANN. ch. 175A, § 5A (West Supp. 1986).

<sup>89</sup> See ANNUAL REPORT OF THE SPECIAL COMMISSION RELATIVE TO MEDICAL PROFESSIONAL LIABILITY INSURANCE AND THE NATURE AND CONSEQUENCES OF MEDICAL MALPRACTICE, MASS. H.R. REP. NO. 5980, at 5 (1983) [hereinafter 1983 MASS. ANNUAL REPORT].

<sup>90</sup> *Id.* at 5. In 1979, the JUA provided malpractice coverage for an average of 9,700 physicians and surgeons and for 124 hospitals throughout the state. *Id.* In 1985, these figures were 11,000 and 117 respectively. See 1985 MASS. ANNUAL REPORT, *supra* note 88, at 9.

<sup>91</sup> 1975 Mass. Acts 362.

<sup>92</sup> See 1985 MASS. ANNUAL REPORT, *supra* note 88, at 5.

<sup>93</sup> See MASS. GEN. LAWS ANN. ch. 13, § 10 (West 1981).

<sup>94</sup> *Id.* at ch. 175A, § 5 (West Supp. 1986).

<sup>95</sup> *Id.* at ch. 231, § 60C (West 1985).

<sup>96</sup> *Id.* § 60D.

a Medical Malpractice Tribunal as a prerequisite to a medical malpractice liability trial.<sup>97</sup> These tort reforms and the establishment of the JUA seemed to produce the desired results as both the number of claims and malpractice insurance premiums stabilized through 1980.<sup>98</sup>

In 1981, however, the medical malpractice insurance market in Massachusetts began to destabilize.<sup>99</sup> In the second half of that year, malpractice claims increased by 50 percent,<sup>100</sup> and in response the JUA requested a 57.9 percent rate increase on occurrence policies,<sup>101</sup> which cover all claims for a year of a physician's practice regardless of when the medical malpractice claim is reported,<sup>102</sup> and a 16 to 56 percent rate increase on claims made policies, which cover claims reported in a single year regardless of when the medically negligent act occurred.<sup>103</sup> The Massachusetts Medical Society (MMS) objected to these increases, requesting only a 14.93 percent and a 27 percent increase respectively.<sup>104</sup> The Commissioner of Insurance allowed a net increase of only 30 percent on both policies for that year.<sup>105</sup>

A similar rate increase was agreed upon by all the interested parties in 1982,<sup>106</sup> but on April 1, 1983, the JUA filed a recommendation for a 162.7 percent net increase in medical malpractice insurance rates for physicians for the period of July 1, 1983 to June 30, 1984.<sup>107</sup> On May 18, 1984, the Commissioner ordered a 42 percent average increase in rates for the same period.<sup>108</sup> On June 7, 1984, the JUA responded by filing an appeal with the Massachusetts Supreme Judicial Court, alleging that the rates established by the Commissioner were not "adequate, just, and reasonable" as required by Massachusetts General Laws, c. 175A, § 5A,<sup>109</sup> and were not 'actuarially sound' and 'calculated to be self-supporting' as required by stat. 1975, c. 362, § 6.<sup>110</sup> The court agreed, reversing

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<sup>97</sup> *Id.* § 60B.

<sup>98</sup> 1985 MASS. ANNUAL REPORT, *supra* note 88, at 6.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 10. Table 1 shows that the number of claims rose from 681 in 1980 to 912 in 1981. *Id.*

<sup>101</sup> *Id.* at 6.

<sup>102</sup> See JUA of Massachusetts, *Medical Malpractice*, at 8 (June 1985). Thus, a claim of medical negligence reported ten years after its occurrence is covered by an occurrence policy if the physician had such a policy during the year the allegedly negligent act took place. *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> 1985 MASS. ANNUAL REPORT, *supra* note 88, at 6.

<sup>105</sup> *Id.* at 7.

<sup>106</sup> *Id.*

<sup>107</sup> The Medical Malpractice Joint Underwriting Ass'n of Mass. v. Commissioner of Ins., 395 Mass. 43, 478 N.E.2d 936 (1985).

<sup>108</sup> *Id.* at 44, 478 N.E.2d at 938.

<sup>109</sup> MASS. GEN. LAWS ch. 175A, § 5A (West 1985), provides in relevant part:

The commissioner shall, annually on or before December first, after due hearing and investigation, fix and establish fair and reasonable classification of risks and adequate, just, reasonable and nondiscriminatory premium charges on claims made and occurrence basis to be used and charged by companies in connection with the issue or execution of medical malpractice insurance for the ensuing calendar year or any part thereof.

*Id.*

<sup>110</sup> Joint Underwriting Ass'n, 395 Mass. at 45, 478 N.E.2d at 938. Statute 1975, c. 362, § 6, as amended by St. 1980, c. 333, provides in relevant part:

Effective after the initial year of operation rates, rating plans and any provision for recoupment through policyholder assessment or premium rate increase, shall be based

and remanding the decision to the Commissioner, requiring him to set retroactive rates for 1983-1984 in accordance with the opinion.<sup>111</sup> On remand, the Supreme Judicial Court empowered the Commissioner to set retroactive rates above 50 percent.<sup>112</sup> Coupled with the already high rate increases for 1984-1985, physicians in Massachusetts again faced excessive premiums and the state once again found itself in the midst of a perceived medical malpractice crisis in which insurance affordability, not availability, was the problem.<sup>113</sup>

Despite the substantial increases in malpractice insurance premiums, some commentators questioned whether the term "crisis" appropriately characterized the situation in Massachusetts.<sup>114</sup> A comparative report to the Medical Society of New York found that the Massachusetts physicians' average net income in 1985 was \$88,700, while their average malpractice premiums for that year were \$4,615.<sup>115</sup> Thus, in 1985, a Massachusetts physician's average insurance premium costs were only 5.2 percent of the physician's net income.<sup>116</sup> According to the study, this percentage was the third lowest among the ten states studied,<sup>117</sup> six of which represented the largest in terms of population.<sup>118</sup> Although these figures question the existence of an affordability crisis, the Massachusetts medical community intensively lobbied the legislature to address the perceived crisis.<sup>119</sup>

In 1986 the state legislature responded, passing a major reform bill which the Governor signed into law on June 23rd of that year.<sup>120</sup> The Governor described the bill as "a critical first step in ensuring the availability of first-class affordable health care for all Massachusetts' citizens and fair compensation for victims of malpractice."<sup>121</sup> Among the bill's many provisions is section 60H, which mandates that in any medical malpractice action the court shall instruct the jury that if it finds the defendant liable for medical negligence, it shall not award the plaintiff more than \$500,000 for pain and suffering, loss of companionship, embarrassment, and other items of general, noneconomic damage.<sup>122</sup> This statutory cap, however, can be bypassed if the jury finds a substantial or

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upon the association's loss and expense experience, and investment income from unearned premium and loss reserves together with such other information based upon such experience as the commissioner may deem appropriate. The resultant premiums rates shall be on an actuarially sound basis and shall be calculated to be self-supporting.

*Id.*

<sup>111</sup> *Joint Underwriting Ass'n*, 395 Mass. at 58, 478 N.E.2d at 945.

<sup>112</sup> *Id.*

<sup>113</sup> See 1985 MASS. ANNUAL REPORT, *supra* note 88, at 7.

<sup>114</sup> See Coalition for Consumer Justice, *supra* note 1, at 2. See also Rutigliano, *Insurance Crisis for Doctors? Fantasy, Fact, or Fiction?*, TRIAL, May 1986, at 29 (AMA figures belie the existence of any crisis).

<sup>115</sup> AN ANALYSIS OF MEDICAL MALPRACTICE INSURANCE EXPENSES AND PHYSICIANS INCOME IN NEW YORK AND SELECTED STATES, REPORT TO THE MEDICAL SOCIETY OF THE STATE OF NEW YORK 9, 11, (Sept. 1985) [hereinafter REPORT TO THE MEDICAL SOCIETY] (prepared by Healthscope Management Services Corp.).

<sup>116</sup> *Id.* at 11.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 3.

<sup>119</sup> See MASSACHUSETTS MEDICAL SOCIETY, MALPRACTICE LAW REFORM: EVERYBODY'S BUSINESS. The MMS submitted a ten bill legislative package to the state legislature in 1985 that was designed to end the medical malpractice insurance affordability crisis. *Id.*

<sup>120</sup> An Act Relative to Medical Malpractice, Ch. 351, 1986, Mass. Adv. Legis. Serv. 310 (Law. Co-op.).

<sup>121</sup> Governor Michael S. Dukakis, Press Release (July 23, 1986).

<sup>122</sup> An Act Relative to Medical Malpractice, Chapter 351, § 26, 1986 Mass. Adv. Legis. Serv.

permanent loss or impairment of a bodily function, or substantial disfigurement, or other special circumstances which would warrant a finding that such limitation would deprive the plaintiff of just compensation.<sup>123</sup> The legislature designed the statutory cap on noneconomic damages in order to decrease expenses and stabilize medical malpractice insurance premiums.<sup>124</sup>

Legislatures in seventeen other states have enacted statutory provisions limiting the recovery of damages in medical malpractice litigation.<sup>125</sup> These statutes usually mandate either an absolute limit on a physician's or hospital's liability,<sup>126</sup> a partial limit on a physician's or hospital's liability in conjunction with a patient compensation fund which supplements the plaintiff's recovery,<sup>127</sup> or an absolute limit on noneconomic damages.<sup>128</sup> The first two approaches limit total damages recoverable while the third permits full recovery for economic damages but limits noneconomic damages.<sup>129</sup>

310 (Law. Co-op.), codified at MASS. GEN. LAWS ANN. ch. 231, § 60H. The statute reads in relevant part:

In an action for malpractice, negligence, error, omission, mistake or the unauthorized rendering of professional services, . . . the court shall instruct the jury that in the event they find the defendant liable, they shall not award the plaintiff more than five hundred thousand dollars for pain and suffering, loss of companionship, embarrassment, and other items of general damages unless the jury determines that there is a substantial or permanent loss or impairment of a bodily function or substantial disfigurement, or other special circumstances in the case which warrant a finding that imposition of such a limitation would deprive the plaintiff of just compensation for the injuries sustained.

*Id.*

<sup>123</sup> *Id.*

<sup>124</sup> See Comment, *Limitation on Recovery*, *supra* note 13, at 1332. The statutory cap was the product of much legislative compromise. One legislative petition called for a \$750,000 limit for injury or death. See AN ACT RELATIVE TO CERTAIN MEDICAL MALPRACTICE CAUSES OF ACTION, MASS. H.R. REP. NO. 6809, at 4 (1985). Governor Dukakis submitted a bill requesting a \$500,000 cap for injury or death, including permanent bodily function loss or disfigurement. See AN ACT RELATIVE TO MEDICAL MALPRACTICE INSURANCE, MASS. H.R. REP. NO. 6829, 18 (1985). The Committee on Insurance filed a bill in 1986 that placed no limit on pain and suffering awards to the victim, but did limit to \$250,000 the amount that a relative suing for loss of companionship or wrongful death could recover. See AN ACT RELATIVE TO MEDICAL MALPRACTICE INSURANCE, MASS. H.R. REP. NO. 5525, at 20 (1986). A Senate bill would have set a statutory cap of \$250,000 for injury or death resulting from medical negligence. See AN ACT RELATIVE TO NON-ECONOMIC DAMAGES IN CERTAIN ACTIONS AGAINST HEALTH CARE PROVIDERS, S. REP. NO. 1017, at 1 (1986).

<sup>125</sup> See AMA REPORT 2, *supra* note 59, at 18.

<sup>126</sup> See, e.g., N.D. CENT. CODE § 26-40.1-11 (1978). The statute limits a health care provider's liability to \$300,000 for all claims arising from any one occurrence. *Id.*

<sup>127</sup> See, e.g., IND. CODE ANN. § 16-9.5-2-2 (Burns 1983). The Indiana statute limits the total recovery for patient injury or death to \$500,000, limits the liability of any health care provider to \$100,000 per occurrence, provides that any amount due from a judgment or settlement that exceeds the health care provider's total liability shall be paid from the patient's compensation fund in an amount determined by the court. *Id.*

<sup>128</sup> See, e.g., CAL. CIV. CODE § 3333.2 (West Supp. 1985). Under the California statute, recovery is limited to \$250,000 for "noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage." *Id.*

<sup>129</sup> See Comment, *Limitation on Recovery*, *supra* note 13, at 1332-33.

Along with at least four states,<sup>130</sup> Massachusetts adopted the third approach: limiting noneconomic damages to \$500,000 with certain exceptions<sup>131</sup> while imposing no limit on the total economic damages a plaintiff may recover.<sup>132</sup> In enacting the statutory cap, the Massachusetts legislature, like legislatures in states with similar provisions, adopted caps on noneconomic damages in order to reduce the dollar amounts of medical malpractice awards. The legislature thought that the statutory cap would allow insurers to predict more accurately plaintiff recoveries and therefore maintain coverage at reasonable rates.<sup>133</sup> Thus, the legislature intended the cap provisions to reduce medical malpractice premiums and thereby help resolve the perceived crisis.<sup>134</sup>

Two recent studies have assessed the effect of statutory caps on the perceived medical malpractice crisis.<sup>135</sup> One study by Patricia Danzon examined the impact of the various forms of statutory caps during the period from 1975 to 1984, and found that caps on jury awards reduced the average award by 23 percent.<sup>136</sup> The study noted, however, that the reduction of jury awards attributable to statutory caps did not automatically translate into reduced malpractice premiums — litigation expenses and investment losses by insurance companies must also be considered.<sup>137</sup> The Danzon study thus did not demonstrate conclusively the effect of statutory caps on medical malpractice premiums.

A second study, however, found that statutory caps did not reduce medical malpractice premiums.<sup>138</sup> The study, conducted by Frank Sloan, examined the impact of several tort reforms, including statutory caps on awards, on the levels and rates of change in general practitioners' insurance premiums from 1974 to 1978.<sup>139</sup> For the years examined, Sloan found that state legislative actions, considered individually or collectively, had no significant impact in reducing physician premiums.<sup>140</sup> Thus, according to the study, statutory caps did not reduce medical malpractice premiums.<sup>141</sup>

Even though the Danzon and Sloan studies questioned the effectiveness of statutory caps on jury awards as a means of reducing medical malpractice premiums, Massachusetts, as well as several other states, enacted liability limiting statutes in their attempts to mitigate the effects of a perceived medical malpractice crisis. Medical malpractice plaintiffs have challenged these statutes on state and federal equal protection grounds in a number of states, and courts have reached inconsistent results.<sup>142</sup> Because the Massachusetts statutory cap limits for the first time a medical malpractice victim's recovery rights,

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<sup>130</sup> See CAL. CIV. CODE § 3333.2 (West Supp. 1985); N.H. REV. STAT. ANN. § 507-C:7(II) (Supp. 1979); OHIO REV. CODE ANN. § 2307.43 (Page 1981); TEX. REV. CIV. STAT. ANN. art. 4590i, § 11.82(a) (Vernon Supp. 1982).

<sup>131</sup> See *supra* note 122 and accompanying text.

<sup>132</sup> *Id.*

<sup>133</sup> Sloan, *State Responses to the Medical Malpractice Insurance "Crisis" of the 1970's: An Empirical Assessment*, 9 J. HEALTH, POL. POL'Y & L. 629, 633 (1985).

<sup>134</sup> See Comment, *Limitation on Recovery*, *supra* note 13, at 1332.

<sup>135</sup> See GAO REPORT, *supra* note 32, at 18.

<sup>136</sup> Danzon, *The Frequency and Severity of Medical Malpractice Claims: New Evidence*, 49 LAW & CONTEMP. PROBS. 57, 78 (1986).

<sup>137</sup> *Id.* at 79.

<sup>138</sup> Sloan, *Empirical Assessment*, *supra* note 133, at 640-41.

<sup>139</sup> *Id.* at 629.

<sup>140</sup> *Id.* at 643.

<sup>141</sup> *Id.*

<sup>142</sup> See *supra* notes 14-16 and accompanying text.

it is likely that its constitutionality will also be tested under state and federal equal protection guarantees.

### III. APPLYING EQUAL PROTECTION ANALYSIS TO STATUTES LIMITING MEDICAL MALPRACTICE LIABILITY

#### A. *Equal Protection Standards*

Although liability limiting statutes distinguish medical malpractice victims from all other tort victims, such distinctions do not per se violate the equal protection guarantees of federal and state constitutions.<sup>143</sup> Lawmakers may discriminate among classes of people when enacting legislation but, in order to satisfy equal protection requirements, legislation must employ criteria that treat similarly situated people equally.<sup>144</sup> Only classification schemes that are unreasonable or result in invidious discrimination are subject to invalidation on state and federal equal protection grounds.<sup>145</sup> Thus, the pertinent inquiry is whether medical malpractice plaintiffs whose jury awards are reduced by statutory damage caps that limit recovery in medical malpractice actions, but not in other tort actions, have suffered unreasonable or invidious discrimination.<sup>146</sup>

When conducting an equal protection analysis of state legislation courts have utilized three standards of review: strict scrutiny, intermediate scrutiny, and minimum scrutiny.<sup>147</sup> Under the strict scrutiny standard, a court will uphold legislation only if the state can demonstrate that the statute advances a compelling state interest and is the least restrictive means available to achieve that end.<sup>148</sup> Legislation is valid under intermediate scrutiny only if the legislative classification substantially relates to the asserted legitimate state purpose for the classification.<sup>149</sup> Under minimum scrutiny, a legislative classification is constitutional if the means chosen by the legislature rationally relates to a valid state objective.<sup>150</sup> According to these standards, the type of statutory classification involved and the importance of the interest affected by the statute determine the applicable level of scrutiny for the court's equal protection analysis.<sup>151</sup>

Courts apply the strict scrutiny standard when a statutory classification discriminates against a suspect class or threatens a fundamental right.<sup>152</sup> A class is suspect where it

<sup>143</sup> See Redish, *Constitutional Implications*, *supra* note 20, at 769.

<sup>144</sup> See Note, *Constitutional Perspective*, *supra* note 3, at 1296. See also *Plyer v. Doe*, 457 U.S. 202, 216, *reh'g denied*, 458 U.S. 1131 (1982).

<sup>145</sup> Redish, *Constitutional Implications*, *supra* note 20, at 769. See, e.g., *McLaughlin v. Florida*, 379 U.S. 184 (1964) (invidious discrimination); *McGowan v. Maryland*, 366 U.S. 420 (1961) (unreasonable classification).

<sup>146</sup> Redish, *Constitutional Implications*, *supra* note 20, at 769.

<sup>147</sup> See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976) (intermediate scrutiny); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (strict scrutiny); *Dandridge v. Williams*, 397 U.S. 471 (1970) (minimum scrutiny).

<sup>148</sup> See *San Antonio Indep. School Dist.*, 411 U.S. at 33-34.

<sup>149</sup> *Craig*, 429 U.S. at 197 (classification based on gender "must serve important governmental objectives and must be substantially related to achievement of those objectives").

<sup>150</sup> *McGowan*, 366 U.S. at 425 (statute violates fourteenth amendment only if classification is irrelevant to state objective).

<sup>151</sup> See Note, *Constitutional Perspective*, *supra* note 3, at 1297.

<sup>152</sup> See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969).

suffers from such disabilities, as a consequence of a history of purposeful unequal treatment or a position of political powerlessness, that it requires greater protection than is afforded by the majoritarian political process.<sup>153</sup> Courts have extended fundamental rights status to individual liberty and political process rights guaranteed by the Constitution.<sup>154</sup> Thus, when a suspect class or fundamental right is involved the state must show a compelling state interest to justify the statutory classification under the strict scrutiny standard.<sup>155</sup> Generally, courts have not used strict scrutiny to determine the constitutionality of medical malpractice limitation statutes under equal protection guarantees because the common law right to bring an action to recover for injuries is not a fundamental right, and the class of medical malpractice victims is not a suspect class.<sup>156</sup>

Intermediate scrutiny analyzes the relationship between the statutory classification and the legislative purpose.<sup>157</sup> A statutory classification passes intermediate scrutiny if the means chosen by the legislature substantially further the purported ends of the legislation, thus requiring the court to investigate the relationship between the means and ends of a statute.<sup>158</sup> Intermediate scrutiny is more deferential to the legislature than strict scrutiny,<sup>159</sup> but presumes that the important rights of those within the legislative classification should not be abridged absent a substantial fit between the means and ends of the legislation.<sup>160</sup> The United States Supreme Court has generally limited its application of this means-ends test to cases involving classifications based on gender and illegitimacy.<sup>161</sup>

When reviewing statutory damage limitation provisions, courts have applied intermediate scrutiny and examined limiting the medical malpractice victim's recovery as it relates to the legislative goals of decreasing insurance premium costs and of maintaining and improving health care.<sup>162</sup> For such statutes to pass intermediate level judicial scrutiny, courts require a substantial relationship or fit between the legislation's means and ends, and this fit must be close enough to justify the discriminatory effects on those medical malpractice victims who fall within the statutory classification.<sup>163</sup>

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<sup>153</sup> *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (a suspect class is a discrete or insular minority that is politically powerless due to circumstances beyond its control).

<sup>154</sup> See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to freedom of interstate travel); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (right to vote); *Griffin v. Illinois*, 351 U.S. 12, *reh'g denied*, 351 U.S. 958 (1956) (right to criminal appeal).

<sup>155</sup> *Lerner, Compensation Schemes*, *supra* note 52, at 152.

<sup>156</sup> See Comment, *Limitation on Recovery*, *supra* note 13, at 1339. See, e.g., *Carson v. Maurer*, 120 N.H. 925, 931-32, 424 A.2d 825, 830 (1980) ("right to recover for personal injuries is not a fundamental right"); *Arneson v. Olson*, 270 N.E.2d 125, 133 (N.D. 1978) (no suspect classification or fundamental right).

<sup>157</sup> See *Craig*, 429 U.S. at 197-98.

<sup>158</sup> See *Craig v. Boren*, 429 U.S. 190, 197 (1976), *reh'g denied*, 429 U.S. 1124 (1977) (state must show that classification is substantially related to important government objective); *Reed v. Reed*, 404 U.S. 71, 75-76 (1971) (classification must rest on some "difference . . . having a fair and substantial relation to the object of the legislation . . .").

<sup>159</sup> *Redish, Constitutional Implications*, *supra* note 20, at 772.

<sup>160</sup> Comment, *Limitation on Recovery*, *supra* note 13, at 1339.

<sup>161</sup> See, e.g., *Craig*, 429 U.S. 190 (gender); *Trimble v. Gordon*, 430 U.S. 762 (1977) (illegitimacy).

<sup>162</sup> See, e.g., *Arneson v. Olson*, 270 N.E.2d 125, 135 (N.D. 1978); *Jones v. State Bd. of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977).

<sup>163</sup> Comment, *Limitation on Recovery*, *supra* note 13, at 1340.

Unlike strict or intermediate scrutiny, minimum scrutiny requires only that the statutory classification rationally relates to a legitimate government interest.<sup>164</sup> Thus, minimum scrutiny requires that the court inquire into the purpose of the legislation in order to determine whether the classification rationally relates to that purpose.<sup>165</sup> In applying this test, however, courts generally have deferred to the legislature, holding a classification valid if any rational basis for creating it can be inferred,<sup>166</sup> thereby creating the presumption that the legislature acted reasonably.<sup>167</sup> This presumption generally prevents courts from examining relevant facts and statistics in order to determine whether the legislation enacted actually relates to or furthers a legitimate state end.<sup>168</sup>

Whether a medical malpractice damage limitation statute is deemed constitutional under equal protection guarantees depends on which standard of review a court adopts. Strict scrutiny does not apply to such a determination because medical malpractice victims do not constitute a suspect class and the interest in a full recovery in a tort action is not a fundamental right.<sup>169</sup> Thus, in reviewing such statutes, courts may employ either intermediate or minimum scrutiny. Intermediate scrutiny examines the relation between the statute's means and ends, while minimum scrutiny is more deferential to the legislature.

### B. Application of Equal Protection Standards to Statutory Caps

Plaintiffs' primary equal protection challenge to statutes limiting recovery in medical malpractice actions has been the claim that statutory caps discriminate between medical negligence victims and places the burden of resolving the perceived medical malpractice crisis on the most severely injured victims.<sup>170</sup> Plaintiffs have also challenged these statutes on the grounds that they discriminate unfairly between medical malpractice victims and all other tort victims, and thus create a special privilege for the class of medical tortfeasors as opposed to all other tortfeasors.<sup>171</sup> The special privilege is created because these statutes limit only medical malpractice tortfeasors' liability and does not affect the liability of other malpractice tortfeasors, such as lawyers and dentists.<sup>172</sup>

<sup>164</sup> See, e.g., *Dandridge v. Williams*, 397 U.S. 471 (1970); *McGowan v. Maryland*, 366 U.S. 420 (1961).

<sup>165</sup> Note, *Constitutional Perspective*, *supra* note 3, at 1298.

<sup>166</sup> See *McGowan*, 366 U.S. at 425. In *McGowan*, the Court stated:

[T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

*Id.*

<sup>167</sup> See Redish, *Constitutional Implications*, *supra* note 20, at 770-71.

<sup>168</sup> Note, *Constitutional Perspective*, *supra* note 3, at 1300.

<sup>169</sup> See *supra* note 156 and accompanying text.

<sup>170</sup> See Comment, *Limitation of Recovery*, *supra* note 13, at 1338. See, e.g., *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 161, 695 P.2d 665, 682, 211 Cal. Rptr. 368, 385, *appeal denied*, 474 U.S. 893 (1985); *Carson v. Maurer*, 120 N.H. 925, 931, 424 A.2d 825, 830 (1980).

<sup>171</sup> Comment, *Limitation on Recovery*, *supra* note 13, at 1338.

<sup>172</sup> *Id.* at 1338-39. See, e.g., *Carson v. Maurer*, 120 N.H. 925, 931, 424 A.2d 825, 830 (1980); *Graley v. Satayatham*, 74 Ohio Op. 2d 316, 319, 343 N.E.2d 832, 837 (1976).



In reviewing the constitutionality of noneconomic damage caps, courts have differed as to which standard of review applies.<sup>173</sup> Courts have applied both the minimum and intermediate scrutiny tests, but no court has applied a strict scrutiny analysis.<sup>174</sup> Courts applying the minimum scrutiny test have upheld the constitutionality of statutory limits on noneconomic damages, finding that they rationally relate to the legitimate state goals of decreasing medical malpractice insurance premiums and ensuring the availability of quality health care.<sup>175</sup> In contrast, those courts applying intermediate scrutiny generally have not questioned the validity of the asserted legislative ends but have invalidated such statutes on the grounds that they do not substantially relate to or further those ends.<sup>176</sup> The case law in the states which have ruled on these statutory provisions illustrates the different approaches and results.

In *Johnson v. St. Vincent Hospital*,<sup>177</sup> the Indiana Supreme Court, applying minimum scrutiny, held that a statute limiting recovery for medical malpractice victims did not violate equal protection guarantees under either the state or the federal constitutions.<sup>178</sup> The *Johnson* court noted that the legislation classified plaintiffs, imposing a burden upon malpractice victims whose noneconomic damages exceeded the statutory limit.<sup>179</sup> The *Johnson* court also found that the statute classified defendants by bestowing a special benefit on health care providers — limiting their tort liability — not available to other tort defendants.<sup>180</sup> In determining which level of equal protection analysis to employ, the court observed that its interpretation of the minimum scrutiny test required that the legislative classification not be arbitrary or unreasonable, and that a "fair and substantial relationship exist between the classification and the legislative purpose."<sup>181</sup> Although this standard resembled a heightened level of scrutiny, in its analysis the *Johnson* court applied minimum scrutiny and found that the statutory cap was "clothed with a presumption of constitutionality," and that the plaintiffs thus bore the burden of refuting every conceivable legislative basis supporting the cap on awards.<sup>182</sup> Despite the classifications inherent in the statute, the *Johnson* court thus found that the limitation was a rational means to achieve the public goals of ensuring the availability of health care services and maintaining an environment where malpractice insurance is available and used,<sup>183</sup> and as such did not violate equal protection guarantees.<sup>184</sup>

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<sup>173</sup> Comment, *Limitation on Recovery*, *supra* note 13, at 1339.

<sup>174</sup> *Id.*

<sup>175</sup> See *Hoffman v. United States*, 767 F.2d 1431 (9th Cir. 1985); *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368, *appeal denied*, 474 U.S. 839 (1985); *Johnson v. St. Vincent Hosp.*, 273 Ind. 374, 404 N.E.2d 585 (1980).

<sup>176</sup> See *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980); *Jones v. State Bd. of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976) *cert. denied*, 431 U.S. 914 (1977); *Wright v. Central DuPage Hosp. Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978); *Graley v. Satayatham*, 74 Ohio Op. 2d 316, 343 N.E.2d 832 (1976).

<sup>177</sup> *Johnson v. St. Vincent Hosp.*, 273 Ind. 374, 404 N.E.2d 585 (1980).

<sup>178</sup> *Id.* at 400, 404 N.E.2d at 601. The court found that the medical malpractice statute did not violate IND. CONST. art. I, § 23 and art. IV, §§ 22–23, which prohibit special privilege legislation. *Id.* at 397, 404 N.E.2d at 600.

<sup>179</sup> *Id.* at 397, 404 N.E.2d at 600.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 398, 404 N.E.2d at 600.

<sup>183</sup> *Id.* at 396, 404 N.E.2d at 599.

<sup>184</sup> *Id.* at 400, 404 N.E.2d at 601.

Both the United States Court of Appeals for the Ninth Circuit and the California Supreme Court have applied the minimum scrutiny test in equal protection challenges to statutes<sup>185</sup> similar to the noneconomic damages cap statute upheld in *Indiana*.<sup>186</sup> In *Hoffman v. United States*,<sup>187</sup> the Ninth Circuit held that the California statute limiting recovery of noneconomic damages in medical malpractice actions<sup>188</sup> did not violate equal protection guarantees.<sup>189</sup> The lower court noted that the statute discriminated between medical malpractice victims with noneconomic loss in excess of the statutory limit and all other tort victims with similar losses.<sup>190</sup> In applying the minimum scrutiny test,<sup>191</sup> the *Hoffman* court reasoned that the legislation was rationally related to the legitimate state objective of assuring the continued availability of quality medical care.<sup>192</sup> Believing that high insurance premiums adversely affected the availability of quality medical care, the Ninth Circuit deferred to the state legislature in accordance with the minimal scrutiny test, finding "plausible" its claim that the cap on noneconomic damages would limit the rise in malpractice insurance premiums.<sup>193</sup>

In *Fein v. Permanente Medical Group*,<sup>194</sup> the California Supreme Court applied the minimum scrutiny test and upheld the constitutionality of the state's noneconomic damage limitation provision,<sup>195</sup> stating that the cap did not violate equal protection guarantees under either the state or federal constitution.<sup>196</sup> The court noted that the statute discriminated between medical malpractice victims and other tort victims, imposing limits only in medical malpractice cases, and within the class of medical malpractice victims, denying complete recovery only to those malpractice plaintiffs with noneconomic damages exceeding the statutory limit.<sup>197</sup> In enacting the statute, the court noted that the legislature was responding to increases in medical malpractice insurance which were creating serious problems for California's health care system.<sup>198</sup> According to the court, these increases threatened to curtail the availability of medical care and created the

<sup>185</sup> See *Hoffman v. United States*, 767 F.2d 1431 (9th Cir. 1985); *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368, *appeal denied*, 474 U.S. 893 (1985).

<sup>186</sup> See *Johnson v. St. Vincent Hosp.*, 273 Ind. 374, 404 N.E.2d 585 (1980).

<sup>187</sup> *Hoffman v. United States*, 767 F.2d 1431 (9th Cir. 1985).

<sup>188</sup> CAL. CIV. CODE § 3333.2 (West Supp. 1985) (\$250,000 limit for noneconomic damages).

<sup>189</sup> *Hoffman*, 767 F.2d at 1437. See Comment, *Limitation on Recovery*, *supra* note 13, at 1344-45.

<sup>190</sup> *Id.* at 1433.

<sup>191</sup> *Id.* at 1434-35. The court rejected strict scrutiny because neither a suspect class nor a fundamental right were involved. *Id.* See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (fundamental right); *McLaughlin v. Florida*, 379 U.S. 184 (1964) (suspect class).

The court also rejected intermediate scrutiny, noting that the Supreme Court has only applied intermediate scrutiny to gender-based classifications and classification premised on legitimacy. *Id.* See, e.g., *Trimble v. Gordon*, 430 U.S. 762 (1977) (legitimacy); *Craig v. Boren*, 429 U.S. 190 (1976) (gender).

<sup>192</sup> *Hoffman*, 767 F.2d at 1437 & n.7.

<sup>193</sup> *Id.* at 1437.

<sup>194</sup> *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368, *appeal denied*, 474 U.S. 893 (1985).

<sup>195</sup> CAL. CIV. CODE § 3333.2 (West Supp. 1985).

<sup>196</sup> *Fein*, 38 Cal. 3d at 164, 695 P.2d at 684, 211 Cal. Rptr. at 387. The court stated that "we know of no principle of California — or federal — constitutional law which prohibits the Legislature from limiting the recovery of damages in a particular setting in order to further a legitimate state interest." *Id.* at 161, 695 P.2d at 682, 211 Cal. Rptr. at 385.

<sup>197</sup> *Id.* at 161, 695 P.2d at 682, 211 Cal. Rptr. at 385.

<sup>198</sup> *Id.* at 158, 695 P.2d at 680, 211 Cal. Rptr. at 383.

possibility that many doctors would practice without insurance, thereby leaving patients who might be injured by such doctors with the prospect of uncollectable judgments.<sup>199</sup> Thus, the court found that the cap was rationally related to the legitimate state objective of reducing insurance costs and, therefore, the legislation had a reasonable basis for differentiating between malpractice plaintiffs and all other plaintiffs.<sup>200</sup> The court concluded that although reasonable persons certainly could disagree as to the wisdom of the provision, it could not say that the law was not rationally related to a legitimate state interest.<sup>201</sup>

In *Fein*, three justices dissented on the grounds that the statutory cap impermissibly denied severely injured malpractice victims compensation for negligently inflicted harm.<sup>202</sup> The dissent noted that under the statute, people who suffer severe injuries late in life may receive up to \$250,000 for the resulting loss of enjoyment during their final years, while infants with identical injuries are limited to the same compensation for their entire lifetimes.<sup>203</sup> This result, according to the dissent, is a fundamentally arbitrary classification because the statute concentrates the costs of the worst injuries on a few individuals, those most severely injured by medical malpractice,<sup>204</sup> whereas it could have spread the burden among all of the statute's beneficiaries, such as health care consumers or, more broadly, taxpayers.<sup>205</sup> The dissent further noted that the statutory cap is not linked to any public benefit because the savings resulting from the cap accrue to the individual defendant for private use.<sup>206</sup> Moreover, the dissent stated that the legislature had cited no evidence that the medical malpractice victim's sacrifices would result in appreciable savings to insurance companies because an insignificant number of individuals, about fourteen a year,<sup>207</sup> received jury awards over the statutory cap in both economic and noneconomic damages combined.<sup>208</sup> Thus, the dissent concluded, no rational basis exists for singling out the most severely injured victims of medical malpractice to pay for the special relief conferred upon health care providers and insurers.<sup>209</sup> *Fein* was subsequently appealed to the United States Supreme Court, where it was dismissed for lack of a substantial federal question.<sup>210</sup>

In contrast to the results reached by courts applying minimum scrutiny, courts applying intermediate scrutiny have found that statutory medical malpractice damage limitation provisions violate state and federal equal protection guarantees because the means employed do not substantially relate to the legislative ends.<sup>211</sup> The intermediate scrutiny tests applied by these courts differ slightly from the test applied by the United

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<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 162, 695 P.2d at 683, 211 Cal. Rptr. at 386.

<sup>201</sup> *Id.* at 160, 695 P.2d at 681, 211 Cal. Rptr. at 384-85.

<sup>202</sup> *Id.* at 168, 695 P.2d at 687, 211 Cal. Rptr. at 39 (Bird, C.J., dissenting).

<sup>203</sup> *Id.* at 173, 695 P.2d at 691, 211 Cal. Rptr. at 394 (Bird, C.J., dissenting).

<sup>204</sup> *Id.* (Bird, C.J., dissenting).

<sup>205</sup> *Id.* (Bird, C.J., dissenting).

<sup>206</sup> *Id.* at 172, 695 P.2d at 690, 211 Cal. Rptr. at 393 (Bird, C.J., dissenting).

<sup>207</sup> *Id.* (Bird, C.J. dissenting) (citing CALIFORNIA AUDITOR GENERAL, *THE MEDICAL MALPRACTICE INSURANCE CRISIS IN CALIFORNIA*, 31 (1975)).

<sup>208</sup> *Id.* (Bird, C.J., dissenting).

<sup>209</sup> *Id.* at 175, 695 P.2d at 692, 211 Cal. Rptr. at 395 (Bird, C.J., dissenting).

<sup>210</sup> *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368, *appeal denied*, 474 U.S. 839 (1985).

<sup>211</sup> See Comment, *Limitation on Recovery*, *supra* note 13, at 1340.

States Supreme Court, which required that the statutory classification serve an important government purpose and be substantially related to achieving that purpose.<sup>212</sup>

In *Carson v. Maurer*,<sup>213</sup> the New Hampshire Supreme Court applied an intermediate scrutiny test, requiring that the challenged statutory classification be reasonable and have a fair and substantial relation to the object of the legislation.<sup>214</sup> The *Carson* court held that a statutory limit of \$250,000 for pain and suffering and other noneconomic damages, similar to that upheld in California, violated equal protection guarantees under the state and federal constitutions.<sup>215</sup> The plaintiffs claimed that the statutory limit denied them equal protection of the laws because it distinguished impermissibly between victims of medical negligence and victims of other forms of negligence with respect to their common law rights to full tort recovery.<sup>216</sup> The plaintiffs also claimed that, by creating an arbitrary damage limitation, the statute precluded only the most seriously injured victims from receiving full compensation for their injuries.<sup>217</sup> In deciding upon the appropriate level of scrutiny, the court reasoned that although neither a fundamental right nor a suspect class was involved, the common law right to full recovery in medical negligence actions enjoyed sufficient status to necessitate a standard of review more lenient than strict scrutiny but more rigorous than minimum scrutiny.<sup>218</sup>

In applying an intermediate scrutiny test, the *Carson* court examined whether the distinction between malpractice victims and all other tort victims was reasonable and whether the classification had a fair and substantial relation to the object of the legislation.<sup>219</sup> The court found that the legislature enacted the statutory cap in order to stabilize insurance risks and reduce malpractice insurance rates by providing that insurers would not have to pay out damages for pain and suffering and other items of noneconomic recovery above the statutory limit.<sup>220</sup> Using the "fair and substantial" relation test, the court first found that the relationship between the legislation and its goal was tenuous because noneconomic damages awards historically contributed insignificantly to increases in insurance premium costs.<sup>221</sup> Secondly, the court found that few medical negligence victims incurred pain and suffering damages in excess of the \$250,000 cap.<sup>222</sup> The court further found that the cap was unfair and unreasonable because it imposed the burden of supporting the medical care industry on those most severely injured and most in need of full compensation.<sup>223</sup> Thus, the *Carson* court held the statutory limitation unconsti-

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<sup>212</sup> *Craig v. Boren*, 429 U.S. 190, 197 (1976).

<sup>213</sup> *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980).

<sup>214</sup> *Id.* at 932, 424 A.2d at 831.

<sup>215</sup> *Id.* at 944, 424 A.2d at 838. The court ruled that N.H. REV. STAT. ANN. § 507-C:7 II (Supp. 1979), which limited a medical negligence victim's recovery for pain and suffering to \$250,000, violated state equal protection guarantees under N.H. CONST. art. I, §§ 2, 12 (1982). *Id.*

<sup>216</sup> *Carson*, 120 N.H. at 931, 424 A.2d at 830.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 932, 424 A.2d at 830.

<sup>219</sup> *Id.* at 932, 424 A.2d at 830-31.

<sup>220</sup> *Id.* at 941, 424 A.2d at 836.

<sup>221</sup> *Id.* (quoting Note, *California's Medical Inquiry Compensation Reform Act: An Equal Protection Challenge*, 52 S. CAL. L. REV. 829, 951 (1979) (correlation between malpractice awards and increasing insurance premiums negligible because only one-quarter of each premium dollar actually goes toward tort victim compensation)).

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 942, 424 A.2d at 837.

tutional for its failure to meet the "fair and substantial" relation test in classifying medical negligence victims.<sup>224</sup>

In reaching its decision, the *Carson* court rejected the defendant's claim that the malpractice damage ceiling was constitutional because it was analagous to the New Hampshire Worker's Compensation Act,<sup>225</sup> which statutorily supplants a victim's common law rights of action.<sup>226</sup> The court noted that where the worker's compensation plan provided a quid pro quo for any recovery rights diminished by the plan, a limitation on pain and suffering damages recoverable in medical malpractice actions provides no equivalent benefit.<sup>227</sup> Under worker's compensation schemes such as New Hampshire's, the injured worker receives a speedy and guaranteed recovery for his injury in return for the loss of his common law tort remedy.<sup>228</sup> Thus, the benefits created by the statute are exchanged for abridged common law benefits,<sup>229</sup> thereby providing employees with a sufficient quid pro quo.<sup>230</sup> Conversely, damage limitation provisions in medical malpractice actions do not provide malpractice victims with a quid pro quo because there is no guarantee of recovery to the victim in exchange for the limitation of her common law right.<sup>231</sup> Adopting this reasoning, the *Carson* court was able to distinguish worker's compensation damage limitations from the statutory noneconomic damages cap in medical malpractice actions.<sup>232</sup>

In *Detar Hospital v. Estrada*, a Texas appellate court held that a statute limiting a health care provider's medical malpractice liability for all damages to \$500,000, not including past and future necessary medical expenses, violated the equal protection clauses of both the state and federal constitutions.<sup>233</sup> The court noted that the Texas Constitution guaranteed a plaintiff's right to bring a common law cause of action to recover in tort.<sup>234</sup> Thus, according to the court, the legislature could not abrogate the constitutionally guaranteed right to redress absent a showing that the legislative basis for the statute outweighed the denial of that right.<sup>235</sup>

In choosing the standard of review to evaluate the constitutionality of the statute, the *Estrada* court stated that minimum scrutiny applied because such areas as the right to recover in tort mandate a restrained standard of review.<sup>236</sup> In its analysis, however,

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<sup>224</sup> *Id.* at 943, 424 A.2d at 838.

<sup>225</sup> See New Hampshire Worker's Compensation Act, N.H. REV. STAT. ANN. ch. 281.

<sup>226</sup> *Carson*, 120 N.H. at 943, 424 A.2d at 837.

<sup>227</sup> *Id.* at 943, 424 A.2d at 837-38.

<sup>228</sup> See *Learner, Compensation Schemes*, *supra* note 52, at 169.

<sup>229</sup> *Id.* at 170.

<sup>230</sup> *Id.* The quid pro quo doctrine originated in the case of *New York Central Railroad v. White*, 243 U.S. 188 (1917). There the United State Supreme Court stated that "it perhaps may be doubted whether the State could abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead." *Id.* at 201.

In the more recent case of *Duke Power v. Carolina Environmental Study Group*, 438 U.S. 59 (1978), however, the Supreme Court explicitly refused to decide whether the due process clause requires the legislature to provide a quid pro quo when it abrogates common law tort remedies. *Id.* at 87-88, 93, & n.n. 32, 33.

<sup>231</sup> See *Carson v. Maurer*, 120 N.H. at 943, 424 A.2d at 837-38.

<sup>232</sup> *Id.*

<sup>233</sup> *Detar Hosp., Inc. v. Estrada*, 694 S.W.2d 359, 365 (Tex. Ct. App. 1985). See also *Baptist Hosp. v. Baber*, 672 S.W.2d 296 (Tex. Ct. App. 1984).

<sup>234</sup> *Estrada*, 694 S.W.2d at 365.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

the court employed an intermediate scrutiny test, requiring that the limitation on a medical malpractice plaintiff's recovery "promotes" the legislative aims.<sup>237</sup> The aims of the statute, the court noted, were: to reduce health care liability claim frequency and severity; to decrease the cost of those claims; and to lower insurance premiums and medical care costs.<sup>238</sup> The court determined that the statutory limitation on damages did not promote these aims, as the spiraling increases in the cost of medical care since the enactment of the statute evidenced.<sup>239</sup> Thus, according to the *Estrada* court, the statute unreasonably infringed on a medical malpractice plaintiff's constitutionally guaranteed right to obtain full redress and therefore violated state and federal equal protection guarantees.<sup>240</sup>

Similarly, in *Arneson v. Olson*,<sup>241</sup> the North Dakota Supreme Court applied an intermediate scrutiny test and held that a statute limiting recovery in medical malpractice actions to \$300,000 violated both state and federal equal protection guarantees.<sup>242</sup> The test enunciated by the court required a "close correspondence between statutory classification and legislative goals."<sup>243</sup> The purpose of the statute included ensuring the availability of competent medical and hospital services at reasonable cost, adequately compensating patients with meritorious claims while eliminating nonmeritorious claims, and encouraging physicians to enter and remain in practice in North Dakota.<sup>244</sup>

In applying the intermediate scrutiny test, the *Arneson* court examined these legislative aims and found that the limitation on severely injured victim's recovery did not achieve its enumerated goals.<sup>245</sup> The court found that the limitation did not adequately compensate patients with meritorious claims but instead deprived the most severely injured medical malpractice victims.<sup>246</sup> The court also determined that the statutory limitation did not deter nonmeritorious claims.<sup>247</sup> Thus, because the statutory limitation did not closely correspond with the legislative goals, the legislation failed under intermediate scrutiny analysis and the statutory classification was therefore invalid.<sup>248</sup>

In addition to examining the relationship between the statutory classification and the legislative purposes, the *Arneson* court also examined the rationale underlying the statute's goals.<sup>249</sup> Noting that the incidence of medical malpractice claims in North Dakota was far lower than the national average, that premiums in North Dakota were the sixth lowest in the country, and that insurance coverage was readily available in the state, the court concluded that there was no evidence of a medical malpractice insurance crisis in North Dakota.<sup>250</sup> In the absence of such a crisis, the court held the statutory cap unconstitutional.<sup>251</sup>

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<sup>237</sup> *Id.* at 366.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978).

<sup>242</sup> *Arneson*, 270 N.W.2d at 136. The court held that N.D. CENT. CODE. § 26-40-1-11 (1978) violated N.D. CONST. §§ 20, 69, 70, and the fourteenth amendment. *Id.*

<sup>243</sup> *Id.* at 135.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 135-36.

<sup>248</sup> *Id.* at 135.

<sup>249</sup> *Id.* at 136.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

Also, in *Graley v. Satayatham*,<sup>252</sup> an Ohio court struck down the provisions of Ohio's Medical Malpractice Act limiting awards for general damages in medical malpractice actions to \$200,000.<sup>253</sup> The *Graley* court stated that in all equal protection cases the crucial question is whether an appropriate governmental interest is suitably furthered by the different treatment of classes of individuals.<sup>254</sup> While the court appeared to enunciate an intermediate scrutiny test, it never clearly articulated a standard of review because it found that no appropriate governmental interest was at stake.<sup>255</sup> The *Graley* court stated that there was no government interest, "unless it be argued that any segment of the public in financial distress be at least partly relieved of financial accountability for its negligence."<sup>256</sup> In noting the absurdity of this proposition, the court said that the legislature could not benefit one class — medical practitioners — by depriving another — medical malpractice patients — of the equal protection of the laws.<sup>257</sup> The *Graley* court concluded that the statute's special treatment of the medical profession is not available to lawyers or dentists or others who are also subject to malpractice suits.<sup>258</sup> Thus, the court invalidated the statute based on the statute's rationale and not on the relationship between that goal and the statutory means.<sup>259</sup>

In *Simon v. St. Elizabeth Medical Center*, another Ohio court followed *Graley* in holding that Ohio's \$200,000 general damages statutory cap violated the state and federal constitutions.<sup>260</sup> In following *Graley*, the court noted that it could add nothing of importance to that decision's equal protection analysis.<sup>261</sup> Thus, although the *Simon* court did not enunciate a standard of review, it based its unconstitutionality finding on the fact that the statutory cap conferred benefits on medical malpractice defendants which were unavailable to other tort defendants, thereby depriving medical malpractice plaintiffs of benefits available to other similarly situated plaintiffs.<sup>262</sup>

In *Jones v. State Board of Medicine*, the Idaho Supreme Court applied an intermediate scrutiny test to determine the constitutionality of the state's medical malpractice damage cap.<sup>263</sup> The test required that the legislative means chosen have a fair and substantial relationship to a reasonably conceived public purpose.<sup>264</sup> The *Jones* court noted that the statutory classification in question, which distinguished between more severely and less severely injured malpractice victims, did not involve a fundamental right, and thus strict

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<sup>252</sup> *Graley v. Satayatham*, 74 Ohio Op. 2d 316, 343 N.E.2d 832 (1976).

<sup>253</sup> *Id.* at 321, 343 N.E.2d at 839. The court held that OHIO REV. CODE ANN. § 2307.43, which states that no amount recovered for general damages in any medical claim, excluding death, shall exceed \$200,000, violated the equal protection clauses of both the United States and Ohio Constitutions. *Id.*

<sup>254</sup> *Id.* at 320, 343 N.E.2d at 837.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 320, 343 N.E.2d at 838.

<sup>260</sup> *Simon v. St. Elizabeth Medical Center*, 3 Ohio Op. 3d 164, 166-67, 355 N.E.2d 903, 906 (1976). The *Simon* court was a Court of Common Pleas of Ohio as was the court in *Graley*.

<sup>261</sup> *Id.* at 167, 355 N.E.2d at 906.

<sup>262</sup> *Id.*

<sup>263</sup> *Jones v. State Bd. of Medicine*, 97 Idaho 859, 871, 555 P.2d 399, 411 (1976), *cert. denied*, 431 U.S. 914 (1977). The court reviewed the constitutionality of IDAHO CODE § 39-4204 (1977), which limited recoverable damages in medical malpractice actions to \$150,000 per claim and \$300,000 per malpractice occurrence. *Id.* at 862, 555 P.2d at 402.

<sup>264</sup> *Id.* at 871, 555 P.2d at 411.

scrutiny was not applicable.<sup>265</sup> The court also found that minimum scrutiny did not apply because under that test the "validity or invalidity of discriminating classifications may . . . depend solely upon the extent of the imagination of the reviewing court," and that an "overindulgent . . . blind following" of the legislative will would result in the "abdication of judicial responsibility."<sup>266</sup> Thus, the *Jones* court found it necessary to look beyond the minimum scrutiny analysis and adopt an intermediate scrutiny test focusing on legislative means and ends in the context of malpractice medical legislation.<sup>267</sup>

In accordance with this standard of review, the court remanded the case for a factual determination concerning whether the legislative means related to the objective of abating the perceived medical malpractice insurance crisis.<sup>268</sup> Specifically, the Idaho Supreme Court instructed the trial court to determine whether an increase in medical malpractice claims caused increased insurance rates, whether malpractice insurance was unavailable at affordable rates, whether such unavailability caused an insurance crisis in the state, and whether the statutory cap would solve the perceived insurance crisis.<sup>269</sup>

As the foregoing cases demonstrate, the constitutionality of medical malpractice damage limitation statutes turns on which standard of scrutiny the reviewing court adopts. Those courts that apply minimum scrutiny have found the statutes constitutional because they rationally relate to the legitimate state goals of decreasing medical malpractice insurance rates and ensuring the availability of quality health care. Courts applying intermediate scrutiny, however, have invalidated these statutes, holding that the means employed do not substantially relate to or further the legislative ends.

#### IV. THE MASSACHUSETTS MEDICAL MALPRACTICE LIABILITY CAP IS UNCONSTITUTIONAL

A number of courts have reviewed noneconomic damages caps under intermediate or minimal scrutiny<sup>270</sup> and a majority of them have found these caps unconstitutional under intermediate scrutiny.<sup>271</sup> The United States Supreme Court recently refused to hear an appeal of a case upholding the constitutionality of a statutory cap,<sup>272</sup> thereby providing no definitive guidance on the issue. Only Justice White dissented from the vote to deny the appeal, noting that the issue divides the appellate and highest courts of several states and will arise in every state that enacts a similar statutory provision.<sup>273</sup> With the recent enactment of the statutory cap on medical malpractice liability in Massachusetts, a constitutional challenge as Justice White predicted, is likely.<sup>274</sup> In reviewing the constitutionality of the statutory cap, the Massachusetts courts should adopt intermediate scrutiny as the proper standard of review and find that the cap provision violates state and federal equal protection guarantees.

The *Carson*, *Estrada*, *Arneson*, *Graley*, *Simon*, and *Jones* decisions, which held that damage limitation statutes violated equal protection guarantees because the legislative

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<sup>265</sup> *Id.* at 870, 555 P.2d at 410.

<sup>266</sup> *Id.* at 871, 555 P.2d at 411.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.* at 877, 555 P.2d at 417.

<sup>269</sup> *Id.* at 874, 555 P.2d at 414.

<sup>270</sup> See *supra* notes 14-15 and accompanying text.

<sup>271</sup> See *supra* note 15 and accompanying text.

<sup>272</sup> *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368, *appeal denied*, 474 U.S. 893 (1985).

<sup>273</sup> 474 U.S. 893, 894 (White, J., dissenting).

<sup>274</sup> *Id.* at 894 (White, J., dissenting).



means did not substantially relate to or further the legislative ends, suggest the possibility of a successful equal protection challenge to section 60H, the \$500,000 cap on noneconomic damages in medical malpractice actions.<sup>275</sup> Unlike the statutory caps reviewed by those courts, which made no special provision for the substantially disfigured or physically impaired medical malpractice victim, the Massachusetts cap exempts the more severely injured — those who suffer substantial disfigurement or permanent loss or impairment of a bodily function — from the statutory limit.<sup>276</sup> The cap does, however, discriminate between medical malpractice victims who fall within the statute and all other tort victims, effectively restricting the common law right of the former group to seek full redress for injuries arising from medical negligence.<sup>277</sup> The statutory cap also reciprocally benefits the medical malpractice tortfeasor by limiting his or her liability, thereby distinguishing between medical malpractice defendants and all other tort defendants.<sup>278</sup> Because section 60H does discriminate, judicial review is necessary to determine if the statute offends the equal protection provisions of the Massachusetts and United States Constitutions.

Equal protection analysis attempts to balance the various interests involved in the litigation. A court must therefore characterize the pertinent interests affected by the statutory cap before determining the appropriate standard of review. The medical malpractice plaintiff has an interest in the common law right to obtain full recovery, as determined by a jury, for injuries resulting from medical negligence. In contrast, the state has an interest in limiting the plaintiff's recovery in order to ensure the affordability and availability of medical malpractice insurance, thereby guaranteeing the availability of adequate medical services.<sup>279</sup> Thus, whether the statutory cap can be justified under equal protection analysis depends on whether impairing a medical malpractice plaintiff's private rights outweighs the projected benefits for the general public.<sup>280</sup> The outcome of the court's interest balancing depends on which standard of scrutiny the court adopts.

The United States Supreme Court has restricted its application of intermediate scrutiny to cases involving classifications based upon gender<sup>281</sup> and illegitimacy,<sup>282</sup> while applying strict or minimum scrutiny to all other classifications.<sup>283</sup> The Massachusetts courts generally have employed the same standards as the Supreme Court in reviewing challenges raised under the state and federal constitutions because they offer virtually identical equal protection guarantees.<sup>284</sup> A state court may, however, apply a higher level

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<sup>275</sup> MASS. GEN. LAWS ANN. ch. 231, § 60H (1988).

<sup>276</sup> *Id.*

<sup>277</sup> See Learner, *Compensation Schemes*, *supra* note 52, at 147.

<sup>278</sup> See *Graley*, 74 Ohio Op. 2d at 320, 343 N.E.2d at 837.

<sup>279</sup> See *Johnson*, 273 Ind. at 396, 404 N.E.2d at 599.

<sup>280</sup> See *Carson*, 120 N.H. at 933, 424 A.2d at 831.

<sup>281</sup> See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976) (gender).

<sup>282</sup> See, e.g., *Trimble v. Gordon*, 430 U.S. 762 (1977) (illegitimacy).

<sup>283</sup> See *Carson*, 120 N.H. at 932, 424 A.2d at 831.

<sup>284</sup> See U.S. CONST. amend. XIV, § 1. The fourteenth amendment states in part that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

See MASS. CONST. art. I, X, XI. Article I states in relevant part, "[a]ll men are born free and equal, and have certain natural, essential, and inalienable rights; that of acquiring, possessing, and protecting property . . ." Article X states in relevant part, "[e]ach individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws." Article XI states in relevant part, "[e]very subject of the commonwealth ought to find a

of scrutiny when interpreting its constitution, thereby granting individuals more rights than the federal constitution requires.<sup>285</sup> The Massachusetts courts should adopt this approach and apply an intermediate scrutiny test when it reviews the constitutionality of section 60H, just as the courts in five other states have done in reviewing the constitutionality of their statutory cap provisions.<sup>286</sup>

Because the group of medical malpractice plaintiffs is not a suspect class and the common law right to full damages is not a fundamental right, strict scrutiny does not apply.<sup>287</sup> Minimum scrutiny and intermediate scrutiny are thus the only alternatives. Minimum scrutiny requires that the court uphold the statutory classification upon finding any rational relation to the government interest.<sup>288</sup> This standard creates a presumption of constitutionality.<sup>289</sup> As the Idaho State Supreme court noted in *Jones*, under minimum scrutiny a statutory classification's validity may depend on whether the reviewing court can imagine any rational relation between the classification and the legislative purpose. Blindly following the legislative will in this manner abdicates judicial responsibility, the court warns.<sup>290</sup> Deferring to the presumption of constitutionality inherent in minimum scrutiny, courts fail to examine whether the classification reasonably fits the legislation's purpose, thereby unfairly penalizing the plaintiff who can demonstrate that the classification, although rationally related, does not reasonably relate to the purpose.<sup>291</sup> Furthermore, as the *Carson* court noted, although not a fundamental right, the common law right to a full recovery in medical negligence actions is so important that it deserves a heightened level of judicial review.<sup>292</sup> Massachusetts should adopt intermediate scrutiny when it evaluates section 60H's constitutionality because the provision restricts a plaintiff's common law right to full recovery in medical malpractice actions. Such a restriction should not be upheld through the judiciary's abdication of its duty to examine the reasonableness of the relationship between the statutory classification and legislative purpose.

In apparent recognition of the shortcomings inherent in minimum scrutiny analysis, the Massachusetts Supreme Judicial Court has indicated a willingness to apply intermediate scrutiny, although this inclination has thus far been expressed in dicta and in concurring and dissenting opinions.<sup>293</sup> Some members of the court seem to recognize

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certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character."

See *Commonwealth v. Henry's Drywall Co.*, 366 Mass. 539, 543, 320 N.E.2d 911, 914 (1974) ("Applying these standards, we conclude that § 129B is a valid exercise of the legislative authority and is constitutional in that it satisfies both the equal protection and due process clauses of our Federal Constitution as well as the parallel requirements of our State Constitution."). Thus, the standards of constitutional review are the same under both constitutions.

<sup>285</sup> See *Carson*, 120 N.H. at 932, 424 A.2d at 831.

<sup>286</sup> See *Jones*, 97 Idaho at 871, 555 P.2d at 411, *cert. denied*, 431 U.S. 914 (1977); *Arneson*, 27 N.W.2d at 136; *Carson*, 120 N.H. at 932, 424 A.2d at 831; *Graley*, 74 Ohio Op. 2d at 320, 343 N.E.2d at 837.

<sup>287</sup> See Comment, *Limitation on Recovery*, *supra* note 13, at 1339.

<sup>288</sup> See Note, *Constitutional Perspective*, *supra* note 3, at 1298.

<sup>289</sup> See Redish, *Constitutional Implications*, *supra* note 20, at 771.

<sup>290</sup> See *Jones*, 97 Idaho at 871, 555 P.2d at 411.

<sup>291</sup> See Note, *Constitutional Perspective*, *supra* note 3, at 1300.

<sup>292</sup> *Carson*, 120 N.H. at 932, 424 A.2d at 830.

<sup>293</sup> Note, *Constitutional Perspective*, *supra* note 3, at 1300. See also *Commonwealth v. Henry's Drywall Co.*, 366 Mass. 539, 541 n.4, 320 N.E.2d 911, 913 n.4 (1974) (dictum); *Mobil Oil Corp. v. Attorney General*, 361 Mass. 401, 419-20, 280 N.E.2d 406, 419 (1972) (Hennessey, J., & Tauro,

that an analysis of equal protection issues requires serious inquiry into the correlation between statutory classification and purpose,<sup>294</sup> in order to avoid abdicating judicial responsibility in reviewing legislation.<sup>295</sup>

An example of this concern is found in *Pinnick v. Cleary*.<sup>296</sup> In a concurring opinion, Chief Justice Tauro stated, "[w]here the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial scrutiny."<sup>297</sup> The Chief Justice further stated that by using evidentiary inquiries, the court might avoid becoming a "virtual rubber stamp" in upholding the constitutionality of challenged legislation on the basis of a superficial review of an inadequate record.<sup>298</sup> Also, in *Commonwealth v. Henry's Drywall Co.*, the court stated in dicta that the burden of proving a statute unconstitutional may be aided by a "factual foundation established in the record by an evidentiary hearing or otherwise."<sup>299</sup> In addition, in *Mobil Oil Corp. v. Attorney General*, the dissent found that the plaintiffs succeeded in establishing the constitutional invalidity of the challenged statute because their arguments were premised on facts and relevant documents and not on mere speculation.<sup>300</sup>

Thus, the Massachusetts Supreme Judicial Court appears to recognize that it must examine the relationship between statutory classification and purpose in order to give real meaning to state and federal equal protection guarantees. It also recognizes that it must require the state to produce evidence supporting the probable beneficial effect of a challenged statute, or conversely, allow plaintiffs to produce evidence refuting the statute's supposed benefits.<sup>301</sup> For these reasons, the Massachusetts courts should follow the courts of New Hampshire,<sup>302</sup> Texas,<sup>303</sup> Ohio,<sup>304</sup> North Dakota,<sup>305</sup> and Idaho,<sup>306</sup> and use intermediate scrutiny to review the constitutionality of section 60H. Applying an intermediate level of review to section 60H, the Massachusetts courts must find the statute unconstitutional because its classification benefits one group — health care providers — at the expense of another — medical malpractice victims — without substantially furthering a legitimate state end as required under intermediate scrutiny analysis.<sup>307</sup>

Section 60H is designed to reduce medical malpractice insurance premiums, thereby ensuring its affordability and the availability of quality health care in the Commonwealth.<sup>308</sup> The legislature enacted section 60H in response to a much publicized medical

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C.J., dissenting); *Pinnick v. Cleary*, 360 Mass. 1, 37–38, 271 N.E.2d 592, 614–15 (1971) (Tauro C.J., concurring).

<sup>294</sup> See Note, *Constitutional Perspective*, *supra* note 3, at 1300–01.

<sup>295</sup> See *Jones*, 97 Idaho at 871, 555 P.2d at 411, *cert. denied*, 431 U.S. 914 (1977).

<sup>296</sup> *Pinnick v. Cleary*, 360 Mass. 1, 271 N.E.2d 592 (1971).

<sup>297</sup> *Id.* at 37, 271 N.E.2d at 614 (Tauro, C.J., concurring).

<sup>298</sup> *Id.* at 37, 271 N.E.2d at 614–15 (Tauro, C.J., concurring).

<sup>299</sup> See *Commonwealth v. Henry's Drywall Co.*, 366 Mass. 539, 541 n.4, 320 N.E.2d 911, 913 n.4 (1974).

<sup>300</sup> *Mobil Oil Corp. v. Attorney General*, 361 Mass. 401, 419–20, 280 N.E.2d 406, 419 (1972) (Hennessey, J., dissenting).

<sup>301</sup> See Note, *Constitutional Perspective*, *supra* note 3, at 1301–02.

<sup>302</sup> See *Carson*, 120 N.H. at 932, 434 A.2d at 825.

<sup>303</sup> See *Estrada*, 694 S.W.2d at 366.

<sup>304</sup> See *Graley*, 74 Ohio Op. at 320, 343 N.E.2d at 837.

<sup>305</sup> See *Arneson*, 270 N.W.2d at 135.

<sup>306</sup> See *Jones*, 97 Idaho at 871, 555 P.2d at 411, *cert. denied*, 431 U.S. 914 (1977).

<sup>307</sup> See *supra* notes 157–63 and accompanying text.

<sup>308</sup> See *supra* notes 121–24 and accompanying text.

malpractice insurance crisis purportedly afflicting the state.<sup>309</sup> As the North Dakota Supreme Court found in *Arneson*,<sup>310</sup> however, the legislation's rationale may be questioned because the crisis itself is questionable.<sup>311</sup> In Massachusetts, the average premium cost for a physician in 1985 was only 5.2 percent of his or her net income.<sup>312</sup> According to a comparative study, this percentage was the third lowest among the ten states studied.<sup>313</sup> These figures do not represent a malpractice insurance crisis of sufficient magnitude to restrict a malpractice plaintiff's common law rights in order to benefit physicians and insurance companies. As the *Graley* court noted, relieving insurance companies and physicians of financial accountability for professional negligence because of perceived financial distress is absurd.<sup>314</sup> Every profession or business undergoes difficult times, and it is not the place of government to manipulate the law in order to provide financial relief to one class, the medical, while depriving another, malpractice plaintiffs, of equal protection guarantees.<sup>315</sup> Thus, the legitimacy of the legislative end may be suspect, considering the questionable validity of the crisis and the fact that the impetus behind the statutory cap was the Massachusetts Medical Society.<sup>316</sup>

Assuming that the situation in Massachusetts can be termed a crisis, intermediate scrutiny analysis dictates that section 60H is unconstitutional because the means chosen by the legislature — a \$500,000 cap on noneconomic damages — does not substantially relate to the purported legislative goal of reducing medical malpractice insurance premiums. As the *Carson* court found, statutory caps do not substantially relate to the legislative end because the total amount paid out by insurers in noneconomic damages contributes insignificantly to insurance premium costs.<sup>317</sup> Only one-quarter of each premium dollar goes to compensating the tort victim for both economic and noneconomic damages, while the rest goes to insurer investments, overhead, litigation expenses and retained earnings.<sup>318</sup>

Notwithstanding the most severely injured medical malpractice victims, few individuals suffer noneconomic damages in excess of the statutory limit of \$500,000. In 1984, the average medical malpractice jury award in Massachusetts for both economic and noneconomic damages was \$236,848.<sup>319</sup> This figure is half the Massachusetts statutory cap, which only limits noneconomic damages. In addition, given the fact that studies have shown and at least one court has determined<sup>320</sup> that limits on noneconomic damage awards have little significant impact on medical malpractice insurance premiums,<sup>321</sup> the

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<sup>309</sup> See *supra* note 6.

<sup>310</sup> See *Arneson*, 270 N.W.2d at 136 (court found no evidence of malpractice crisis in North Dakota).

<sup>311</sup> See *supra* notes 114–18 and accompanying text.

<sup>312</sup> See *supra* note 116 and accompanying text.

<sup>313</sup> See *supra* note 117 and accompanying text.

<sup>314</sup> *Graley*, 74 Ohio Op. at 320, 343 N.E.2d at 837.

<sup>315</sup> *Id.*

<sup>316</sup> See *supra* note 119 and accompanying text.

<sup>317</sup> See *Carson*, 120 N.H. at 931, 434 A.2d at 836.

<sup>318</sup> See Note, *Equal Protection Challenge*, *supra* note 221, at 940–41.

<sup>319</sup> See 1985 MASS. ANNUAL REPORT, *supra* note 88, at 13.

<sup>320</sup> See *Detar Hosp. v. Estrada*, 694 S.W.2d 359, 365–66 (Tex. Ct. App.) (court noted that costs of medical care and malpractice premiums continued to increase despite enactment of statutory cap on damages).

<sup>321</sup> See *supra* notes 135–42 and accompanying text.

Massachusetts statutory cap does not further the goal of reducing premiums.<sup>322</sup> Thus, the means employed by the Massachusetts legislature to solve the malpractice insurance crisis violates equal protection under the intermediate scrutiny test because the provision does not substantially relate to or further the legislative ends. As the *Carson* court noted, the reasonableness of the statute depends on balancing the public benefits against depriving the medical victim's right to full compensation.<sup>323</sup> When the benefits accruing from a statutory provision such as section 60H cannot be proven, the victim's rights should not be circumscribed on mere speculation of the provision's effectiveness.

Section 60H can be distinguished from the Massachusetts Worker's Compensation Act, which restricts a plaintiff's common law right to sue in tort for the negligent infliction of injury and limits the total amount an injured employee may recover.<sup>324</sup> Under this scheme, the injured worker receives a speedy and guaranteed recovery for her injury in return for the loss of her common law tort remedy. Thus, the statutory benefits are provided in exchange for the employee's abridged common law benefits, thereby providing the employee with a sufficient quid pro quo.<sup>325</sup> As the *Carson* court noted, however, a statutory damage cap such as section 60H does not provide medical malpractice victims a quid pro quo because there is no guarantee of recovery to the victim in exchange for the restriction on his common law rights.<sup>326</sup> Thus, section 60H is distinguishable from the statutory limits of the Worker's Compensation Act.

Section 60H is unconstitutional under intermediate scrutiny because it discriminates between similarly situated tort victims without demonstrating a substantial relationship between the statutory classification and legislative ends. Upholding such a statute denies a medical malpractice plaintiff full recovery merely because he is a patient, while the defendant is relieved of full liability merely because she is a health care provider.<sup>327</sup> If the same plaintiff had been injured by the physician's negligent actions outside the scope of her professional capacity, that plaintiff would be entitled to recover full noneconomic damages, but because he is a patient injured by the physician's medical negligence, he is denied full recovery of those damages.<sup>328</sup> This distinction is unfair and unreasonable because the means which produce this result do not substantially further the ends of ensuring the affordability of insurance and quality health care.<sup>329</sup> Because of this tenuous relationship, section 60H violates equal protection guarantees and is therefore unconstitutional under both the Massachusetts and federal constitutions.

#### CONCLUSION

Massachusetts' attempt to solve the perceived medical malpractice crisis by enacting section 60H of chapter 231 of the General Laws is likely to be challenged in the courts on equal protection grounds, as have similar statutes in other states. Like those statutes, section 60H discriminates between classes of tort victims and classes of tortfeasors. Such

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<sup>322</sup> See *supra* note 100 and accompanying text.

<sup>323</sup> *Carson*, 120 N.H. at 933, 434 A.2d at 830.

<sup>324</sup> MASS. GEN. LAWS ANN. ch 152, § 26 (1977).

<sup>325</sup> See *supra* notes 225-32 and accompanying text.

<sup>326</sup> *Carson*, 120 N.H. at 943, 434 A.2d at 837-38.

<sup>327</sup> Comment, *Limitation on Recovery*, *supra* note 13, at 1348.

<sup>328</sup> *Id.*

<sup>329</sup> See *supra* notes 317-23 and accompanying text.

statutory discrimination is constitutional provided the legislation satisfies equal protection guarantees.

In assessing the constitutionality of section 60H against these guarantees, Massachusetts courts should apply intermediate scrutiny which mandates that the legislative means chosen substantially further or relate to legitimate legislative goals. The legitimacy of the statute's goals, alleviating the medical malpractice crisis through insurance premium reductions, is suspect because the characterization of the situation as a crisis is questionable. Also, statutory limits on medical malpractice awards have not resulted in demonstrable insurance premium reductions. Thus, under intermediate scrutiny section 60H violates equal protection guarantees because the means chosen by the legislature do not substantially further or relate to the legislative goal. Therefore, Massachusetts courts should find section 60H unconstitutional.

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