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Gary L. Vinson

University of the Pacific; McGeorge School of Law

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Exemplary Damages In Medical Malpractice Actions: California’s Requirement For Posting Of A Cost Bond By Plaintiff

In recent years there has been a growing concern with what has come to be called in California a medical “malpractice crisis.” In 1972 the California Legislature passed Senate Bill 941 amending Section 1029.6 of the Code of Civil Procedure to allow a defendant in a medical malpractice action to move for an ex parte order requiring the plaintiff to post security of not less than $2,500 in order to pursue a cause for exemplary damages. This legislation was aimed at the problem arising as a result of the California policy of prohibiting medical malpractice insurance from covering exemplary damages. Under the old law a complaint which included a prayer for exemplary damages therefore gave the plaintiff a “wedge” with which to bargain for a favorable settlement. This comment briefly discusses the implications of the new legislation upon the constitutional rights of the plaintiff. The author concludes that while the changes involved in Civil Procedure Code Section 1029.6 may in fact prevent the threat of the use of exemplary damages as a bargaining device in any but the most flagrant situations, it appears inherently unfair and presents serious questions of constitutional validity under the due process and equal protection provisions of the fourteenth amendment.

In 1972 the California Legislature amended Section 1029.6 of the Code of Civil Procedure. As amended, it allows a defendant in a medical malpractice action to move the court for an ex parte order requiring the plaintiff to post security in the minimum amount of $2,500 in order to pursue his cause for exemplary damages. Since medical malpractice insurance policies do not provide coverage for exemplary damages, a complaint which included a prayer for these damages under the old law provided the plaintiff a “wedge” with which to bargain for a speedy, favorable settlement of compensatory damages. It was argued that this bargaining wedge encouraged frivolous requests for exemplary damages, thereby creating what was called a “blackjack” ef-

2. CAL. CIV. CODE §1668; CAL. INS. CODE §533.
fect. It was this blackjack effect at which the 1972 legislation was aimed.4

While this legislation may very well prevent the threat of exemplary damages as a bargaining device in all but the most flagrant situations, it appears to be inherently unfair and it presents a possible violation of the plaintiff’s constitutional rights under the fourteenth amendment. In order to more fully understand and to clarify the implications of the constitutional questions involved, as well as to point the way to correct the statute’s inequities, it is necessary to examine what has come to be known as the medical “malpractice crisis” and California’s previous responses to it.

The Malpractice Crisis

The rate at which medical malpractice litigation has increased in recent years has far exceeded the overall rate of increase in general litigation.5 While it is true that the absence of any central agency to which reports are made results in a scarcity of reliable statistics,6 it has been estimated that from 1930 to 1940 the number of malpractice claims rose ten-fold and increased another ten-fold from 1940 to 1950.7 The trend has not yet abated. In 1969 the Aetna Life and Casualty Company indicated a 43 percent increase in the number of medical malpractice claims it had processed during the previous five years.8

A recent article has cited the following reasons as the major contributors to the increase in lawsuits: a radical change in the patient’s attitude toward his body—the patient is better educated medically and more medically sophisticated; a changed attitude toward the medical profession—the doctor is no longer viewed as the “good samaritan” of the “country doctor” era, but now has the tarnished image of the “super-successful” businessman; the impersonalization of medicine—the patient is no longer treated by one doctor that he knows and trusts, but instead, is rotated through various teams of specialists; bad public relations by the doctor who spends too little time establishing doctor-patient rapport; and finally, an inadequate supply of doctors to meet modern health care demands.9

The effects of increased litigation on the medical profession and on

8. Brooke, supra note 6, at 227.
Within the medical profession, the impact has resulted in ultra-conservatism on the part of the doctors. This has come to be known as "negative defensive medicine" and consists of a doctor refusing to engage in activities with a high risk of resulting law suits. Additionally, doctors resort to "positive defensive medicine," a performance of procedures which are not required but which are used to create evidence of the doctor's diligence. Finally, it has been asserted that the doctor's awareness of a possible malpractice suit is itself a factor contributing to the breakdown of the doctor-patient rapport.

Moreover, it is argued that this increased litigation has resulted in a decrease in both the quantity and quality of available medical care. The unnecessary utilization of procedures and facilities has reduced their availability to other patients, thereby decreasing the quantity of care available. The quality of care has suffered as a result of the reluctance of doctors to accept patients with complicated problems, to use high risk techniques when the situation calls for it, and to adopt new and innovative medical procedures.

A further result of the increase in malpractice litigation has been the rise in the cost of medical care services. The expense of the extra tests ordered to document the patient's ailments and the doctor's diligence are of course passed on to the consumer. This, however, is not the only increase. Also contributing to the increased medical prices are several other categories of costs of doing business in the medical profession. Included among these operating costs are premiums charged for malpractice insurance. The increased number of malpractice lawsuits which must be investigated and defended, along with the increased number and amount of judgments, has caused a tremendous increase in malpractice insurance premiums and a decline in the number of carriers who are willing to write policies in this area.

All of these factors, the increase in medical malpractice litigation, the rising costs, and the malpractice insurance problem, have com-

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12. Ribicoff, Medical Malpractice: the patient vs. the physician, 6 TRIAL NO. 2, at 10 (1970).
13. Id. at 11.
14. The Medical Malpractice Threat, supra note 11, at 950.
15. The Medical Malpractice Threat, supra note 11, at 949.
17. Brooke, supra note 6, at 227.
bined to create a situation which has been labeled the “malpractice crisis.”

RESPONSES TO THE CRISIS

In addition to the attention the crisis has received from the legal and medical professions and the insurance industry, it has also been the subject of governmental scrutiny. In 1969 the United States Senate issued a resolution calling for a study to analyze the problems basic to breakdowns in the organization, financing, and delivery of health care, as well as the factors contributing to the skyrocketing cost. In California, the Speaker of the Assembly in 1972 directed the Assembly Committee on Rules to study the subject of medical malpractice litigation and the feasibility of creating a state administrative agency to initially hear and determine the merits of medical malpractice cases. California’s interest in the malpractice crisis, however, is not of such recent origin.

The California Legislature, during the past few years, has passed several statutes which affect the professional liability of doctors. Proponents of this legislation declared an intent not to complicate the meritorious suit, but rather to clarify and improve the position of the professional in a liability case. Taken alone, each statute has done little to solve the professional liability problem. As a package, however, they go a long way toward the goal of curtailing the trend toward soaring malpractice rates and liability suits, by improving the doctor’s position in a suit and helping the insurance carriers to hold the line on premiums.

This legislative package includes, among others: a law allowing the question of the statute of limitations to be tried prior to the negligence suit upon a motion by either plaintiff or defendant; a law protecting the proceedings and records of medical review committees of medical societies and hospitals from discovery; a law allowing an advance payment of damages to a plaintiff without construing that payment as

23. Id.
24. CAL. CODE CIV. PROC. §597.5. The initial settling of this issue will avoid lengthy, costly trials, thereby reducing unnecessary expense by both parties.
25. CAL. EVID. CODE §1157. By protecting such records against court subpoena, physicians are likely to be more candid in their testimony concerning mistakes of their own or of colleagues. This often results in a settlement rather than a lengthy suit.
an admission of liability; a law minimizing frivolous malpractice suits by requiring plaintiff to post a $500 bond if the defendant can show to the satisfaction of the court that the plaintiff has no reasonable cause of action; a law preventing civil liability on the part of a doctor rendering emergency care necessitated by the prior medical care of another physician; a law providing that rescue teams, hospitals, and specified others are immune from liability for an act or omission while attempting to resuscitate a person who is in immediate threat of death, provided they are properly trained and equipped; a law providing that no act or omission of any rescue team in an authorized emergency vehicle, while attempting to resuscitate any person in immediate danger of loss of life, shall result in liability to the rescue team, or owners or operators, if good faith is exercised; a law allowing for discovery in arbitration cases involving personal injury; a law establishing a statute of limitations of one year from time of discovery or four years from date of injury, whichever occurs first; a law freezing the complicated res ipsa loquitur doctrine into law; and a law extending the “good Samaritan” concept into the emergency room setting.

PROBLEM OF EXEMPLARY DAMAGES

Since 1969 California law has attempted to discourage frivolous malpractice suits by requiring the plaintiff to post a bond as security for the costs of defending against the action. Under Section 1029.6 of the Code of Civil Procedure, the plaintiff may be required to post such security if it is shown at a hearing that the plaintiff will not suffer any undue economic hardship in making such a deposit and that there is no reasonable possibility that the plaintiff has a cause of action. The security cannot exceed $500 unless there are multiple defendants, each filing a motion, in which case a maximum of $1,000 may be

26. CAL. INS. CODE §11583. By allowing the plaintiff to receive early financial assistance, particularly a plaintiff with limited means, it is conceivable that the suit will be withdrawn and the need for a trial eliminated.
27. CAL. CODE CIV. PROC. §1029.6.
28. CAL. BUS. & PROF. CODE §2144.5.
29. CAL. HEALTH AND SAFETY CODE §1426.
30. CAL. VEHICLE CODE §165.5.
31. CAL. CODE CIV. PROC. §1283. The availability of all pertinent information to an arbitration panel substantially increases the chance that the professional liability case will be settled short of litigation.
32. CAL. CODE CIV. PROC. §340.5. This effectively establishes an absolute four-year statute of limitations in malpractice cases. An additional benefit will be the elimination of the need for insurance carriers to carry huge reserves required by the previous absence of an effective statute of limitations.
33. CAL. EVID. CODE §646. Codification of this doctrine will assist the preparation of defense by eliminating the previously unknown element of meaning and interpretation which a particular court might apply.
34. CAL. HEALTH AND SAFETY CODE §1407.5.
35. CAL. CODE CIV. PROC. §1029.6(a).
demanded by the court. These provisions apply to both compensatory and exemplary damages. If the plaintiff is successful in any portion of his action, the defendant is then required to make reimbursement for the cost of obtaining the security.

It was alleged, however, that despite this security requirement, the plaintiff who did file a medical malpractice action prayed for exemplary damages routinely when there was no real basis for recovery. The purpose of such a prayer was to give plaintiff's attorney a "wedge" to use for settlement. This wedge came about as a result of public policy in California that prohibited a person from insuring himself against intentional wrongdoing. Based on this public policy, California statutes governing carriers which provide professional malpractice insurance prohibit coverage for any amount awarded as exemplary damages.

To give rise to exemplary damages, a doctor's behavior must be very extreme, i.e., willful conduct accompanied by aggravating circumstances amounting to malice. Such accusations made against a professional of the healing arts are likely to result in a well publicized trial. Such a trial may result in the potential destruction of the doctor's professional career. Therefore, when a doctor is named as a defendant and exemplary damages are sought, he will be faced with potential personal liability and threatened in his career. Fearing this, doctors pressure their insurance carriers to make prompt out-of-court settlements on the compensatory damages.

With these factors in mind, it is alleged that a plaintiff's attorney commonly seeks exemplary damages primarily to "blackjack" the defendant into settlement. It is this blackjacking that led to the further restriction involved in the 1972 malpractice legislation.

THE NEW LAW—ANALYSIS AND EFFECT

Aimed at reducing the blackjack effect described above, the new

36. CAL. CODE CIV. PROC. §1029.6(c).
37. CAL. CODE CIV. PROC. §1029.6(d).
39. AMERICAN TRIAL LAWYERS ASSOCIATION, supra note 7, at 61.
41. CAL. CIV. CODE §§1668, 3294; CAL. INS. CODE §533.
42. In order to warrant the allowance of punitive damages the act complained of must not only be willful in the sense of intentional, but it must also be accompanied by aggravating circumstances, amounting to malice. . . . There must be an intent to vex, annoy or injure. Mere spite or ill will is not sufficient; and mere negligence, even gross negligence is not sufficient to justify an award of punitive damages.
43. Hanson & Stromberg, Hospital Liability for Negligence, 21 HAST. L.J. 1, 23 (1969).
45. Los Angeles Daily Journal, July 6, 1972, at 1, col. 4.
law, embodied in Section 1029.6(e) of the Code of Civil Procedure, places an obstacle before the frivolous litigant through the imposition of a $2,500 security requirement. This security requirement is conditioned upon the plaintiff's payment of all costs and reasonable attorney's fees incurred by the defendant in defending against the request for the award of exemplary damages. The security is imposed upon the motion of any defendant. If the security is not filed within thirty days after the order is served, the portion of the complaint requesting exemplary damages will be stricken. While the frequency with which exemplary damages are awarded in medical malpractice actions is extremely low,46 the purpose of this law is to reduce the number of instances in which they are initially sought, thereby relieving doctors of the pressure to make compensatory damage settlements larger than they would otherwise.47

This new statute is not the only California code section which requires a plaintiff to post a security bond to cover costs incurred by the defendant in his defense of a civil action. Such security is also required when the plaintiff is a non-resident,48 a minority stockholder in a derivative suit,49 a "vexatious" litigant,50 when the defendant is a public entity,51 a public employee,52 an engineer or an architect,53 or where the cause of action is defamation.54 Although the amount of the deposit required in these instances varies, these security requirements have a number of similarities. The motion to require the bond is made by the defendant prior to the trial, and an opportunity is given the plaintiff to show why the bond should not be required (except when the defendant is a public entity or a public employee, in which case the plaintiff is given no such opportunity, the security being automatically required upon defendant's demand and service). In ruling on the motion, the court has a degree of discretion to decide whether to require the bond or not and, if so, in what amount.

As amended by Senate Bill 941, Section 1029.6(e) of the Code of Civil Procedure is unique in several ways. In this portion of the statute, the defendant may move the court for an ex parte order.55 This

47. Interview with J. Michael Allen, supra note 22.
48. CAL. CODE CIV. PROC. §1030.
49. CAL. CORP. CODE §834(b).
50. CAL. CODE CIV. PROC. §391 et seq.
51. CAL. GOV'T CODE §947(a).
52. CAL. GOV'T CODE §951.
53. CAL. CODE CIV. PROC. §1029.5.
54. CAL. CODE CIV. PROC. §830.
55. CAL. CODE CIV. PROC. §1029.6(e):
Whenever a complaint described in subdivision (a) requests an award of exemplary damages, any defendant against whom the damages are sought may
seems to be inconsistent with the previous part of the statute: subsection (a) of Section 1029.6, designed to deter frivolous suits in their entirety, permits the plaintiff to attend a hearing and present his position as to why the bond should not be required,66 whereas subsection (e), designed to deter frivolous prayers for exemplary damages, provides for an ex parte order based entirely on the defendant's motion. The new section has no requirement for notice to other affected parties, no requirement for a hearing, and no requirement that the defendant show a need or justification for the posting.

In addition, unlike other security requirements, subsection (e) requires that the court “shall” require the plaintiff to file the bond or make the cash deposit upon the filing of the defendant’s motion. In all of the above mentioned statutes requiring security cost bonds67 and in subsection (a) of this very statute, the court is given a degree of discretion. In subsection (e), however, the requirement imposed is a mechanical one. No provision is made for consideration of the merits of the case, the financial status of the plaintiff, the burden which might be imposed, or any other relevant circumstance. The inelastic minimum of $2,500 is imposed automatically.

There are several additional aspects of this statute which are important to note. First, subsection (e) contains no provision for reimbursement to the plaintiff of the costs incurred in posting the surety bond or cash deposit should the plaintiff prevail in his action for exemplary damages. Subsection (d) does make such a provision for the $500 security required by subsection (a). Arguably, the reimbursement portion of subsection (d) is also applicable to the $2,500 security requirement of subsection (e). However, the strict wording of subsection (d), coupled with the fact that the legislature left the provision physically preceding subsection (e) in the overall statutory framework of the section and made no similar provision within or following sub-

move the court for an ex parte order requiring the plaintiff to file a corporate surety bond, approved by the court, or make a cash deposit in an amount fixed by the court. Upon the filing of the motion, the court shall require the plaintiff to file the bond or make the cash deposit. In no event shall the bond or cash deposit be less than two thousand five hundred dollars ($2,500). The bond or cash deposit shall be conditioned upon payment by the defendant in defending against the request for the award of exemplary damages, as determined by the court, if the plaintiff fails to recover any exemplary damages. The order requiring the bond or cash deposit shall require the bond to be filed or cash deposit to be made with the clerk of the court not later than 30 days after the order is served. If the bond is not filed or cash deposit is not made within such period, upon the motion of the defendant, the court shall strike the portion of the complaint which requests the award of exemplary damages.

56. CAL. CODE CIV. PROC. §1029.6(a): “[A]ny . . . defendant may . . . move the court for an order, upon notice to plaintiff . . . and hearing, requiring the plaintiff to furnish . . . security for costs of defense . . . .”

57. See notes 48-54 supra.
section (e), appears to mean that the plaintiff will bear the cost of the security deposit even if he successfully recovers the exemplary damages.

Secondly, a plaintiff may be able to make a sufficient showing of negligence to prevail in the malpractice action for compensatory damages, but be unable to show the “aggravating circumstances amounting to malice” that is required for an award of exemplary damages. In this situation, the portion of the complaint requesting exemplary damages will be denied, and the plaintiff will then have to pay the defendant's cost and reasonable attorney's fees for defending that portion of the action or forfeit the security. An additional problem for the plaintiff arises in that every defendant named in the complaint may move for the security requirement against every plaintiff. Thus, if the good faith plaintiff seeks exemplary damages against a doctor, two registered nurses, and a hospital, he will have to post $10,000 just to be able to retain the request for exemplary damages in the complaint. Furthermore, if two plaintiffs should join together in the suit, each one will have to post $10,000, a figure which would exclude all but the most flagrant practices from fair litigation.

The scope of potential defendants covered by the law is extensive. All of the publicity surrounding the bill addressed itself to problems encountered by doctors. As written, however, the section applies to thirteen additional classes of defendants ranging from dispensing opticians to veterinarians.

Though all of the above mentioned characteristics may raise some doubt about the overall wisdom of the new law, there is a more pervading question which must be answered, for even though the new code section may seem unfair, it will remain as law unless it is also found to be unconstitutional.

CONSTITUTIONAL QUESTIONS

In committee hearings held prior to the enactment of Senate Bill 941, a witness for opponents of the bill told the Assembly Judiciary Committee that the bill might violate the mandate of due process of

Arthur E. Shapira. 1973 Medical Malpractice Actions 911
the United States Constitution. If there is serious doubt as to the validity of the amended statute, litigation may be expected. What then are the constitutional problems raised by Senate Bill 941? Does a law which requires a plaintiff to post a $2,500 surety bond or cash deposit in order to include within his complaint a prayer for exemplary damages meet both the due process and equal protection mandates of the fourteenth amendment?

The due process clause has been interpreted to mean that a state may not adjudicate the rights and obligations of a defendant without providing him reasonable notice and opportunity to appear for an appropriate hearing. Absent this meaningful opportunity to be heard, the promise of the due process clause goes unfulfilled.

Nor does a defendant receive equal protection if the opportunity to obtain such a hearing depends on his financial status. This principle was clarified in *Griffin v. Illinois* wherein the United States Supreme Court invalidated a state law denying appellate review to persons convicted of a crime merely because they were unable to pay for a transcript of the trial. In the majority opinion, Mr. Justice Black stated, "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." From this line of thinking, it followed naturally that the indigent appellant was entitled not only to a record, but also to counsel since such assistance was available to the affluent appellant. The growth of *Griffin* has been steady and has been extended to invalidate, *inter alia*, procedures whereby a state supreme court would not consider cases within its jurisdiction if the person could not pay the filing fee and whereby state courts would not consider habeas corpus writs without payment of a filing fee.

The early case law development regarding protection of indigents in general involved litigation of rights of defendants and dealt only with criminal matters. It was not long, however, until there emerged a recognition of a right of access to the courts for defendants in civil actions as well. A civil defendant's right to due process was held to have been violated under a Wisconsin prejudgment wage garnishment

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64. Los Angeles Daily Journal, July 6, 1972, at 1, col. 4.
65. "There can be no doubt that at a minimum [due process] requires that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).
66. *Id.* at 318.
68. *Id.* at 19.
69. Douglas v. California, 372 U.S. 353, 355 (1963) ("In either case the evil is the same: discrimination against the indigent").
statute which sanctioned the “taking” of his property without affording him prior notice and a hearing.72 Similarly, a state statute imposing a poll tax of $1.50 was struck as violating the equal protection clause because of its resulting deterrent effect upon the exercise of voting rights by indigents.73 Mr. Justice Douglas spoke directly to the point the next year when he said,

[T]he Equal Protection Clause of the Fourteenth Amendment is not limited to criminal prosecutions. Its protections extend as well to civil matters. I can see no more justification for denying an indigent a hearing in an eviction proceeding solely because of his poverty than for denying an indigent the right to appeal the right to file a habeas corpus petition or the right to obtain a transcript necessary for appeal.74

Following this thinking, a United States circuit court announced in 1970,

The Equal Protection Clause applies to both civil and criminal cases; the Constitution protects life, liberty and property. It is the importance of the right to the individual, not the technical distinction between civil and criminal, which should be of importance to a court in deciding what procedures are constitutionally required in each case.75

Having reached this point in the development of the law, the next question posed was the extent to which fourteenth amendment protections are available to litigants seeking access to the court for the first time to settle private disputes. In March 1971, the United States Supreme Court decided Boddie v. Connecticut76 and in the opinion provided an indication of the direction the law will take in this area. In Boddie, the Supreme Court found that two Connecticut statutes were unconstitutional as applied to the appellants. Gladys Boddie and seven other plaintiffs, all welfare recipients, attempted to commence divorce actions in the Connecticut courts, but could not afford to pay


74. Williams v. Shaffer, 385 U.S. 1037, 1039-40 (1967) (Douglas, J., dissenting from a denial of writ of certiorari; citations omitted). The case involved a Georgia summary eviction statute which provided the landlord a means to oust a tenant very quickly merely by filing an affidavit that the tenant has held over and failed to pay rent. The tenant could stop the eviction and obtain a jury trial by filing a counter affidavit denying the landlord's allegations, but in order to do so he had to tender a security bond payable to the landlord for the amount of rent and any other costs which might be recovered against him.


the $45 filing fees and the $15 service-of-process fees imposed on persons commencing civil lawsuits. After failing in their attempts to have the requirements waived, they challenged the constitutionality of the fees as applied to indigents. A federal district court dismissed the complaint, and it was subsequently appealed to the United States Supreme Court. In reversing the previous decision, the opinion delivered by Mr. Justice Harlan stated,

Our conclusion is that, given the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship, due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.

The question of how far Boddie will be extended and whether it is applicable to a state security requirement statute is yet to be determined. There is language in the opinion which appears to curb any implications of a blanket extension making Boddie applicable to plaintiffs in all civil actions. Mr. Justice Harlan emphasized that the decision was heavily influenced by the facts that the state had exclusive control of the method of dissolving the marriage and that marriage is a "fundamental human relationship." On the other hand, the opinion contains many indications that the Supreme Court may be progressing slowly toward a constitutional guarantee of free access to the courts for the poor.

A. Due Process

In discussing the first important element of the Boddie decision, i.e., the state having exclusive control of the method of dissolving a marriage, the Court acknowledged that a state could deny access to its techniques of final dispute settlement under certain circumstances. Where there are still effective alternatives for the adjustment of differences remain.

79. "The legitimacy of the State's monopoly over techniques of final dispute settlement, even where some are denied access to its use, stands unimpaired where recognized, effective alternatives for the adjustment of differences remain." Id. at 375-76.
80. We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual, for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship. The requirement that these appellants resort to the judicial process is entirely a state-created matter.
ences, the state may monopolize its settlement techniques even though some citizens will be denied access. Thus the access to court is limited to those plaintiffs who have been unable to obtain by private arrangement the relief which they now seek in court.

Discussing the Boddie plaintiffs, the Court indicated an absence of knowledge of any jurisdiction in which husband and wife could free themselves from the legal obligations of marriage or prohibitions against remarriage without the use of the state's judicial machinery. Resort to the court was thus not voluntary in the sense that it was not only the "paramount dispute-settlement technique, but, in fact, the only available one." There were no effective alternatives for the adjustment of the differences between the parties, and access to the courts was required to fulfill the due process requirement.

Upon first consideration, it may seem that a plaintiff seeking exemplary damages for medical malpractice may have sufficient alternative methods for settling the dispute and thus be excluded from the courts. This conclusion, however, is subject to serious doubt. Though the tort claimant has a power to settle his dispute with the tortfeasor, a power the divorce plaintiff does not have, the alternatives for settlement may be illusory. There is no alternative for exemplary damages from the malpractice insurance carrier; nor is it likely that the physician will admit liability and pay these damages voluntarily. Thus the ultimate remedy for the tort plaintiff may be held by the state. The courts constitute "the exclusive means through which almost any dispute can ultimately be resolved short of brute force.

The second important element recognized in granting the Boddie plaintiffs access to court was the "basic position of the marriage relationship in this society's hierarchy of values." This aspect of the case

83. Id. at 375.
84. Id. at 376.
85. Id. at 377.
86. Id. at 376.
87. See text accompanying notes 40-41 supra.
89. Id. at 957.
90. A State has an ultimate monopoly of all judicial process and attendant enforcement machinery. As a practical matter, if disputes cannot be successfully settled between the parties, the court system is usually the only forum effectively empowered to settle their disputes. Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court. 401 U.S. 371, 387 (1971) (Brennan, J., concurring).
91. Id. at 374.
has also been viewed as too limiting. It has been suggested that divorce is just not very fundamental in our hierarchy of values and that a court which believes that it is would necessarily view many other rights as fundamental.\footnote{Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954, 957-58 (1971).} Posing an example which may be easily applied to a malpractice plaintiff, Mr. Justice Black said,

Society generally encourages people to seek recompense when they suffer damages through the fault of others. And I cannot believe that my Brethren would find the rights of a man with both legs cut off by a negligent railroad less “fundamental” than a person’s right to seek a divorce. . . . For this Court to have first provided for governmental assumption of civil court costs in a divorce case seems to me a most unfortunate point of departure.\footnote{Id. at 958.}

It may well be that exemplary damages arising out of a medical malpractice claim may constitute a fundamental position in society’s hierarchy of values.\footnote{“Adequate shelter, compensation for serious personal injury, or relief from unbearable debt—all of which may become the subject of litigation—also seem no less important as prerequisites to personal happiness than the ability to dissolve an unwanted marriage.” The Supreme Court, 1970 Term, supra note 81, at 107 n.17 (1971).} With this and other important public policies in mind, the fundamental quality sought to be attributed to divorce could easily be extended to many other causes of action.\footnote{“I see no constitutional distinction between appellants’ attempt to enforce this state statutory right and an attempt to vindicate any other right arising under federal or state law.” Boddie v. Connecticut, 401 U.S. 371, 387 (1971).}

Once the Court found that the Boddie plaintiffs had a fundamental cause of action, the settlement of which required state monopolized techniques, they announced that due process demanded that plaintiffs be given access to the courts to solve their problems. In so doing, they may have added “access to court” to the class of fundamental interests which had previously included such rights as voting and criminal appellate defense.\footnote{The Supreme Court, 1970 Term, supra note 81, at 109.} This would mean that, absent a countervailing state interest of overriding significance, due process would require that, at a minimum, a person forced to settle his claims of right and duty through the judicial process be granted an opportunity to be heard at a meaningful time and in a meaningful manner appropriate to the case.\footnote{401 U.S. at 377-78.}

It would be well to distinguish at this point the relief sought by the Boddie plaintiffs and the relief sought by the medical malpractice plaintiff seeking exemplary damages. The former seek to dissolve a legal relationship while the latter seeks to recover dollar damages as a punishment for tortious behavior.\footnote{CAL. CIV. CODE §3294.} It is agreed that exemplary dam-
ages are not a matter of right for they may be withheld by the jury and when awarded they are a windfall to the plaintiff. Nevertheless, the statute creates a potential right to recovery which should be protected against unconstitutional violations.

Recalling the characteristics of the California Legislature's 1972 amendment to Section 1029.6 of the Code of Civil Procedure and applying the Boddie logic to it, will it satisfy the due process requirements? Does the State have a monopoly on the ultimate machinery for settling disputes about exemplary damages? Is the plaintiff's right to seek exemplary damages for the doctor's action a "fundamental" right deserving protection? Does the plaintiff have an opportunity to be heard (the order is ex parte) at a meaningful time and in a meaningful manner? Will his inability to post a $2,500 surety bond or cash deposit foreclose his access to a court which can settle the dispute?

B. Equal Protection

It should be noted that the majority opinion in Boddie made no suggestion of an equal protection issue. There were, however, two concurring opinions, one by Mr. Justice Douglas and one by Mr. Justice Brennan, which discussed the application of the fee requirement to indigents as a denial of equal protection. There was also a dissent by Mr. Justice Black based on his belief that civil trials should not be hampered by the same strict and rigid fourteenth amendment rules applicable to criminal trials, but he subsequently acknowledged that fees which bar plaintiffs access to court are not consistent with the equal protection clause of the Constitution. The language of these opinions denounces any and all fee requirements which would deny a person any right to which he is otherwise entitled. Mr. Justice Brennan succinctly stated,

100. CAL. CIV. CODE §3294.
101. "Even where the only rights to be adjudicated are those created and protected by state law, due process requires that state procedures be adequate to allow all those concerned a fair hearing of their state law claims." McGautha v. California, 402 U.S. 183, 256 (1971) (Brennan, J., concurring).
102. See text accompanying notes 55-57 supra.
103. "Indeed, Justice Harlan completely ignored the rapid expansion of the equal protection doctrine over the past fifteen years by failing to cite any equal protection decision since Griffin v. Illinois." The Supreme Court, 1970 Term, supra note 81, at 108 n.22.
105. Id. at 386.
106. Id. at 389.
107. In my view, the decision in Boddie v. Connecticut can safely rest on only one crucial foundation—that the civil courts of the United States and each of the States belong to the people of this country and that no person can be denied access to those courts, either for a trial or an appeal, because he cannot pay a fee, finance a bond, risk a penalty, or afford to hire an attorney. Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954, 955-56 (1971).
The rationale of *Griffin* covers the present case. Courts are the central dispute-settling institutions in our society. They are bound to do equal justice under law, to rich and poor alike. They fail to perform their function in accordance with the Equal Protection Clause if they shut their doors to indigent plaintiffs altogether. Where money determines not merely "the kind of trial a man gets," *Griffin v. Illinois*, 351 U.S. 12, 19 (1965), but whether he gets into court at all, the great principle of equal protection becomes a mockery. A State may not make its judicial processes available to some but deny them to others simply because they cannot pay a fee.  

How will the equal protection clause apply to the security deposit requirement of Section 1029.6(e) of the California Code of Civil Procedure? Will a plaintiff who can meet every requirement of California Civil Code Section 3294, concerning the elements required for an award of exemplary damages, be denied the right of recovery because he cannot afford the cost of the bond? Will the right to seek exemplary damages be open to the affluent but foreclosed to the poor? As to this right, will the courts be a private preserve for the affluent?  

Here again it is helpful to distinguish the fee required by the *Boddie* plaintiffs from the deposit of the malpractice plaintiff seeking exemplary damages. The former were required to pay $60 before they could even gain access to court. The latter is not denied access if the $2,500 is not posted, but is barred from including within his complaint a prayer for exemplary damages. Nevertheless, the requirement that a poor plaintiff post a security bond before his claim for exemplary damages is heard may bar his access to the court to determine his rights on that issue as did the fee requirements in *Boddie*.  

A security deposit requirement may raise a somewhat more difficult constitutional question than a filing fee due to its different purpose. A security deposit protects one party from expenses incurred by litigation. A mandatory waiver of the security deposit causes the state to

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108. 401 U.S. at 388-89.  
109. Recall that the judge has no discretion in the matter but must, upon defendant's motion, issue an *ex parte* order for a minimum of $2,500. See text accompanying notes 55-57 supra.  
110. CAL. CIV. CODE §3294: "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."  
111. Further, CAL. CODE CIV. PROC. §1029.6(a) requires a plaintiff seeking compensatory damages to post $500 security only if the defendant shows to the court's satisfaction that plaintiff would not suffer undue economic hardship in making such a filing.  
112. CAL. CODE CIV. PROC. §1029.6(e).  
113. The Supreme Court, 1970 Term, *supra* note 81, at 112.
abandon its policy of protecting that party. Still, such a deposit may be a greater obstacle than is needed to provide the protection. The Court recognized this problem in the Boddie decision and discussed fees designed to deter frivolous litigation. They viewed this justification very skeptically, however, and pointed out alternatives by which the state might achieve the same purpose without barring a poor man from presenting a meritorious suit: e.g., penalties for false pleadings or affidavits and actions for malicious prosecution or abuse of process. The Court also took the opportunity to distinguish a previous case in which it upheld a security deposit requirement for a stockholder's derivative suit by indicating the differences between derivative actions of shareholders and divorce actions of individuals.

EXTENSION OF BODDIE V. CONNECTICUT

In light of the severely limiting statement made by Mr. Justice Harlan in the Boddie opinion, there is doubt as to possible extension of the rule. On the other hand, there are indications that the rule and logic of Boddie may not be restricted to its facts. In his concurring opinion, Mr. Justice Brennan differed with the majority on two points. One, as discussed above, was the equal protection issue. The other was the narrow application. He took the position that the state had a monopoly on all judicial machinery and that there was no constitutional distinction between the rights sought to be enforced by the Boddie plaintiffs and any other rights arising under federal or state law. He indicated that the two distinctions made by the majority would not withstand analysis and that "the right to be heard in some way at some time extends to all proceedings entertained by courts." Mr. Justice Black dissented in Boddie, indicating that the strict due process rules applicable in criminal cases should not hamper the government in the conduct of civil trials. Two months later, however, he indicated that if the decision were to stand the restrictions announced by the majority should not apply. In this later opinion, he indi-

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114. Id.
115. Id.
116. 401 U.S. at 381-82.
118. 401 U.S. at 381 n.9.
119. See note 80 supra.
120. 401 U.S. at 386.
121. See text accompanying note 108 supra.
122. 401 U.S. at 387.
123. The state monopolization of methods for settling divorce disputes and the fundamental position of marriage in society. Id. at 374.
124. Id. at 387-88.
125. Id. at 391.
126. I dissented in Boddie v. Connecticut, 401 U.S. 371, 389 (1971), but now believe that if the decision in that case is to continue to be the law, it cannot
cated the course which the Court might be taking and stressed his belief that the rule of *Boddie* should not be limited.\textsuperscript{127} Furthermore, since the *Boddie* opinion was delivered, there has been conjecture that the majority opinion itself left room for a liberalization of the rule.\textsuperscript{128}

It may be theorized that the security deposit requirement will not deny access to anyone with a meritorious claim for exemplary damages because as a matter of practicality his attorney will post the deposit for him. This line of reasoning, however, is subject to question. Suppose that the financial ability of the lawyer is such that he cannot afford to make the deposit either. Are we not then confronted with fourteenth amendment issues all over again?

The question which California courts will have to answer is whether or not the *Boddie* rule will be extended to find that a plaintiff seeking exemplary damages for medical malpractice is denied his fourteenth amendment rights by a statute which requires him to post a bond of no less than $2,500 in order to present his claim for exemplary damages to a jury.

**ALTERNATIVES**

Conceding for the purpose of discussion that attorneys have used prayers for exemplary damages to "blackjack" physicians into settlements, might not the evil have been remedied by an amendment less likely to deprive a good faith plaintiff of his fourteenth amendment rights?

While under consideration, the bill was criticized on several counts and amendments were offered. The criticisms and amendments were aimed at the elimination of the portion of the bill requiring an *ex parte* order and at the automatic minimum figure of $2,500.\textsuperscript{129} The amendments, however, were rejected by the author of the bill.\textsuperscript{130}

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\begin{itemize}
  \item and should not be restricted to persons seeking a divorce. It is bound to be expanded to all civil cases. Persons seeking a divorce are no different from other members of society who must resort to the judicial process for resolution of their disputes. Consistent with the Equal Protection Clause of the Constitution, special favors cannot and should not be accorded to divorce litigants.
  \item Some may sincerely believe that the decision in *Boddie* was far more limited in scope—that is, applies only to divorce cases. Other people might recognize that this constitutional decision will eventually extend to all civil cases but believe that it can only be enforced slowly step by step, so that the country will have time to absorb its full import. But in my judgment, *Boddie* cannot and should not be limited to either its facts or its language, and I believe there can be no doubt that this country can afford to provide court costs and lawyers to Americans who are now barred by their poverty from resort to the law for resolution of their disputes.
  \item Id. at 956.
  \item *The Supreme Court, 1970 Term*, supra note 81, at 106.
  \item Los Angeles Daily Journal, May 18, 1972, at 20, col. 2.
  \item Id.
\end{itemize}
Perhaps an amendment of this nature would have eliminated doubt as to the constitutionality of the statute. By permitting the plaintiff to be present at the hearing and to speak on his own behalf, the law would go much further in fulfilling the mandate of a reasonable hearing at a reasonable time required by the due process clause. By allowing the judge a degree of discretion to ascertain the plaintiff's financial ability before setting the minimum amount of the security, the assurance of equal protection would be more certain.

CONCLUSION

If it is true that plaintiff's attorneys have used frivolous prayers for exemplary damages to "blackjack" doctors into settlements in medical malpractice actions, then it is commendable that the California Legislature has taken action to remedy this practice. But if in so doing, the legislature has enacted a law that will impose an unreasonable barrier on the good faith plaintiff with a valid case for exemplary damages, the whole purpose will be defeated, for unless this law can withstand constitutional attack, it will benefit no one.

Notwithstanding the constitutional questions, in a period when the courts and the legislature are demonstrating an increasing concern for the plight of the poorer members of society and for assuring that they have access to legal machinery for the settlement of disputes, the provisions of Senate Bill 941, now embodied in Section 1029.6 of the Code of Civil Procedure, raise serious questions of its viability as a public policy.

Gary L. Vinson