1-1-1985

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Extending MICRA Liability Limitations To All Negligence Actions: The Case For Tort Reform

"The tort system is the only element of American society that continues to function as though resources were unlimited."1

In 1975, the California Legislature enacted the Medical Injury Compensation Reform Act (MICRA)2 in response to an apparent crisis in the health care field.3 The perceived crisis was twofold.4 First, many insurance companies issuing medical malpractice insurance policies in California determined that their costs were so high malpractice coverage

2. 1975 Cal. Stat. c. 1, §1, at 3949. During the 1975 Second Extraordinary Session of the California Legislature called by Governor Edmund G. Brown, Jr., the legislature considered medical malpractice problems faced by the state. The session was labelled extraordinary because the legislature met in the interval between regular legislative sessions. Id.
3. Id. at 4007. Recognition by the California Legislature of a crisis is contained in the preamble to MICRA which states in pertinent part:

   The Legislature finds and declares that there is a major health care crisis in the State of California attributable to skyrocketing malpractice premium costs and resulting in a potential breakdown of the health delivery system, severe hardships for the medically indigent, a denial of access for the economically marginal, and depletion of physicians such as to substantially worsen the quality of health care available to citizens of this state. The Legislature, acting within the scope of its police power, finds the statutory remedy herein provided is intended to provide an adequate and reasonable remedy within the limits of what the foregoing public health safety considerations permit now and into the foreseeable future.

   Id. Governor Brown's proclamation to the California Legislature stated in pertinent part:

   The cost of medical malpractice insurance has risen to levels which many physicians and surgeons find intolerable. The inability of doctors to obtain such insurance at reasonable rates is endangering the health of the people of this State, and threatens the closing of many hospitals. The longer term consequences of such closings could seriously limit the health care provided to hundreds of thousands of our citizens.

   In my judgment, no lasting solution is possible without sacrifice and fundamental reform. It is critical that the Legislature enact laws which will change the relationship between the people and the medical profession, the legal profession and the insurance industry, and thereby reduce the costs which underlie these high insurance premiums.

   Id. at 3947.
4. KEENE, CALIFORNIA'S MEDICAL MALPRACTICE CRISIS, A LEGISLATOR'S GUIDE TO THE MEDICAL MALPRACTICE ISSUE 27 (1976); see, e.g., When Doctors Went Out On Strike, U.S. News & World Rep., May 26, 1975, at 4, col. 1 (strike by San Francisco anesthesiologists angered at rising malpractice insurance costs); see also, When Doctors Rebel Against Higher Insurance Costs, U.S. News & World Rep., January 19, 1976, at 36, col. 2 (work slowdown by Los Angeles County doctors due to proposed insurance rate increase of 486 percent); see
could no longer be provided. Some insurers withdrew from the malpractice field entirely, while others substantially raised premiums. Sudden cost increases gave rise to the second part of the problem. Many doctors threatened to stop providing medical care involving high risk procedures. Others terminated practice or went "bare." The result was that full medical care was not available in all areas of the state, and patients treated by uninsured doctors faced the risk of obtaining unenforceable judgments if injuries resulted from malpractice.

The combined effect of increased premiums and reduced coverage on the cost and availability of medical care prompted the California Legislature to enact MICRA to solve the medical malpractice dilemma. Unfortunately, health care providers are not the only defendants adversely affected by insurance cost and availability problems. Defendants in general tort actions face similar difficulties. Since the tort reform provisions of MICRA apply only to certain health care providers and are limited to acts of professional negligence, analogous problems faced by other negligence defendants have gone

also, Shore, Civil Liability Expands in State But Insurance Costs Keep Up Pace, L.A. Daily Journal, September 11, 1978, at 9, col. 1 (pointing out the problems of medical care availability and insurance coverage cost and availability). But see Joint Legislative Audit Committee, Office of the Auditor General, California Legislature, The Medical Malpractice Insurance Crisis in California §265.2, at 1 (Dec. 1975) (no real crisis exists); U.S. Department of Health, Education & Welfare, The Report of the Secretary's Commission on Medical Malpractice 109 (1973) ("a general consensus exists on the point that medical malpractice, at present, is viewed as a 'crisis' only by the medical profession"); cf Jones v. State Board of Medicine, 555 P.2d 399, 412 (1976), cert. denied, 431 U.S. 914 (1977). "The Act is a necessary legislative response to a 'crisis in medical malpractice insurance' in Idaho, but the record does not demonstrate any such crisis." Id. 5. 1975 Cal. Stat. c. 2, §12.5, at 4007. 6. See supra note 3 and accompanying text. 7. Practicing "bare" means to practice without malpractice insurance coverage. Barme v. Wood 37 Cal. 3d 174, 179, 689 P.2d 446, 448-449, 207 Cal. Rptr. 816, 818 (1984); BLACK'S LAW DICTIONARY, 721 (5th ed. 1979). Still other professionals maintained coverage at a minimum level not commensurate with the risks of practice in light of medical malpractice judgments in California. This latter group comprised what are commonly referred to as "underinsured." BLACK'S LAW DICTIONARY at 1368. 8. See supra note 3 and accompanying text. 9. Id. 10. See infra notes 13-16 and accompanying text. 11. CAL. BUS. & PROF. CODE §646 (d)(2). "Health care provider" means any person licensed or certified pursuant to Division 2 (commencing with §500) of the Business and Professions Code, or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with §1440) of Division 2 of the Health and Safety Code ... . "Health care provider" includes the legal representatives of a health care provider ... . Id. 12. Id. §646 (d)(3). "Professional negligence" is a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within
unaddressed. High judgment awards, expanded liability theories, and the joint and several liability rule in effect in California have created problems for negligence defendants other than medical care providers. The dilemma is similar to that which confronted the medical profession at the time MICRA was enacted.

the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital. Id.

13. In a discussion of a trial court case, Fitzsimmons v. O'Neal, one newspaper noted that $3.2 million was awarded to plaintiffs in an attorney malpractice suit. Galante, Jury Awards $3.2 Million In Legal Malpractice, NAT'L L. J., May 6, 1985, Vol. 7, No. 34, at 3, col. 1, at 10, cols. 4, 5. Of the total award, $2.5 million consisted of punitive damages for which the defendants were personally liable. Legal observers believe that the only larger lawyer-malpractice verdict in California was the $3.5 million award returned in 1980 against former San Francisco Mayor Joseph L. Alioto and his attorney son, Joseph M. Alioto. Id. Lloyd's of London Chairman Peter North Miller was quoted as saying that the downturn in Lloyd's profits is attributable not to the "cutthroat" competition for premium income that has damaged or destroyed many U.S. insurers but to liability litigation and extravagant court awards in this country. Keppel, Losses, Fraud Hit Lloyd's of London, Los Angeles Times, June 10, 1985, at IV, 1, cols. 2-3. "Without reform of tort law in the United States, there will not be a market to cover the liabilities Americans want to see covered." Id.; The combined loss for [legal] malpractice insurance carriers in California last year was between $50 million and $60 million; and future losses may be greater. One carrier alone is purported to be facing the prospect of million-dollar-plus verdicts in 55 pending malpractice cases. Kirsch, A Changing Insurance Game Threatens Lawyers, California Lawyer, July 1985, Vol. 5, No. 7, at 31, 32 (quoting Norm Smith, a broker with Capital Workshop Financial Services in San Francisco).

14. See, e.g., Aloy v. Mash 38 Cal. 3d 413, 424, 696 P.2d 656, 663, 212 Cal. Rptr. 162, 169 (1985) (Reynoso J., dissenting). In Aloy, the California Supreme Court ruled that an attorney may be held liable for malpractice even if allegedly incorrect advice given to a client in an unsettled area of the law is later validated by the courts. In his dissenting opinion, Associate Justice Cruz Reynoso stated, "[W]here the law is unsettled, the attorney who gives advice later determined to be correct may well have committed malpractice, while the attorney whose advice turns out to be erroneous may avoid liability entirely." Id.

15. The general policy in California is to afford all citizens protection from negligence. CAL. CIV. CODE §1714. The joint and several liability rule, in accord with the policy of protection for all, is meant to protect victims of negligence by defendants who lack financial resources to pay judgments. If one responsible party has the ability to pay for the victim's damages, then that party, rather than the victim, suffers when other responsible parties cannot pay their share. American Motorcycle Association v. Superior Court, 20 Cal. 3d 578, 587, 578 P.2d 899, 904, 146 Cal. Rptr. 182, 187 (1978). For example, in a situation when the plaintiff is found 30% at fault, the first defendant is found 60% at fault but is unable to pay, and the second defendant is 10% at fault but has the resources to pay the judgment, the second defendant pays 70% of the plaintiff's total damages even though that defendant was only 10% at fault in causing the plaintiff's injuries. W. PROSSER, HANDBOOK OF THE LAW OF TORTS §47 at 297 (4th ed. 1971). See Sewing Up the Deep Pocket, The Sacramento Bee, May 4, 1983, at B11, col. 2 (Sen. John Foran's bill (SB 575) would retain joint liability for economic damages but would limit liability for noneconomic damages to the defendant's percentage of fault); see also Granelli and Nakaso, Public Bodies Battle to Limit Joint-and-Several Doctrine, Los Angeles Times, Feb. 21, 1985, at 24, col. 1 (public and private entities urge abolition of the joint and several liability doctrine); Granelli and Nakaso, Liability: Who Should Pay Most?, Los Angeles Times, Feb. 21, 1985, at B11, col. 3. Although Los Angeles County was found only 30% at fault for the injuries sustained by a passenger in a car which rolled on a county road, under the joint and several liability doctrine the county paid 99% of the award of $1.77 million.

Cities, counties, the private sector and attorneys are experienc-

17. In a 1983 survey, the League of California Cities found that 84 cities with populations under 500,000 had paid out in judgments and settlements more than $16.5 million in the three years preceding the survey. More than $12.5 million was paid in 1982. Cities faced potential liability amounting to more than $115 million in cases pending in 1983 in which the city had little or no fault. 1983 Municipal Liability Insurance Survey, LXI, 2 Western City Magazine 3 (February 1985). Subsequent to the 1983 survey, San Diego reported $28 million in pending litigation. Trim the Cost of Nuisance Suits, San Francisco Examiner, May 3, 1983 at B2, col. 2. The 1983 survey showed that the cities had paid out $4 million in 1980-81 and $12 million in 1981-82. The increase was computed based on reports from only 20% of the cities in the state. Los Angeles, San Diego, and other major municipalities were excluded. Id. El Segundo City Manager Arthur Jones reported the number of claims filed against that city in 1980-81 rose to 55, more than triple the number of the previous year. Needham, Cities Get Tougher in Accident Suits Because of Number, Cost, Los Angeles Times, Nov. 17, 1983, at B4, col. 3. Mr. Jones indicated the city's insurance agent “has requested a considerable increase in fees for processing claims,” with a 50% increase in these fees approved by the City Council from 1982 to 1983. Id.

18. For example, the 1984-85 insurance premium for the County of Marin was $97,000 with a $250,000 deductible for $30 million liability coverage. For 1985-86, a premium of $448,000 has been quoted with a $500,000 deductible for $15 million in coverage, which excludes all road liability. Colusa County has a total annual budget of $10 million. Of this amount, $1 million is earmarked for the payment of insurance premiums. Interview with Attorney Mark Wasser, General Counsel for The County Supervisors Association of California (July 2, 1985) (notes on file at the Pacific Law Journal). In Orange County, a group of 12 cities that had formed an insurance pool was given 60 days notice that the carrier, which had decided to stop writing policies for public entities in California, would cancel coverage. The groups contracted with another insurer for a new group policy that increased rates between 300 and 450 percent for each town, and raised the deductible from $100,000 to $250,000. Industry analysts predict the new premiums may double in three years. Granelli, and Nakaso, Public Bodies Battle to Limit Joint-and-Several Doctrine, Los Angeles Times, Feb. 21, 1985 at B11, Col. 3.

19. Over 75 major business, professional and financial organizations filed an amicus curiae brief for defendant appellant in Fein v. Permanente Medical Group, Civil No. 24336 (Cal. Supreme Court filed Nov. 10, 1981) (on file at the Pacific Law Journal). These organizations, designated as the Association for California Tort Reform, comprise a statewide coalition dedicated to the reform of California's tort liability laws. Id.

20. Examples of attorney malpractice insurance problems include a ninefold rate increase to an annual premium of nearly $1 million for a major Los Angeles firm that now must finance malpractice coverage with a loan. Galante, Legal Insurance Crisis, Malpractice Rates Zoom, Nat'l L.J., June 3, 1985, Vol. 7, No. 38, at 1, Col. 1. The firm “never paid a penny” in a malpractice case. Id. Approximately 14% of the lawyers in California are being sued for malpractice. This percentage is twice the national average and twice the figure for six years ago. San Francisco attorney James D. Hadfield, president and CEO of California's Lawyer's Mutual Insurance Company stated, “The result [has been] a desperate situation” in terms of policy prices. In high litigation areas such as California, the situation is “getting to the point where insurance for lawyers won't be available at all.” Id. at 25. See, e.g., Kirsch, supra note 13, at 31 (relating that one San Francisco attorney's premiums have risen from $900 to $3,800 per year). "In general the average yearly premium in California today exceeds $1,300 per lawyer, and those specializing in the high risk fields (real estate, securities, personal injury, family law, estate planning and entertainment) are paying up to $3,000 per year for coverage with generous policy limits." Id. at 33. These premiums are likely to go even higher with estimates ranging from $2,000 to $10,000 per lawyer per year depending on the type of practice and the size of the insurer. Id. Ronald E. Mallen, chairman of the American Bar Association's Standing Committee on Lawyers' Professional Liability states: "The existing [malpractice insurance] programs have the capacity to handle about 30,000 attorneys but we're going to have roughly another 15,000 to 20,000 lawyers who want insurance but can't find it or can't afford it." Id.
ing insurance coverage reductions,\textsuperscript{21} substantial premium increases,\textsuperscript{22} and higher deductibility thresholds.\textsuperscript{23} Without immediate reforms in the tort recovery system, general liability insurance may become unattainably expensive as well as scarce.\textsuperscript{24} Insurance coverage problems already have resulted in cutbacks of government services.\textsuperscript{25} Tax revenues have been diverted from public program allocations to payment of settlements and judgments.\textsuperscript{26}

Legislators and citizen groups are pressing for a solution.\textsuperscript{27} Many ideas have been offered ranging from piecemeal reform to sweeping restructure of the California tort recovery system.\textsuperscript{28} Several proposals that have been made would extend the basic features of MICRA to all negligence actions as a means of achieving tort reform and restoring balance to the tort system.\textsuperscript{29}

This comment will explore the four major provisions of MICRA to determine whether the provisions should be extended to all negligence actions.\textsuperscript{30} The legislative purpose and goals of MICRA, which parallel current reasons for extending the Act, will be discussed.\textsuperscript{31}

\textsuperscript{21} Fluor Corp., a Fortune 500 company with a subsidiary, Fluor Technology, involved in toxic waste cleanup, has reported that insurance coverage is no longer available from any source at any price for pollution-related damages. Coverage for federal Superfund toxic waste cleanup activities were expressly eliminated from Fluor’s former policy. Interview with Diane R. Smith, Senior Counsel, Fluor Engineers, Inc. (July 1, 1985) (notes on file at the Pacific Law Journal).

\textsuperscript{22} See supra note 18 and accompanying text.

\textsuperscript{23} Id.

\textsuperscript{24} See supra note 21 and accompanying text.

\textsuperscript{25} Most counties budget tort liability from road appropriations. Therefore, settlements and judgments paid out are taken from road maintenance funds, depleting the funds available for necessary road work. Interview with Mark A. Wasser, General Counsel, County Supervisors Association of California (July 2, 1985) (notes on file at the Pacific Law Journal).

\textsuperscript{26} Id.

\textsuperscript{27} During 1985, numerous proposals were made to the California Legislature to mitigate the effects of higher judgment awards and increased liability. Examples include SB 75 (Foran-Beverly), sponsored by the Association for California Tort Reform, which would hold a defendant liable for noneconomic damages only in proportion to the defendant’s degree of fault as determined by the factfinder. AB 1122 (McAlister) would change the burden of proof to obtain punitive damages from a “preponderance of the evidence” to “clear and convincing” evidence. AB 2322 (Grisham) would provide that a nonsettling defendant in a negligence action cannot be held responsible for more than that defendant’s percentage of fault for a plaintiff’s injuries. See, e.g., 1985-86 Regular Session, AB 2505 (Filante), which would extend the four primary provisions of MICRA to all negligence actions. SB 700 (Maddy) would extend the sliding contingency fee scale for attorneys’ fees in MICRA to all negligence actions. AB 1769 (Grisham) would extend the periodic payment of future damages provision in MICRA to all negligence actions. See generally 1979-80 Regular session: AB 550, 1715 and 1769; 1981-82 Session: AB 311, SB 1190 and 1191; 1983-84 Session: SB 928 (measures proposed to enact various tort reforms including MICRA-type limitations on liability and abolition of joint liability beyond the defendant’s proportion of fault).

\textsuperscript{28} Id.

\textsuperscript{29} Id.

\textsuperscript{30} See infra notes 57-278 and accompanying text.

\textsuperscript{31} See infra notes 38-41 and accompanying text.
The major provisions of MICRA will be reviewed briefly. This comment will propose extension of two MICRA provisions to all negligence actions.\textsuperscript{32} First, the enactment of a sliding scale for attorneys’ contingency fees will be suggested.\textsuperscript{33} Next, a provision for periodic payment of future damages will be discussed.\textsuperscript{34} The MICRA cap on noneconomic damages and the provision of the Act abrogating the collateral source rule will not be recommended for extension. This comment will conclude that extending two of the MICRA provisions will help restore balance to the California tort recovery system without compromising the rights of injured plaintiffs. In addition, extending the provisions would have a beneficial impact on general liability insurance rates similar to the impact of MICRA on medical malpractice insurance rates.\textsuperscript{35} Extension of MICRA provisions to all negligence actions would reduce overall costs of coverage to insurers and would thereby indirectly reduce premium costs to consumers.\textsuperscript{36}

**MICRA Provisions and Legislative Purpose**

The rationale behind the MICRA provisions can best be understood by examining the purpose of the Act. This analysis is important in determining the advisability of extending MICRA provisions, because the purposes served by extension would parallel the purposes identified by the legislature when MICRA was enacted.\textsuperscript{37} California legislators believed that MICRA would stabilize or reduce the costs underlying high medical malpractice premiums.\textsuperscript{38} Rate stability would assure the availability of an adequate number of health care providers and a sufficient source of recovery for those injured by medical malpractice.\textsuperscript{39} The goals of the legislature are reflected in the following major provisions of MICRA.

**A. Limitation on Contingency Fee Agreements**

MICRA placed limits on the amount of attorneys’ fees that could be collected on a contingency basis in medical malpractice cases.\textsuperscript{40} These limits apply whether the plaintiff’s recovery is by settlement,

\begin{itemize}
  \item \textsuperscript{32} See infra notes 61-62 and accompanying text.
  \item \textsuperscript{33} See infra notes 69-114 and accompanying text.
  \item \textsuperscript{34} See infra notes 115-213 and accompanying text.
  \item \textsuperscript{35} See infra note 65 and accompanying text.
  \item \textsuperscript{36} See infra note 67 and accompanying text.
  \item \textsuperscript{37} See supra note 3 and accompanying text.
  \item \textsuperscript{38} Id.
  \item \textsuperscript{39} Id.
  \item \textsuperscript{40} Cal. Bus. & Prof. Code §6146.
\end{itemize}
The sliding scale of MICRA provides that attorneys may charge forty percent of the first $50,000 recovered; thirty-three and a third percent of the next $50,000 recovered; twenty-five percent of the next $100,000 recovered; and ten percent of any amount of the recovery that exceeds $200,000.

B. Periodic Payment of Future Damages

At the request of either the defendant or the plaintiff in a medical malpractice lawsuit, the court must enter judgment ordering that future damages be paid in whole or in part by periodic payments, rather than by lump sum, if the award equals or exceeds $50,000 in future damages. Money damages awarded for the compensation of lost future wages may not be reduced or terminated by the death of the injured plaintiff. The future earnings award must be paid to dependents of the plaintiff.

C. Abrogation of the Collateral Source Rule

In a medical malpractice lawsuit, the defendant may elect to introduce evidence of any monies to which the plaintiff is entitled in addition to the recovery obtainable from the defendant. MICRA provides that the award to the plaintiff may be reduced by any amount previously recovered from a collateral source for the same injury. In contrast, the traditional collateral source rule bars evidence of injury compensation received by a plaintiff from a source independent of the tortfeasor. Thus, no reduction of judgments due to collateral source

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41. Id., §6146(d)(1).
42. CAL. BUS. & PROF. CODE §6146(a). See, Jenkins & Schweinfurth, California's Medical Injury Compensation Reform Act: An Equal Protection Challenge, 52 So. CAL. L.R. 829, 838, n. 64, (1979). For example, if plaintiff X receives a judgment of $1 million, under the provisions of MICRA, X's attorney could contract for or collect $141,666 or approximately 14% of plaintiff's recovery. The average national contingency fee collected by an attorney for a $1 million judgment is $333,000, or from $333,000 to $500,000 on a sliding contingency fee basis, depending on whether the case actually progressed through trial or was appealed.
43. CAL. CIV. PROC. CODE §667.7. The authorization of periodic payments is conditioned on the judgment debtor's ability to post adequate security. Id. Failure to make periodic payments renders the judgment debtor in contempt of court and liable for damages resulting from non-payment. Id.
44. Id. §667.7 (c)(1).
45. Id. §667.7 (c); cf. State ex rel. Strykowski v. Wilkie, 261 N.W. 432, 434, 457 (1978) (Day, J., dissenting) (periodic payments ending at claimant's death).
46. CAL. CIV. PROC. CODE §3333.1.
47. CAL. CIV. CODE §3333.1.
48. Id.
recovery results.\textsuperscript{50} Payments that may be introduced into evidence under MICRA include Social Security, state or federal disability income, workers' compensation, health or income-disability insurance, accident insurance providing health benefits or income-disability coverage, and any contract entitling plaintiff to payment of or reimbursement for medical services.\textsuperscript{51} If the defendant elects to introduce evidence of collateral sources, the plaintiff may introduce evidence of any amount paid to secure the plaintiff's right to the insurance benefits.\textsuperscript{52} However, the collateral source may not recover from the malpractice defendant or the plaintiff for any amount already paid, through either indemnity or subrogation.\textsuperscript{53}

\section*{D. Cap on Recovery of NoneconomicDamages}

MICRA placed a $250,000 cap on noneconomic damages.\textsuperscript{54} Noneconomic damages include pain and suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damages resulting from medical malpractice.\textsuperscript{55} The MICRA cap does not apply to economic damages such as medical expenses or lost earnings resulting from the injury.\textsuperscript{56}

\textbf{MICRA Provisions Recommended For Extension}

Reports from governmental entities,\textsuperscript{57} attorneys,\textsuperscript{58} and the private sector\textsuperscript{59} indicate a problem of increasing liability insurance premium costs and decreasing coverage availability. These difficulties are analogous to the dilemma faced by the health care profession in pre-MICRA years.\textsuperscript{60} If the problems remain unsolved, California citizens may be forced to bear the risk of their own losses from ordinary

\textit{Source Rule in Personal Injury Litigation, 7 Gonz. L. Rev. 310, (1972) (the collateral source rule is widely accepted in most jurisdictions notwithstanding that application of the rule may result in a so-called double recovery).}

\textsuperscript{50} Kirtland & Packard, 59 Cal. App.3d 140, 145-46, 131 Cal. Rptr. 418, 421.


\textsuperscript{52} Id. Insurance premiums are an example of the plaintiff's admissable evidence in a medical malpractice action. \textit{Id.}

\textsuperscript{53} \textit{Id.}

\textsuperscript{54} \textit{CAL. CIV. CODE} §3333.2 (b).

\textsuperscript{55} \textit{Id.}


\textsuperscript{57} See supra note 18 and accompanying text.

\textsuperscript{58} See supra note 20 and accompanying text.

\textsuperscript{59} See supra note 21 and accompanying text.

\textsuperscript{60} See supra note 3 and accompanying text.
negligence. Insurance may not be available to cover all risks or may be too costly for many people.

Two of the four major MICRA provisions, if extended to all negligence actions, would help solve the current dilemma of rising insurance premium costs and shrinking insurance availability. The two provisions recommended for extension are limits on attorney contingency fees and the provision for periodic payment of damages. The actual relief that would result from an extension cannot be forecast precisely. Industry analysts predicted, however, that medical malpractice payouts would decrease by twenty percent after the 1975 enactment of MICRA. Empirical evidence from some states showed awards decreased as much as fifty percent from 1975 to 1977.

After MICRA was enacted, insurers were able to halt increases in malpractice insurance rates because of lower payouts and settlements. In fact, one appellate court acknowledged that medical malpractice premiums went down by twenty-five percent without adjusting for inflation after the enactment of MICRA. Analogous provisions extended to all negligence cases may be expected to have a similar effect on liability insurance premiums in general. Steps toward reform, beginning with the extension of selected MICRA provisions, would improve the capability of the tort system to meet the needs for which

61. See supra note 40 and accompanying text.
63. The American Bar Association estimated that one of the MICRA provisions, abrogation of the collateral source rule, alone would reduce medical malpractice payouts by up to 20%. An empirical study following 1985 medical malpractice reforms nationwide showed that in states requiring reduction of awards by the amount of collateral source payments, payouts dropped 50% from 1975 to 1977. Bell, Legislative Intrusions into the Common Law of Medical Malpractice: Thoughts About the Deterrent Effect of Tort Liability, 35 Syracuse L. Rev. 939, 946 (1984).
64. Id. at 947. A smaller reduction in medical malpractice awards resulted from the cap on noneconomic damages. Id. States that enacted caps in 1975 had malpractice awards 19% lower in 1977. Id.
65. Id. at 948. In addition to this finding, economists who have studied states that enacted limitations on attorneys' contingent fees concluded that the limits have increased the number of cases dropped by five percent, decreased the size of settlements by nine percent, and reduced by eleven percent the number of cases tried. The MICRA provisions taken together resulted in a 25% decline in medical malpractice premiums for most hospitals in the state in the years following enactment of MICRA. American Bank & Trust Co. v. Community Hospital of Los Gatos-Saratoga, Inc., 36 Cal. 3d 359, 382-83, 683 P.2d 670, 685, 204 Cal. Rptr. 671, 686 (Mosk, J., dissenting) (1984).
66. American Bank & Trust, 36 Cal. 3d. at 382-383, 683 P.2d at 685, 204 Cal. Rptr. at 686.
67. Id. at 382-383, 683 P.2d at 685, 204 Cal. Rptr. at 686 (1984); Brief of Amicus Curiae, Fred J. Hiestand at 7, American Bank and Trust Co. v. Community Hospital of Los Gatos-Saratoga, Inc., Civil No. 24171 (Cal. Supreme Court filed Aug. 9, 1983) (on file at the Pacific Law Journal).
the system was established. Each MICRA provision will be analyzed individually in the context of extension, beginning with the limitation on contingency fees and followed by the periodic payments provision. Policy considerations will be addressed first, followed by discussion of constitutional questions.

A. Extension of the Limitation on Contingency Fees

The first MICRA provision proposed for extension to all negligence actions is the sliding scale limitation on contingent attorneys’ fees. The United States is one of very few nations that permits plaintiffs’ attorneys to set fees as a percentage of either court awards or settlements. The medical malpractice insurance crisis provided the impetus for enactment of the MICRA limitation on contingency fees. By enacting the contingency fee limitation, the California Legislature decreased the high cost of medical malpractice insurance premiums which threatened the availability of medical care. In addition, the legislature sought to avoid potential recovery problems created by insufficient liability coverage for patients injured by medical malpractice. The legislature determined that the limited sliding fee scale of MICRA would reduce costs to malpractice defendants and insurers, particularly in the large number of cases resolved through settlement. Since the attorney fee limitation of MICRA permits an attorney a smaller portion of the settlement, plaintiffs may be more likely to agree to a lower settlement. In addition, the limit on attorneys’ fees deters attorneys from litigating marginal cases or encouraging clients to hold out for unrealistically high settlements.

Certain immutable characteristics of the contingency fee arrangement have made this method of compensation the subject of vigorous debate over the years. The confluence of interest between attorney and client bound by a contingency fee agreement is marginal. In

69. Id. at 159. For example, Great Britain has banned the contingency fee. Id.
70. See supra note 3 and accompanying text.
71. Id.
72. Id.
74. CAL. BUS. & PROF. CODE §6146.
75. Roa, 37 Cal. 3d at 926-27, 695 P.2d at 166-67, 211 Cal. Rptr. at 79-80.
76. Id. at 930-31, 695 P.2d at 170, 211 Cal. Rptr. at 83.
78. Id.
fact, conflicts of interest are inherent in the contingency fee arrangement.\textsuperscript{79} Since the fee is paid regardless of the amount of time spent on the case, early settlement may be advantageous to the attorney, especially when a small claim is involved. Extensive bargaining or a trial might yield a higher recovery for the plaintiff, but the additional amount of compensation to the attorney may be insignificant or wholly disproportionate to the amount of time necessary to pursue the claim.\textsuperscript{80}

Those opposed to extending MICRA argue that giving a smaller percentage to the attorney representing a plaintiff with high damages in a negligence action actually harms the plaintiff.\textsuperscript{81} The rationale is that attorneys will not vigorously prosecute or even undertake cases if compensation per unit of time expended is insufficient.\textsuperscript{82} This argument is not supported by evidence obtained from jurisdictions in which fee limitations are applied. For example, New Jersey has adopted a sliding contingency fee scale for all tort actions.\textsuperscript{83} Despite a fee scale that was even less generous to attorneys than the MICRA scale when it was adopted, no problems resulting from the fee limitation were reported in New Jersey.\textsuperscript{84} In fact, commentators in New Jersey have indicated that New Jersey's limited contingency fee detractors were wrong in predicting that the poor would suffer impaired access to the courts.\textsuperscript{85}

Contingency fee arrangements are not as risky for the attorney as the name suggests.\textsuperscript{86} A noted authority states that plaintiffs recover, either by suit or settlement, in the vast majority of cases in which a lawyer is retained.\textsuperscript{87} The argument for limitation of contingency

\textsuperscript{80} MacKinnon, supra note 77 at 198.
\textsuperscript{81} Brief of Amicus Curiae, Fred J. Hiestand at 7, Roa v. Lodi Medical Group, Civil No. S.F. 24435 (Cal. Supreme Court filed Aug. 10, 1982) (on file at the Pacific Law Journal).
\textsuperscript{82} Id.
\textsuperscript{83} The percentage of the recovery permitted for attorneys' contingency fees has been increased by the New Jersey Legislature since the original enactment of a sliding scale limiting contingency fees. \textit{New Jersey Rules of General Application}, 1:21-7, 1984.
\textsuperscript{84} Id.
\textsuperscript{85} \textit{New Jersey's Maximum Contingent Fee Schedules: The Validity of Rule 1:21-7}, 5 \textit{Rut.-Cam.} 534 (1974). “The [New Jersey] rule's detractors may have overstated their objections by predicting impaired access of the poor to the courts.” \textit{Id.} at 549.
\textsuperscript{86} Connell, \textit{The Lawsuit Lottery} 145 (1979). In other words, “there is very little that is contingent about the contingent fee.” \textit{Id.}
\textsuperscript{87} \textit{Id.}, citing address by Professor Maurice Rosenberg, Columbia Law School, American Bar Association Convention (1976).
fees is strongest when recovery is almost certain.  

Since 1975 California legislators have repeatedly offered bills for consideration that would limit or regulate contingency fees. The MICRA scale is the most reasonable quantitative proposal offered thus far, and should be extended to all negligence actions. In addition, constitutional challenges to MICRA have been met successfully and similar constitutional challenges to a MICRA extension can be overcome.

The contingency fee limitation of MICRA was upheld as constitutional by the California Supreme Court in *Roa v. Lodi Medical Group*.

*Roa* was one of a recent series of cases involving the constitutionality of the various MICRA provisions. The Court in *Roa* applied a rational basis standard of review to hold that the sliding scale for contingency fees was not a denial of due process or a violation of equal protection. The rational basis standard of review is the lower tier of the traditional two-tier approach to judicial review of legislation on constitutional challenges. In order to meet the rational basis standard of review, the statute being challenged must bear a rational relation to any conceivable legitimate state interest.

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88. *Id.*
89. The legislature considered at least nine bills seeking to limit or regulate contingent fees in 1975. They ranged from AB 7 (no maximum schedule but subject to court approval) to AB 14, 1672 (a flat 10% except that counsel and client may split the first $1,667 any way they wish). *See also* SB 407, SB 397, AB 1, AB 926 and AB 1941 (on file at Pacific Law Journal).
90. Report of the Committee on Medical Professional Liability, 102 ABA Annual Rep. 786, 831 (1977). *See also* Dept. of HEW Report of Secretary's Committee on Medical Malpractice 919730 pp. 34-35; Kohlman, *An Equitable Contingency Fee Contract* 50 State Bar J. 268, 295-98, n.42 (1975). A sliding scale approach has been recommended as the preferable form of regulation. Attorneys fees should be related to the amount of legal work and expense involved in handling a case and not to the fortuity of the plaintiff's economic status and degree of injury. A decreasing maximum schedule of attorney's fees, set on a state by state basis and reasonably generous in the lower recovery ranges, would prevent the denial of access to legal representation. *Id.*
95. Westbrook v. Mihaly, 2 Cal. 3d 765, 784, 471 P.2d 487, 500, 87 Cal. Rptr. 839, 852
Application of the rational basis standard of review includes extreme deference to the legislature\(^9\) and a presumption of constitutionality.\(^6\) In addition, the burden of proving the statutory classification unconstitutional is on the party challenging the statute.\(^9\) Historically, the rational basis test has been applied to economic and social welfare legislation.\(^9\) Since MICRA relates to public health care, the statute is appropriately analyzed under the rational basis standard of review.\(^10\)

In contrast to the rational basis test, the strict scrutiny standard of review requires that the challenged legislation be necessary to serve a compelling state interest.\(^10\) The strict scrutiny test has been applied when legislative classifications impinge on suspect classes\(^10\) or fundamental rights.\(^10\) The legislative classifications in MICRA do not require application of the strict scrutiny standard of review\(^10\) because neither a suspect class nor a fundamental right is affected by the Act. Therefore, the rational basis test has been chosen repeatedly by courts reviewing medical malpractice legislation\(^10\) and was applied by the California Supreme Court in the four MICRA challenge cases.\(^10\)

(1970); accord, McDonald v. Board of Election Commissioners, 394 U.S. 802 (1969) (presumption of constitutionality; statutory classifications deemed unconstitutional only if no circumstances reasonably may be conceived for justification); see also McGowan v. Maryland, 366 U.S. 420 (1961).


97. See, e.g., McGowan, 336 U.S. at 420.

98. See, e.g., Lindsley, 220 U.S. at 78-79.


100. See, e.g., Roa, 37 Cal. 3d at 926-27, 695 P.2d at 166-67, 211 Cal. Rptr. at 79-80.


102. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 28 (1973). Classifications are considered suspect when the class is subjected to a history of purposeful unequal treatment, or is relegated to a position of political powerlessness so as to need special protection from the majoritarian political process. Id. The U.S. Supreme Court has held that suspect classifications include those made on the basis of race. Id. Classifications based upon alienage are considered suspect. Truax v. Raich, 239 U.S. 33, 39-43 (1915). National origin classifications also are deemed suspect and may not be used to deny equal protection. Hernandez v. Texas, 347 U.S. 475, 478-80 (1954).

103. San Antonio, 411 U.S. at 33-34. Fundamental rights are those rights explicitly or implicitly guaranteed by the U.S. Constitution. Id.


105. See supra note 104 and accompanying text.

106. See supra notes 91-92 and accompanying text.
Applying the rational basis standard, the court in Roa stated the legislature could reasonably have concluded MICRA's sliding scale limitation on attorneys' fees would be more equitable than a flat contingency fee. The sliding scale ensures that an attorney does not receive a "windfall" simply because a client is seriously injured. In order to relate an attorney's fee more closely to the amount of legal work and expense involved in a case and less to the plaintiff's economic status and degree of injury, a decreasing schedule of fees should be set by each state. The schedule should be generous with regard to smaller awards so potential plaintiffs are not deprived of representation. The sliding scale guarantees that the most seriously injured plaintiffs will retain the largest share of any recovery secured on their behalf.

The rationale in Roa for upholding the constitutionality of the MICRA contingency fee limitation can be applied to all negligence actions. The limitation does not infringe on the right of negligence victims to retain counsel. The provision merely places a limit on the compensation an attorney may receive when representing an injured plaintiff under a contingency fee arrangement. The validity of legislative regulation of attorneys' fees is well established and the constitutionality of this limiting regulation as an exercise of the police power has been settled. Therefore, extension of the limitation on attorneys' contingency fees can be supported.

107. Roa, 37 Cal. 3d at 933, 695 P.2d at 172, 211 Cal. Rptr. at 85.
108. Id. at 929, 933, 695 P.2d at 169, 172, 211 Cal. Rptr. at 81-82, 85.
110. Roa, 37 Cal. 3d at 929, 933, 695 P.2d at 169, 172, 211 Cal. Rptr. at 81-82, 85.
111. Statutory limitations on attorneys' fees are not uncommon, either in California or other states. See, e.g., American Trial Lawyers v. New Jersey Supreme Court, 66 N.J. 258, 330 A.2d 350 (1974); Gair v. Peck, 6 N.Y. 2d 97, 188 N.Y.S. 2d 491, 160 N.E. 2d 43 (1958), appeal dismissed, 361 U.S. 374 (1960). In California, attorneys' fees have long been regulated both in workers' compensation proceedings (LAB. CODE §4906) and in probate proceedings (Prob. Code §§910, 911). Other states have already adopted maximum fee schedules that apply to all personal injury contingency fee arrangements. Id. In addition, the United States Congress has passed several laws limiting the amount of attorney fees chargeable in various types of cases. See, e.g., 28 U.S.C. §2678 (1966) (limit on attorneys' fees in actions under the Federal Tort Claims Act); 42 U.S.C. §406 (b)(1) (1968) (limit on attorneys' fees in actions under the Social Security Act); 38 U.S.C. §3404 (1958) (limit on attorneys' fees for claims under the Veterans' Benefit Act).
112. Roa, 37 Cal. 3d at 929, 695 P.2d at 169, 211 Cal. Rptr. at 81-82.
113. Id. at 929, 695 P.2d at 169, 211 Cal. Rptr. at 81-82.
B. Extension of the Periodic Payment Provision

The second MICRA provision proposed for extension by this comment is the periodic payment of judgments or settlements equal to or exceeding $50,000 in future damages. California law authorizes courts to order payment of judgments in periodic installments in cases of spousal support, workers' compensation, and medical malpractice cases. Periodic payments are not allowed in other types of actions.

MICRA provides that if an award of future damages exceeds $50,000, then at the request of either party the court shall order periodic payment of the portion of the judgment designated to compensate future losses. If the judgment debtor is inadequately insured, the court must require the posting of security to assure full payment of the award. Furthermore, should future damages be comprised of future earnings, death of the judgment creditor will not defeat payment to surviving heirs. Future damages for care and treatment revert to the judgment debtor if the judgment creditor dies before the court-allotted time, thus preventing a "windfall" of continuing care benefits to survivors.

The $50,000 threshold of MICRA was intended to mitigate the problem faced by liability insurers forced to liquidate large investments quickly to satisfy judgments. By allowing payment as future damages accrue, insurance companies could maintain small ready reserve accounts and plan investments based on orderly and reasonable pay-
ment schedules. Moreover, high rates of return could be realized on larger investments kept in long-term accounts. The ultimate effect would be a reduction of insurance premiums.

An analogous problem to that of insurers is faced by the uninsured or underinsured defendant since payment of a large judgment in a lump sum can force bankruptcy. If periodic payments are permitted, the judgment debtor may survive financially and still be able to meet obligations to the plaintiff. If deprived of the option of periodic payments, a defendant might be forced to liquidate assets immediately on unfavorable terms in order to pay a judgment. The defendant's obligations could be met with much greater ease and certainty if payments were spread over the applicable years.

During hearings prior to the enactment of MICRA, the legislature recognized benefits derived by both plaintiffs and defendants through periodic payments. Legislators were keenly aware that lump sum awards can be dissipated easily in frivolous expenditures and luxuries, rather than spent on substitutes for losses caused by injuries. A...
recent study of 1,700 accident victims' disposal of lump sum settlement payments concluded that this disposition does not assure a stable substitute for lost wages incurred due to injuries. Thus, the evidence suggests that periodic payments enhance an individual's certainty of having money available for future damages actually incurred.

Counterarguments to the periodic payment provision include the plaintiff's alleged right to control his or her own recovery. However, the California Supreme Court has responded to this argument by holding that a tort plaintiff has no protectable property right in either the measure or the timing of damages. Although the legislature might have chosen a different means to contain medical malpractice insurance costs, the courts cannot strike down a statute because of a disagreement with the wisdom of the law or because a better way to solve the problem may exist. Correction of ill-considered legislation must be effected through a responsive legislature.

Awards payable in installments or "structured awards," are in general use in at least six states and many foreign countries. Periodic payments have been used voluntarily in several large California tort cases in which the parties settled the issues before trial. Periodic payments are reasonable because awards are intended to provide for the support, treatment, and economic indemnification of the injured plaintiff in future years. The awards are not intended to provide a large one-time payment. Periodic payments are an adequate source for compensation of future losses as they occur.

Juries presently are confronted with long and technical arguments with respect to average life expectancy and the range of possible interest rates by which a lump sum award should be discounted in order to determine how much money must be paid today to yield a particular lump sum awards spend their recovery within a relatively short time after receipt and long before their period of disability and resulting need has ended. See, e.g., Michigan Law Revision Commission, 10th Annual Report, Recommendation Regarding Damage Payments (1976) at 129; Report of the Special Advisory Panel on Medical Malpractice for the State of New York (1976), at 43-44; State of Oregon Interim Task Force on Medical Malpractice, Report (1976), at 363; Harper & James, The Law of Torts §25.2 (1956).
Predicting the life expectancy of an individual is a highly speculative activity despite sophisticated tables citing averages. Moreover, making an accurate prediction of life expectancy when the plaintiff has suffered an injury serious enough to warrant a large award for future losses creates additional difficulties. Jury guesswork has resulted in a number of windfalls to beneficiaries whose financial dependence and emotional ties to the deceased plaintiff have been slight or nonexistent.

The purposes of justice and proper compensation would be met more effectively if periodic payments were required for future damages in all negligence cases. Adoption of periodic payments would provide stability for defendants and insurers, releasing larger amounts of capital for investment and ultimately reducing premium costs. One of the goals of MICRA was to serve the policy interest of providing stability for insurers and defendants, which would encourage long-term investments. Extending the MICRA provision for periodic payments would serve the similar policy interest of economic stability for general liability insurers and defendants in nonmedical malpractice cases. Policy interests, however, are only part of the necessary analysis in determining whether to extend the periodic payment provision to all negligence actions. Constitutional questions also must be analyzed in the context of extending the provision for periodic payment of future damages.

In both American Bank & Trust Co. v. Community Hospital of Los Gatos-Saratoga, Inc. and Fein v. Permanente Medical Group, the California Supreme Court upheld the constitutionality of MICRA’s periodic payment provision by applying a rational basis standard of review. The rationale of the court in American Bank & Trust and Fein can be applied to support the constitutionality of an extension

145. Id. The degree of difficulty in making these calculations is, of course, debatable. Nevertheless, support exists for the position that these calculations are far from simple and are in no way individuated. Id.
146. Id.
147. See supra note 134 and accompanying text.
149. This view is consistent with the evidence that using average life expectancy tables can result in a windfall inheritance of future damages to beneficiaries of the injured plaintiff. See supra notes 140-146 and accompanying text.
150. See supra note 63 and accompanying text.
151. See supra note 3 and accompanying text.
154. See supra note 94 and accompanying text.
of the periodic payment provision.\textsuperscript{155} The periodic payment provision had been challenged in both cases on the ground that the provision violated equal protection guarantees by impermissibly discriminating between medical malpractice victims and other tort victims.\textsuperscript{156} In addition, in both cases challengers claimed the provision violated due process rights of malpractice victims\textsuperscript{157} and the sixth amendment jury trial guarantee.\textsuperscript{158} A final argument made by plaintiffs in \textit{American Bank \& Trust}, was that the MICRA provision for periodic payments was unconstitutionally void for vagueness because a question remained regarding trial court formulation of a comprehensive payment schedule without the benefit of detailed special jury verdicts.\textsuperscript{159}

The court in \textit{American Bank \& Trust} responded to the objection that the periodic payment provision discriminated against medical malpractice plaintiffs by holding that no violation of equal protection or due process guarantees occurred.\textsuperscript{160} The rationale of the court was that a rational relation existed between the periodic payments required by the act and the legislative purpose sought to be served.\textsuperscript{161} The requisite rational relation was found since the periodic payment of future damages furthers the fundamental goal of matching losses with compensation.\textsuperscript{162} This result is accomplished because money is paid to an injured plaintiff when the plaintiff incurs the anticipated expenses or losses in the future.\textsuperscript{163} The legitimate state interest of reduc-

\textsuperscript{155} "It is true, of course, that a periodic payment of damages procedure could reasonably be applied across the entire tort spectrum; as already noted, there have been a variety of proposals advocating just such a general form." \textit{American Bank \& Trust}, 36 Cal. 3d 359, 371, 683 P.2d 670, 677, 204 Cal. Rptr. 671, 678 (1984). See generally Elligent, \textit{The Periodic Payment of Judgments} 46 INS. COUNSEL J. 130 (1979) (Many states have enacted provisions authorizing the periodic payment of damages in a variety of tort fields).

\textsuperscript{156} \textit{American Bank \& Trust}, 36 Cal. 3d at 364, 371, 683 P.2d at 672-73, 677-78, 681-82, 204 Cal. Rptr. at 673-74, 678-79, 682-83.

\textsuperscript{157} \textit{Id.} at 368, 369, 683 P.2d at 675-76, 204 Cal. Rptr. at 676-77; \textit{Fein}, 38 Cal. 3d at 158-59, 695 P.2d at 680-81, 211 Cal. Rptr. at 383.

\textsuperscript{158} \textit{American Bank \& Trust}, 36 Cal. 3d at 376, 683 P.2d at 680, 204 Cal. Rptr. at 681-82, \textit{Fein}, 38 Cal. 3d at 159, 695 P.2d at 680-81, 211 Cal. Rptr. at 383.

\textsuperscript{159} \textit{American Bank \& Trust}, 36 Cal. 3d at 377, 683 P.2d at 681-82, 204 Cal. Rptr. at 682-83; \textit{Fein}, 38 Cal. 3d at 158-59, 695 P.2d at 680-81, 211 Cal. Rptr. at 383.

\textsuperscript{160} The plaintiff in \textit{American Bank \& Trust} argued that the periodic payment provision violated due process because periodic payments diminished the value of the malpractice action without providing an adequate "quid pro quo." \textit{American Bank \& Trust}, 36 Cal. 3d at 368, 683 P.2d at 675-76, 204 Cal. Rptr. at 676-77. The court held, however, that under settled constitutional principles, balancing the benefits against the detriments of legislation in determining validity under the due process clause of the fourteenth amendment to the United States Constitution is unnecessary and inappropriate. \textit{Id.} at 369, 683 P.2d at 676, 204 Cal. Rptr. at 677.

\textsuperscript{161} \textit{Id.} at 369, 683 P.2d at 676, 204 Cal. Rptr. at 677.

\textsuperscript{162} \textit{Id.}

\textsuperscript{163} \textit{Id.}
ing the cost of medical malpractice insurance\textsuperscript{164} is served by limiting a defendant's obligation to paying for future losses actually experienced by the plaintiff.\textsuperscript{165} The $50,000 threshold required to trigger the periodic payment provision of MICRA\textsuperscript{166} was also found to be rationally related to legitimate state interests because periodic payments of smaller future damage claims are not cost efficient to administer.\textsuperscript{167} The court in \textit{American Bank & Trust} noted that the constitutionality of a legislative measure does not depend upon assessment by the court of the empirical success or failure of the provision.\textsuperscript{168} Therefore, even if the MICRA enactment had not yielded quantifiable positive results\textsuperscript{169} in relation to the legislative goal of bringing down malpractice insurance costs,\textsuperscript{170} the periodic payment provision still would withstand constitutional judicial scrutiny.\textsuperscript{171}

In answer to the argument that medical malpractice plaintiffs were being singled out for differential treatment, the court in \textit{American Bank & Trust} used the rationale of \textit{Williamson v. Lee Optical of Oklahoma}.\textsuperscript{172} The United States Supreme Court in \textit{Williamson} held that "one step at a time" solutions to a state's problems are constitutionally permissible.\textsuperscript{173} While singling out medical malpractice plaintiffs constituted a permissible single step toward solving malpractice insurance problems,\textsuperscript{174} the court noted in \textit{American Bank & Trust} that the legislature could reasonably apply periodic payments to all tort cases.\textsuperscript{175} Advocates of extension of the MICRA provisions to all negligence actions have commented that the objection to differential treatment of plaintiffs is overcome by extending the MICRA provisions to all tort actions.\textsuperscript{176} Extension was not required, however, for

\textsuperscript{164} \textit{See supra} note 3 and accompanying text.
\textsuperscript{165} \textit{American Bank & Trust}, 36 Cal. 3d at 369, 683 P.2d at 676, 204 Cal. Rptr. at 677.
\textsuperscript{166} \textit{See supra} note 44 and accompanying text.
\textsuperscript{167} \textit{Id.} at 375, 683 P.2d at 680, 204 Cal. Rptr. at 681.
\textsuperscript{168} \textit{Id.} at 375, 683 P.2d at 680, 204 Cal. Rptr. at 681.
\textsuperscript{169} \textit{See supra} note 63 and accompanying text.
\textsuperscript{170} \textit{See supra} note 3 and accompanying text.
\textsuperscript{171} \textit{American Bank & Trust}, 36 Cal. 3d at 375, 683 P.2d at 680, 204 Cal. Rptr. at 681.
\textsuperscript{172} 348 U.S. 483, 489 (1955).
\textsuperscript{173} The equal protection clause does not prohibit a legislature from implementing a reform measure "one step at a time," \textit{Id.} The equal protection clause does not prevent the legislature "from striking the evil where it is felt most." Werner v. Southern California Newspaper, 35 Cal. 2d 121, 132, 216 P.2d 825, 832 (1950).
\textsuperscript{174} \textit{See supra} note 3 and accompanying text.
\textsuperscript{175} \textit{American Bank & Trust}, 36 Cal. 3d at 371, 683 P.2d at 677-78, 204 Cal. Rptr. at 678-79.
\textsuperscript{176} \textit{Brief of Amicus Curiae}, Association for California Tort Reform by Fred J. Hiestand at 2, Fein v. Permanente Medical Group, Civil No. S.F. 24336 (Cal. Supreme Court filed Nov. 10, 1981) (on file at the Pacific Law Journal).
periodic payments to be found constitutional in the medical malpractice setting.\textsuperscript{177}

The court in \textit{American Bank & Trust} also held that no violation of the due process rights of malpractice victims resulted from periodic payments.\textsuperscript{178} The court reasoned that the provision is rationally related to the legitimate state interests of reducing malpractice insurance costs.\textsuperscript{179} For example, a defendant's obligation is limited to future damages the plaintiff actually incurs.\textsuperscript{180} As a result, a potential windfall to the plaintiff's heirs that can follow from lump sum payments is avoided. The cost associated with indirect payment to persons other than the injured plaintiff is one of many factors which increase insurance premiums.\textsuperscript{181} By eliminating this cost, the state's interest in reducing insurance premiums is served.\textsuperscript{182}

Another constitutional challenge to MICRA in \textit{American Bank & Trust} was that periodic payments violate the sixth amendment jury trial guarantee.\textsuperscript{183} The language of MICRA apparently authorizes the court to set the amount of future damages subject to periodic payment.\textsuperscript{184} Although trial court discretion is broad, authorizing the court to decide future damages constitutes an impermissible "impairment of the substantial features of a jury trial" or an "improper interference with the jury's decision."\textsuperscript{185} The court in \textit{American Bank & Trust} answered this constitutional challenge by construing the act

\begin{footnotes}
\item[177] See supra note 173 and accompanying text.
\item[178] The court stated that the legislature could reasonably have concluded that periodic payments would further the fundamental goal of matching losses with compensation by helping ensure that money paid to an injured plaintiff would be available when the plaintiff incurred the anticipated expenses or losses in the future. \textit{American Bank & Trust}, 36 Cal. 3d at 372, 683 P.2d at 678, 204 Cal. Rptr. at 679.
\item[179] \textit{Id.}
\item[180] See supra note 43 and accompanying text.
\item[181] See supra notes 35-36 and accompanying text.
\item[182] \textit{American Bank & Trust}, 36 Cal. 3d at 372, 683 P.2d at 676-77, 204 Cal. Rptr. at 677-678.
\item[183] Plaintiff in \textit{American Bank & Trust} contended that the sixth amendment jury trial guarantee requires the jury to fix the amount of future damages and make special findings on any subsidiary issue that affects the structuring of a periodic payment schedule. As enacted, \textit{Cal. Civ. Proc. Code} §667.7 is ambiguous as to the roles the legislature intended the jury and court to play in the formulation of a periodic payment judgment. While the jury is to determine the plaintiff's total damages and the court is to fashion the details of the periodic payment schedule, the statute is not clear whether the jury or the court is to determine the amount of the future damage component of the total award. \textit{American Bank & Trust}, 36 Cal. 3d at 376, 683 P.2d at 680, 204 Cal. Rptr. at 681-82.
\item[184] \textit{Id.}
\item[185] \textit{Id.} at 377, 683 P.2d at 681-82, 204 Cal. Rptr. at 682-83. If the court adopted the defendant's interpretation of the statute as authorizing the trial court rather than the jury to fix the amount of future damages subject to periodic payment, then the statute would be an
\end{footnotes}
to avoid any doubt regarding constitutionality. The court concluded that the MICRA periodic payment provision embodied in Code of Civil Procedure section 667.7 should be interpreted to require the jury to designate the portion of the verdict that is intended to compensate the plaintiff for future damages. Construction of the statute to allow courts to schedule payments after the jury designates future damages is reasonable because this construction maintains the province of the jury to ascertain the amount of damages awarded. Only the manner in which the judgment is to be paid is affected by the periodic payment provision. Moreover, the periodic payment provision intrudes into the realm of the jury less than the well accepted provisions of additur and remittitur, which were held constitutional by the California Supreme Court in Jehl v. Southern Pacific Co. The power of additur to increase and the corollary power of remittitur to decrease the award is a significant alteration of the jury's verdict. Nevertheless, additur and remittitur are permissible intrusions into the province of the jury.

The court in American Bank & Trust also rejected the constitutional challenge that the periodic payment provision was void for vagueness. In structuring a periodic payment schedule to meet the unconstitutional infringement on the province of the jury. Id., 683 P.2d at 681-82, 204 Cal. Rptr. at 682-83.

186. American Bank & Trust, 36 Cal. 3d at 377, 683 P.2d at 681-82, 204 Cal. Rptr. at 682-83. 187. Id. 188. Id.

189. The court stated that "[w]hile the jury has ascertained the amount of future damages—and has thus identified the amount of damages subject to periodic payment—we believe that the court's authority under [CAL. CIV. PROC. CODE] §667.7, subdivision (b)(1), to fashion the details of a periodic payment schedule does not infringe the constitutional right to jury trial." Id., 683 P.2d at 681, 204 Cal. Rptr. at 682. The special verdict procedure allows the court to submit to the jury written questions to ascertain what portion of the total damages awarded were compensation for future damages. Fed. R. Civ. P. 49(a).


193. Although remittitur is a 150-year-old practice, some commentators contend remittitur is falling out of favor. Wenske, Mo. Judges Ordered to End Reduction of Jury Awards, Nat'l L.J., Vol. 7, No. 45, July 22, 1985, at 4. The Missouri Supreme Court recently abolished the discretionary authority of state trial and appeals court judges to reduce injury awards when they believe damages awarded by the jury are excessive. Citing discretionary abuse and inconsistent application of the procedure, the Missouri Supreme Court fully restored multimillion-dollar verdicts for two people injured in the 1981 collapse of skywalks in the Hyatt Regency Hotel in Kansas City, Missouri. Id.

194. American Bank & Trust, 36 Cal. 3d at 377, 683 P.2d at 681-82, 204 Cal. Rptr. at 682-683.
statutory objective of compensating an injured plaintiff, reliance on the special verdict procedure is appropriate. The court stated in conclusion that as with other innovative procedures and doctrines, trial courts will deal with new problems in a case by case fashion. Appellate courts will fill in gaps in the statutory scheme. Since the California Supreme Court has recognized the power of the legislature to provide for structured awards, extension of the MICRA periodic payment provision to all negligence actions should pass constitutional review. Governmental interests in reducing the cost of insurance and maintaining coverage availability are served by extension and are analogous to the interests served by MICRA. The liability insurance coverage problems to be solved are more widespread than analogous problems that existed when MICRA was enacted. In addition, the evidence indicates that the reforms of MICRA lowered medical malpractice insurance premium costs. Therefore, application of the MICRA periodic payment provision to all negligence actions should ameliorate insurance coverage problems faced by negligence defendants in general.

The objections raised by the three dissenters in American Bank & Trust, however, cannot be ignored and take on special significance when considered in light of the case history. In his dissenting opinion,

195. CAL. CIV. PROC. CODE §667.1(f).
196. See, e.g., Li v. Yellow Cab Co., 13 Cal. 3d 804, 824, 532 P.2d 1226, 1240, 119 Cal. Rptr. 858, 872 (1975) (applying special verdicts in the field of comparative negligence, the court said the special verdict procedure "can be of invaluable assistance" to the court). See supra note 189 and accompanying text.
197. American Bank & Trust, 36 Cal. 3d at 378, 683 P.2d at 682-83, 204 Cal. Rptr. at 683-84.
198. Id.
199. See supra notes 152-153 and accompanying text.
200. See supra note 3 and accompanying text.
201. See supra notes 63-67 and accompanying text.
202. Id.
203. When American Bank & Trust was first heard by the California Supreme Court, the court found the periodic payment provision unconstitutional. 33 Cal. 3d 674, 190 Cal. Rptr. 371 (1983), rehearing granted, 36 Cal. 3d 359, 683 P.2d 670, 204 Cal. Rptr. 671 (1984). Upon grant of rehearing, that decision was vacated. Each time American Bank & Trust was heard, the court split in a 4-3 decision. In the first case, which held the periodic payment provision unconstitutional, the majority was comprised of opinion author Justice Mosk, Chief Justice Bird, Justice Rattigan and Justice Racanelli, the latter two assigned to the court as pro tem by Chairperson of the Judicial Council. In the same opinion, dissenters included author Justice Kaus, Justice Broussard and Justice Feinberg, the latter assigned to the court as pro tem by the Chairperson of the Judicial Council. On rehearing, the majority, which found the periodic payment provision constitutional, was comprised of author Justice Kaus, Justice Broussard, Justice Grodin and Justice Feinberg, the latter assigned to the court as pro tem by the Chairperson of the Judicial Council. The dissent included author Justice Mosk, Chief Justice Bird, and Justice Rattigan, the latter assigned to the court as pro tem by Chairperson of the Judicial Council. The chart below illustrates the change in court personnel:
Justice Mosk argued that periodic payments provide benefits to the wrongdoer at the expense of the victim. In agreement with this view was Chief Justice Bird, who pointed out in her dissenting opinion that the wrongdoer is relieved of liability for continuing payment of future damages not designated as lost income after the death of the plaintiff. These arguments ignore the general policy decision made when MICRA was enacted that all interested parties must sacrifice in order to reach a fair and rational solution to the insurance crisis. The interested parties included physicians, attorneys, insurance companies, and patients alike. Various interests had to be counterbalanced to achieve a viable legislative solution in the public interest. In some cases defendants or defendants’ insurers may be relieved of paying future damages because the plaintiff dies earlier than expected. In most cases, however, full damage awards will be paid out and savings to insurers will result from the insurer’s ability to maintain stable investments. The overall result will be to halt insurance

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The appointment of Justice Grodin to the bench subsequent to the first hearing seemingly changed the result of the case. Future appointments may alter the result in the context of additional questions that arise regarding application or extension of MICRA provisions.

204. American Bank & Trust, 36 Cal. 3d at 377-78, 683 P.2d at 682, 204 Cal. Rptr. 683-84.
205. Id. at 388-89, 683 P.2d at 689-90, 204 Cal. Rptr. at 690.
206. KEENE, supra note 4, at 27, 29.
207. Id.
208. Id at 33.

We pushed for a comprehensive approach. There were several reasons: first, no piecemeal solution to the problem was possible. Second, by pitting the various concerned and powerful interest groups against one another, while preserving the delicate balance among them, we had a better chance of getting something out. This is called the “equal bite” theory behind [MICRA]. Third, it was essential to have a bill of sufficient magnitude to command media attention and concentrate public support. [MICRA] was supported by the California Medical Association but it was also supported by consumer groups, union organizations, senior citizen groups, and county boards of supervisors. In short, the comprehensive nature of [MICRA] assures great public sympathy in support of the bill and precluded any attempt by one interest group to kill it in any specific committee.

209. See supra notes 125-127 and accompanying text.
premium increases\textsuperscript{210} and to continue insurance availability. All parties to a negligence suit and the state would benefit from this result. Therefore, the periodic payment provision of MICRA should be extended to all negligence actions.

**MICRA Provisions Not Recommended For Extension**

The two major MICRA provisions not recommended for extension are abrogation of the collateral source rule\textsuperscript{211} and the limitation on recovery for noneconomic damages.\textsuperscript{212} Although both of these provisions were held constitutional in the MICRA challenge cases,\textsuperscript{213} policy reasons dictate that the provisions should not be extended. Abrogation of the collateral source rule will be discussed first, followed by consideration of the cap on recovery of noneconomic damages.

### A. Abrogation of the Collateral Source Rule

The effect of the traditional collateral source rule is to prevent tortfeasors and their insurers from receiving the benefits of collateral source funds created through the prudence and foresight of the injured plaintiff.\textsuperscript{214} MICRA's abrogation of the collateral source rule is in accord with the express policy of California courts to prevent double recoveries for the same injury.\textsuperscript{215} This policy promotes the tort recovery purpose of making the injured plaintiff whole.\textsuperscript{216}

Nevertheless, the collateral source rule survives in most jurisdictions\textsuperscript{217} for several reasons. First, requiring tortfeasors to compensate victims deters further negligence by penalizing tortious behavior.\textsuperscript{218}

\textsuperscript{210} Report to the California Citizens' Commission on Tort Reform, Righting the Liability Balance, supra note 68, at 150.
\textsuperscript{211} See supra notes 49-53 and accompanying text.
\textsuperscript{212} See supra notes 54-55 and accompanying text.
\textsuperscript{213} See supra note 92 and accompanying text.
\textsuperscript{214} Helfend v. Southern California Rapid Transit District, 2 Cal. 3d 1, 9-10, 465 P.2d 61, 65-66, 84 Cal. Rptr. 173, 177-78 (1970). "Collateral source funds are usually created through the prudence and foresight of persons other than the tortfeasor, frequently including the injured person himself. They are intended for the benefit of the injured person, and not for that of the person who injures him. That intention should be effectuated." Gypsum Carrier, Inc. v. Handelsman, 397 F.2d 525, 534-35 (9th Cir. 1962); Accord, Grayson v. Williams, 256 F.2d 61, 65 (10th Cir. 1958).
\textsuperscript{218} See, e.g., City of Salinas v. Souza & McCue Construction Co., 66 Cal. 2d 217, 227,
Second, awards are often considered inadequate because juries do not consider attorneys' fees and costs.219 Finally, the tortfeasor should not, as a policy matter, receive the benefits of the victim's providence.220 Abolition of the collateral source rule increases the potential for a well insured plaintiff to relieve a negligent defendant of all liability for damages.221 Eventually, the shift in whose insurer covers the injury could result in increased insurance premiums for the injured victims.222 This result is inconsistent with fundamental fairness principles.223

Commentators argue that the collateral source rule is outdated.224 Modernly, many injured people have significant sources of compensation other than the tortfeasor.225 In addition, since the cost of compensating injured persons is spread among the public, the question of which insurer pays the damages is academic.226 Shifting the burden of payment for damages incurred from the defendant's insurer to the plaintiff's insurer is advocated by commentators who argue that liability insurance already has revolutionized the law of torts.227 This revolution is claimed to have rendered the rules of negligence obsolete, since as a practical matter courts offer only passing regard to the formula while in fact looking to the insurance.228 Court opinions in tort cases, however, do not mention insurance as a reason for holding the defendant liable.229 Liability insurance does not create the liability, but only provides for indemnity once liability has been proved.230 However, California courts do weigh the relative financial


220. See infra note 253 and accompanying text.

221. Because CAL. CIV. CODE §3333.1 allows evidence of the plaintiff's collateral sources to be introduced, a possibility exists that damages awarded to the plaintiff will be reduced to the extent of the plaintiff's own insurance recovery. Bell, supra note 63, 944-45. Prior to enactment of MICRA, the plaintiff would have recovered fully from the negligent defendant. Id.

222. To the extent that plaintiff's insurer pays damages that prior to MICRA would have been paid by the defendant, general liability insurance premiums may be raised to offset the shifted burden of payment. Comment, An Analysis of State Legislative Responses to the Medical Malpractice Crisis, 1975 DUKE L.J. 1417, 1425, 1449 (1975).

223. Id.


225. Id. For example, many people carry their own insurance coverage, or are covered under workers' compensation or employer insurance plans. Id.

226. Id.


228. Id.

229. Id. at 553.

230. Id.
resources of the respective parties in negligence actions to determine who can best bear the loss.\textsuperscript{231} Since defendants in tort cases are primarily public utilities, commercial enterprises, industrial corporations and automobile owners, these defendants can distribute inevitable losses by means of rates, prices, taxes, or insurance.\textsuperscript{232}

Courts and legislatures also have considered the prophylactic effect of preventing future tortious conduct by holding the tortfeasor liable for compensating the victim.\textsuperscript{233} Since people know they may be held liable for their wrongs, a strong incentive exists to prevent injuries from occurring.\textsuperscript{234} The deterrent effect of liability on potential tortfeasors is persuasive in determining that extension of the MICRA provision abrogating the collateral source rule would have a detrimental societal impact.

Advocates of extending abrogation of the collateral source rule argue that by eliminating double recoveries insurance rates will decrease.\textsuperscript{235} Since consideration of collateral sources and offsetting collateral recovery from the award are discretionary, however, extension of this MICRA provision does not guarantee lower rates.\textsuperscript{236} Pre-MICRA estimates indicated that abrogation of the collateral source rule would reduce malpractice insurance costs less than two percent.\textsuperscript{237} Other commentators who addressed the probable impact of abrogating the collateral source rule, however, claimed the new rule would have greater effect.\textsuperscript{238} This prediction was verified in states that mandate offset.\textsuperscript{239} Discounting for collateral source payments in ascertaining the damage

\textsuperscript{231} Id. at 22.
\textsuperscript{232} Id.
\textsuperscript{233} Id. at 23.
\textsuperscript{234} Id.
\textsuperscript{235} Comment, The Collateral Source Rule: Double Recovery and Indifference to Societal Interests in the Law of Tort Damages, 2 Univ. of Puget Sound L. Rev. 197, 211 (1978). These costs are substantial; studies show that costs to the insurance industry as a whole in satisfying subrogation rights is 60% of total overhead costs. Moreover, with repeal of the collateral source rule and subrogation, "claimants are more likely to settle . . . because there is a single plaintiff with a loss already partly satisfied and therefore a smaller claim." Fleming, supra note 218, at 1536.
\textsuperscript{236} See Keen, California's Medical Malpractice Crisis, A Legislator's Guide to the Medical Malpractice Issue, supra note 4, at 29 (MICRA abrogation of collateral source rule is discretionary).
\textsuperscript{238} Bell, supra note 63, at 944-45.
\textsuperscript{239} Under MICRA, the defendant may introduce evidence of plaintiff's collateral source benefits, but the jury is not bound to reduce damage awards because of collateral source benefits. See Cal. Civ. Code §3333.1.
award resulted in lower total payments by defendants in litigated cases when the plaintiff was insured.\(^{240}\) In addition, lower settlement payments resulted.\(^{241}\) The number of claims also dropped, possibly because claims with low expected payouts were not brought.\(^{242}\)

The American Bar Association estimated prior to the enactment of MICRA that the MICRA provision abrogating the collateral source rule would reduce malpractice payouts by about twenty percent.\(^{243}\) Empirical evidence gathered subsequent to the enactment of MICRA and similar reforms adopted nationwide substantiates these predictions.\(^{244}\) In states that legislatively require subtraction of collateral source payments from awards, the post-malpractice reform awards were fifty percent lower in 1977 than they had been in 1975.\(^{245}\) Not only did evidence show that abrogation of the collateral source rule actually reduced malpractice insurance premiums in states that mandated offset,\(^{246}\) this MICRA provision also was found constitutional by the California Supreme Court in *Barne v. Wood*.\(^{247}\)

Despite positive statistics and the probable constitutionality of statutory abrogation of the collateral source rule in all negligence actions,\(^{248}\) extension of this MICRA provision is not recommended. Diminishing a defendant's accountability for negligently caused injuries by shifting the risk of loss destroys the deterrent effect of tort

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240. Bell, *supra* note 68, at 945.
242. *See*, e.g., *id.* at 10-12, 44. A person injured by medical malpractice may need a minimum $30,000 claim before an attorney may be found who will take the case. *Id. But cf. supra* note 85 (experience of New Jersey with access of the poor to the courts)
244. The American Insurance Association estimated that a dollar-for-dollar offset for collateral sources would reduce insurance premiums by 10 to 15%. *Id.*
246. *Id.*
247. See *supra* notes 238-39 and accompanying text.
248. *Barne*, 37 Cal. 3d at 174, 689 P.2d at 446, 207 Cal. Rptr. 816 (1984). The Court in *Barne* held that precluding a collateral source that has provided benefits to a medical malpractice plaintiff from obtaining reimbursement from the defendant does not violate due process or equal protection. The court found the MICRA provision abrogating the collateral source rule was rationally related to two legitimate state purposes. These purposes were to restore insurance premiums to an affordable cost and to assure insurance availability. The court further stated that due process does not require the legislature to tie liability invariably to fault. By shifting some of the costs of malpractice from the negligent defendant to the plaintiff's own insurer, some recovery for the plaintiff was assured. On the other hand, insisting that malpractice defendants and their insurers bear all of the loss might have resulted in malpractice insurance unavailability or many doctors practicing without insurance. Thus, the court approved the constitutionality and underlying policy of MICRA even without considering the post-MICRA empirical studies showing success in reducing malpractice insurance premiums. *Id.* at 180-82, 689 P.2d at 449-51, 207 Cal. Rptr. at 819-21.
liability. The result is that the state's interest in preventing injury-causing behavior is undermined. Abrogation of the collateral source rule would make defendants less accountable for negligence. In addition, the fact that plaintiff's costs and attorneys' fees must be paid from the plaintiff's award means that recovery from collateral sources is not a double recovery, but actually provides a closer approximation to full compensation. Finally, the California Supreme Court stated in Grayson v. Williams: "[N]o reason in law, equity or good conscience can be advanced why a wrongdoer should benefit from a collateral source . . . . If there must be a windfall certainly it is more just that the injured person shall profit therefrom, rather than the wrongdoer . . . ." Thus, the policy reasons in Grayson coupled with the tradition of holding a defendant responsible for tortious conduct, provide strong arguments against abrogation of the collateral source rule as in MICRA.

B. Cap on Recovery of Noneconomic Damages

The final MICRA provision considered for extension is the $250,000 cap on noneconomic damages. Extension of the recovery cap is not recommended for policy considerations relating to full compensation of a plaintiff for injuries. These policy reasons will be discussed after a brief review of the constitutional challenge of the cap on due process and equal protection grounds.

The weight of authority from other jurisdictions supports the due process and equal protection constitutional challenges of this MICRA provision. Nevertheless, the California Supreme Court in Fein v. Perm-
anente Medical Group held the means selected in this provision were rationally related to the legislature's goal of reducing medical malpractice insurance premium costs.\textsuperscript{258} Despite the finding of constitutionality, the effectiveness of the cap on noneconomic damages is diminished by several factors. First, paid-out damage awards constitute only a fraction of insurance premium costs.\textsuperscript{259} Second, very few plaintiffs suffer noneconomic damages over $250,000.\textsuperscript{260} Therefore, not only is the relation between the means chosen and the goal sought extremely tenuous, but only the few severely injured plaintiffs are selected to bear the burden of this limitation on recovery.\textsuperscript{261} MICRA has the effect, through this provision, of denying full recovery to plaintiffs who have demonstrable noneconomic losses exceeding $250,000.\textsuperscript{262}

In California tort law, tortfeasors are held accountable for damages proximately caused by their negligent behavior.\textsuperscript{263} This rule, combined with the historic policy of providing full compensation for negligently

to bear the burden of limited recovery). A majority of the courts that have addressed the constitutionality of noneconomic damage limits have found them invalid. See, Wright v. Central DuPage Hospital Association, 347 N.E. 2d 736, 743 (1976) (the damage limit on a workers' compensation claim is statutorily created and may not be used by analogy to justify damage limits on common law actions); Carson v. Maurer, 424 A.2d 825, 838 (1980) (cap of $250,000 for pain and suffering or other noneconomic loss creates an arbitrary damage limitation and violates the principles of equal protection); Arneson v. Olson, 270 N.W. 2d 125, 136 (N.D. 1978) ($300,000 limitation on recovery in medical malpractice cases is a violation of the equal protection provision of the North Dakota Constitution and of the fourteenth amendment to the United States Constitution); Simon v. St. Elizabeth Medical Center, 355 N.E. 2d 903, 906-907 (dictum) (Ohio Ct. Comm. Pleas. 1976) (may not confer benefits on malpractice defendants through a statutorily created damage limitation and thus deprive plaintiffs of benefits available to others); cf. Jones v. State Board of Medicine, 97 Idaho 859, 877, 555 P.2d 399, 416, cert. denied, 431 U.S. 914 (1976) (remanding for factual determination whether a medical malpractice crisis existed); but see Johnson v. St. Vincent Hospital, Inc. 404 N.E. 2d 585, 601 (1980) (limitation imposed upon damages recoverable under malpractice act held consistent with requirements of privileges and immunities clause of the Indiana Constitution, the prohibition of Indiana Constitution against special legislation, and the equal protection clause of the fourteenth amendment of the United States Constitution).

260. Id. at 951. DeCarteret, High Court Passes on Pain Price Curb, L.A. DAILY J., Feb. 2, 1979, at 1, col. 6, at 20, col. 4; Jones, supra note 257 at 874-75, 555 P.2d at 414-15 (nationally, fewer than one percent of all awards in 1970 exceed $100,000). But see REPORT OF THE California Citizens' Commission on Tort Reform, Righting the Liability Balance, supra note 68, at 101, 114 (showing a clear upward spiral in the amount of payments per claim in personal injury and medical malpractice cases between 1970 and 1976).
261. See, e.g., Fein, 38 Cal. 3d at 169-70, 695 P.2d at 687-89, 211 Cal. Rptr. at 390-92. (Bird, C.J., dissenting); Carson, 120 N.H. 2d at 943-44, 424 A.2d at 838. The Carson court struck down a provision identical to the MICRA cap, saying, "[i]t is simply unfair to unreasonably impose the burden of supporting the medical industry solely upon those persons who are most severely injured and therefore most in need of compensation." Id.
263. Jenkins & Schweinfurth, supra note 265, at 954.
inflicted injuries, deters unreasonable conduct.\textsuperscript{264} A limitation on noneconomic damages reduces the deterrent effect garnered by historical precedent, and thereby reduces the protections afforded California citizens.\textsuperscript{265} For the impoverished plaintiff, noneconomic damages can provide the principal source of compensation for decreased lifespan or loss of physical capacity.\textsuperscript{266} An impoverished plaintiff may be unable to prove substantial loss of future earnings or other pecuniary damages in order to secure economic damages.\textsuperscript{267} In addition, while a $250,000 cap may sound generous, most large recoveries occur in cases involving permanent damage to infants or to previously healthy young adults.\textsuperscript{268} When spread over the expected lifespan of such a plaintiff, $250,000 is insignificant.\textsuperscript{269}

Proponents of a cap on noneconomic damages argue that a high pain and suffering award may result in a windfall to the deceased plaintiff's heirs.\textsuperscript{270} However, no danger of such a windfall exists because the amount awarded for future pain and suffering will be subject to the MICRA provision for periodic payment of future damages whenever such damages meet or exceed $50,000.\textsuperscript{271} Only damages relating to lost future income that would devolve to dependents is continued beyond the lifespan of the injured plaintiff.\textsuperscript{272} Thus, the amount the jury determines will compensate the plaintiff for noneconomic damages will be received by the plaintiff as these noneconomic damages continue throughout the plaintiff's life.\textsuperscript{273}

Two proposals have emerged that would alleviate the policy problems attending extension of the MICRA cap on noneconomic damages. The first is an exception that would permit the jury to exceed the cap when presented with special circumstances.\textsuperscript{274} Another suggestion is the establishment of a permanent State Commission on Pain and Suffering

\textsuperscript{264} Id. "[A]n alternative analytical approach, which focuses more directly on the determinants of an individual's behavior, would be a more fruitful guide [than economic considerations] to judgments about the deterrent effects of liability rules." Bell, \textit{supra} note 63, at 975.

\textsuperscript{265} Jenkins & Schweinfurth, \textit{supra} note 259, at 955.

\textsuperscript{266} Fein, 38 Cal. 3d at 170-72, 695 P.2d at 688-90, 211 Cal. Rptr. at 391-93 (Bird, C.J. dissenting).

\textsuperscript{267} Id., 695 P.2d 688-90, 211 Cal. Rptr. at 391-93.

\textsuperscript{268} Id.

\textsuperscript{269} Id., 695 P.2d 688-90, 211 Cal. Rptr. at 391-92.

\textsuperscript{270} See \textit{supra} notes 123-24 and accompanying text.

\textsuperscript{271} See \textit{supra} notes 37-42 and accompanying text.

\textsuperscript{272} See \textit{supra} notes 37-42 and accompanying text.

\textsuperscript{273} See \textit{supra} note 136 and accompanying text.

\textsuperscript{274} For example, the state of New Jersey currently limits contingency fees for all personal injury actions, and has included a statutory provision for exception from the ceiling amount when the court finds special circumstances, including an exceptionally difficult case. New Jersey
This Commission would be charged with the duty to develop sample standards of reasonable pain and suffering awards fitted to typical fact situations. The proposed statute would require the courts to instruct juries about the standards, but would not require adherence to the standards in review of decisions for the purpose of additur or remittitur. Either of these proposals would make a cap on noneconomic damages more responsive to the individual plaintiff's proven damages. Thus, many of the policy concerns regarding arbitrary capping of noneconomic damages would be answered. Without adaptation of the capping provision to solve problems regarding full compensation to the injured plaintiff and similar treatment for similarly situated plaintiffs, the MICRA cap on noneconomic damages is not recommended for extension.

CONCLUSION

Increasing general liability insurance premiums and decreasing insurance coverage availability are causing problems similar to those faced by the medical profession before 1975. The enactment of MICRA solved many of the problems of the medical malpractice crisis. Extension of MICRA provisions relating to attorneys' fees and periodic payments to all negligence actions would be a positive step toward restoring balance to the California tort recovery system. The underlying purpose of tort recovery, making the plaintiff whole, would be protected under the two proposed extensions. Valuable societal controls on negligence that result from the deterrent effect of holding defendants accountable for acts and omissions would also be maintained under the extension proposal. The extended provisions would add a protective dimension by shaping a defendant's liability to prevent bankruptcy or insolvency. Valuable Californ-
nia businesses would be sustained as a result of structured awards, even in the face of large judgments or settlements. An incentive to compromise and settle would exist because attorneys' fees would absorb a smaller portion of the injured plaintiff's recovery.

Extension of the sliding scale on attorneys' contingency fees and the periodic payment of future damages would have an impact on insurance premium cost and availability as evidenced by MICRA's impact on medical malpractice insurance cost and availability. On the other hand, extending the MICRA provisions abrogating the collateral source rule and placing a cap on noneconomic damages would have a minimal impact on insurance premium cost and availability. In addition, these two provisions would be detrimental to the important societal interests of holding a tortfeasor accountable and fully compensating an injured plaintiff. While the two provisions may be found constitutional if extended, strong policy reasons militate against extension.

Ignoring the spiraling costs of insurance and the decreasing availability of coverage can only result in placing California citizens at risk for ensuring their own safety in all circumstances. California historically has been a state with progressive laws that reflect an abiding concern for the social welfare of citizens. The progressive attitude of California lawmakers should continue, while at the same time legislators consider the changing reality of risk allocation. Extension of two of the MICRA provisions would constitute a small step toward balance in the tort recovery system and would be a meaningful safeguard for California citizens and California businesses.

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278. See supra notes 3, 15 and accompanying text.