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The Illinois Medical Malpractice Reform Act of 1985: Illinois Operates Unconstitutionally on Medical Malpractice Victims, 19 J. Marshall L. Rev. 677 (1986)

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THE ILLINOIS MEDICAL MALPRACTICE REFORM ACT OF 1985: ILLINOIS OPERATES UNCONSTITUTIONALLY ON MEDICAL MALPRACTICE VICTIMS

In July 1985, the Illinois Legislature enacted the Medical Malpractice Reform Act[1] (the Act). The Act is designed to remedy the supposed "crisis" in medical malpractice insurance which purportedly threatens to permanently damage the medical profession's ability to provide health care in Illinois.[2] The Act radically alters procedural and substantive rules in medical malpractice actions.[3] Fortunately for victims of medical malpractice, the Act is unconstitutional. The Act violates both the equal protection clause and the prohibition against special legislation in the Illinois Constitution.[4]

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1. ILL. REV. STAT. ch. 110, §§ 2-1013 — 2-1714 (1985). The term "medical malpractice" is used generically in this comment and includes medical, hospital, and other healing art malpractice. The term "healing art malpractice," however, does not include treatment by prayer in accordance with "tenants and practices of a recognized church or religious denomination." *Id.* § 2-1012.

2. *See* REPORT OF THE TASK FORCE ON MEDICAL MALPRACTICE TO GOVERNOR JAMES R. THOMPSON, p. 3 (1985) [hereinafter cited as TASK FORCE ON MEDICAL MALPRACTICE]. This report defined the medical malpractice problem as follows: "Illinois is accelerating through the first stages of a crisis in medical malpractice and today stands on the edge of a medical system that is beginning to deteriorate dramatically." *Id.*

3. One of the new procedural rules requires that the plaintiff's attorney file an affidavit with the complaint declaring that the attorney has consulted and received the facts of the case with a health care professional who is in the same speciality as the defendant. ILL. REV. STAT. ch. 110, § 2-622 (1985). The affidavit must state that the reviewing consultant has determined in a written report that there is "reasonable and meritorious cause" for filing the action. *Id.* A copy of the reviewing health care professional's report must be attached to the affidavit. *Id.*

Another major procedural change is the creation of review panels to screen all medical malpractice claims. *Id.* §§ 2-1013 — 2-1019. Whenever a medical malpractice action is filed in Illinois Circuit Court, a review panel must be convened to hear and determine the issue of liability and damages. *Id.* § 2-1013. Each review panel is comprised of a circuit court judge, a health care practitioner, and an attorney. *Id.* The parties may agree, at any time, to be bound by the determination of the review panel. *Id.* § 2-1018. Where no agreement has been made to be bound by the panel's ruling and the determination is unanimous, the parties must file a written acceptance or rejection of the determination. *Id.* A party that rejects the unanimous panel determination, however, faces a severe penalty if this party subsequently does not prevail in Circuit Court on the issue of liability. *Id.* § 2-1018(b). Upon motion by the prevailing party, the court must order the rejecting party to pay the prevailing party all costs, attorneys fees, and expenses incurred in connection with both the trial and the review panel. *Id.* § 2-1019(c). For a discussion of the constitutionality of review panels, see *infra* note 116 and accompanying text.

4. ILL. CONST. art. I, sec. 2. This section provides "no person shall be deprived of

Moreover, the Act chills the United States Constitution's First Amendment guarantee of access to the courts.[5]

Legislative History and Background

In the mid-1970's, many states enacted medical malpractice "reform" legislation in response to the medical society's cry for assistance to the problem of rapidly increasing medical malpractice insurance.[6] Proponents of this wave of medical malpractice legislation argued that drastic increases in the number of unfounded medical malpractice suits were the cause of skyrocketing medical malpractice premium rates.[7] Critics maintained, however, that the "crisis" was not attributable to frivolous lawsuits, but rather to huge losses the insurance companies suffered as a result of bad investments.[8] In 1975, the Illinois legislature created a commission to study the issues surrounding the medical malpractice problem.[9] Many of the recommendations of the commission were enacted into law in the Medical Malpractice Act of 1975 (the 1975 Act),[10] the forerunner of the present Act.

Appropriately, most of the 1975 Act was declared unconstitutional in *Wright v. Central DuPage Hospital Association.*[11] Despite the strong precedent of *Wright,* it did not dissuade the powerful

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life, liberty, or property without due process of law nor be denied the equal protection of law." *Id.* The equal protection clause guarantees that all persons similarly situated must be treated similarly. *See* Comment, *Constitutionality of the Indiana Medical Malpractice Act: Reevaluated,* 19 VAL. U.L. REV. 493 (1985) (citing Frost v. Corporation Comm'n, 278 U.S. 515, 522 (1929)). For a discussion of equal protection see generally Note, *Legislative Purpose, Rationality and Equal Protection,* 82 YALE L.J. 123 (1972).

5. For a discussion of decisions which have held that the First Amendment guarantees access to the courts see *infra* note 156 and accompanying text.

6. *See* Keith, *The Texas Medical Liability and Insurance Improvement Act — A Survey and Analysis of Its History, Construction and Constitutionality,* 36 BAYLOR L. REV. 265, 266-67 (1984) [hereinafter cited as Keith]. For a complete examination of these early legislative efforts to remedy the "medical malpractice crisis" see S. GROSSMAN, STATE-BY-STATE SUMMARY OF LEGISLATORY ACTIVITIES ON MEDICAL MALPRACTICE, A LEGISLATOR'S GUIDE TO THE MEDICAL MALPRACTICE ISSUE, 12 (D. Warren & R. Merrit eds. 1976). *See also* Comment, *An Analysis of State Legislative Response To The Medical Malpractice Crisis,* 1975 DUKE L.J. 1417.

7. In 1975, the premiums charged physicians and surgeons increased 100% over the 1974 levels. Comment, *Medical Malpractice Legislation: The Kansas Response To The Medical Malpractice Crisis,* 23 WASHBURN L.J. 566 n.6 (1984) [hereinafter cited as Comment, *The Kansas Response To The Medical Malpractice Crisis*].

8. Keith, *supra* note 6, at 270.

9. The Commission was created by Public Act 79-962 and was charged with the responsibility "for developing a comprehensive plan for a medical reparation system, which can provide prompt and equitable compensation to the victim of medical injury at a reasonable cost." TASK FORCE ON MEDICAL MALPRACTICE, *supra* note 2, at 1.

10. ILL. REV. STAT. ch. 110, §§ 58.3 — 58.9 (1975), *held unconstitutional in,* Wright v. Cent. Du Page Hospital Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976). For a discussion of the 1975 Act see *infra* notes 103-104 and accompanying text.

11. 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

medical lobby from continuing to seek special privileges for health care providers from the consequences of their negligence.[12] In response to these pleas for assistance, the governor of Illinois appointed a task force to study the medical malpractice crisis and propose legislative cures.[13] In 1985, the State's medical societies introduced a package of bills as emergency legislation.[14] The State

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12. For a discussion of the medical lobby's efforts to persuade the Illinois legislature, see *infra* note 29 and accompanying text.

13. *Task Force on Medical Malpractice*, *supra* note 2, at 1.

14. The Illinois State Medical Society sponsored SB 959 through SB 968 and HBs 1600 through 1609 H.B. 1600-1609, 84th General Assembly, 1985 Ill.; SB 0960-0968, 84th General Assembly, 1985 Ill. *See* G. Montroy, A COMPREHENSIVE ANALYSIS OF MEDICAL MALPRACTICE BILLS 1 (Apr. 17, 1985) (unpublished manuscript, available at John Marshall Law School Library) [hereinafter cited as MONTROY]. SB 959 and HB 1600 called for a limit on liability for damages for any disfigurement or pain and suffering of $100,000 in a medical malpractice action. *Id.* at 7. This bill also proposed the abolishment of punitive damages in *any* malpractice case. *Id.* The punitive damage portion of the bill was passed and is included in Section 2-1115 of the 1985 Act. *See* ILL. REV. STAT. ch. 110, § 2-1115 (1985).

SB 960 and HB 1601 proposed that in a wrongful death action against a health care provider, there will be no presumption of monetary loss in excess of $25,000 even though the death was caused under circumstances as would amount to a felony. MONTROY, *supra*, at 8. These bills did not pass, and thus are not incorporated into the 1985 Act.

Senate Bill 961 and HB 1602 require the jury to itemize the verdict for economic loss to include expenses incurred for medical, surgical, dental, or other health care services; amounts intended to compensate for lost wages; and all other economic loss claimed by the victim. *Id.* at 9. These bills required the jury to determine the number of years which these amounts would accrue. These bills were incorporated into Section 2-1109 of the 1985 Act. *See* ILL. REV. STAT. ch. 110, § 2-1109 (1985).

SB 962 and HB 1063 called for the creation of review panels comprised of a doctor, lawyer, and a judge to screen medical malpractice cases. MONTROY, *supra*, at 9. this bill was made part of the 1985 Act.

SBs 963 and 964 and HB 1604 and 1605 proposed that the requirement of proving special damages to establish a cause of action for malicious prosecution be eliminated in a suit by a health care provider against the plaintiff or the plaintiffs attorney. *Id.* at 11. These bills were made part of the 1985 Act. *See* ILL. REV. STAT. ch. 110, § 2-114 (1985).

SB 965 and HB 1606 required that all damage awards in medical malpractice be reduced by 100% of all health insurance, wages paid by the employer, and private or governmental disability income programs. MONTROY, *supra*, at 11. The 1985 Act requires that the amount of recovery be reduced by 50% of all benefits provided for lost wages and 100% of all benefits provided for medical and hospital charges. *See* ILL. REV. STAT. ch. 110, § 2-1205 (1985).

SB 966 and HB 1607 proposed standards for expert witnesses in medical malpractice cases. MONTROY, *supra*, at 12. These bills required that in order for an expert to testify at trial, the expert must devote no less than 75% of his professional time to active clinical practice or instruction at an accredited medical school. *Id.* Although the provisions of these bills did not pass, a version was incorporated in the 1985 Act which establishes standards for expert witnesses. *See* ILL. REV. STAT. ch. 110, § 8-2501 (1985).

SB 967 and HB 1608 required that attorneys fees in medical malpractice actions be limited to 50% of the first $1,000; 40% of the next $2,000; 35% of the next $22,000 and 25% of any amount over $25,000. MONTROY, *supra*, at 13. A version of these bills was made part of the 1985 Act. For a discussion of the provisions of the 1985 Act pertaining to attorney contingent fees see *infra* note 125 and accompanying text.

SB 968 and HB 1609 allowed a physician to be dismissed from a medical mal-

Bar Associations introduced counterproposals designed to address the medical societys' concern over non-meritorious lawsuits.[15] Two days prior to the vote on the various bills, however, all negotiations between the medical and legal factions ceased.[16] On that day, a day that has become known as "Doctors Day," 4,000 physicians marched on the state capitol to confront the legislature and the Governor of Illinois.[17] Two days later, the Illinois legislature enacted House Bill 1604.[18]

Illinois' misguided reaction to the supposed medical malpractice crisis can be divided into two major categories of "reform." The first category involves changes in pleading and procedural rules[19] in medical malpractice litigation to erect barriers to frivolous lawsuits and encourage their early settlement.[20] The other major category encompasses rules to reduce the actual damages[21] awarded in successful medical malpractice suits and to ease the burden of their payment.[22]

This comment discusses this latter category focusing upon the provisions of the Act which abrogate the collateral source rule,[23] provide for the periodic payment of future damages,[24] and limit the amount of attorney contingency fees.[25] First, each of these sections is delineated. Next, each section is examined in the context of potential challenges to its constitutionality. Finally, this Comment concludes that the Act unconstitutionally violates the equal protection clause and the prohibition against special legislation in the Illinois Constitution as well as the first amendment of the United States Constitution.

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practice suit by filing an affidavit in lieu of an answer that he was not directly or indirectly involved in the events alleged in the lawsuit. *Id.* at 14. These bills are part of the 1985 Act. *See* ILL. REV. STAT. ch. 110, § 2-1010 (1985).

15. *See* MEDICAL MALPRACTICE — WHOSE RESPONSIBILITY IS IT? — A WHITE PAPER OF THE ILLINOIS TRIAL LAWYERS ASSOCIATION (Illinois Trial Lawyers Assn. 1985) (available at The John Marshall Law School Library).

16. Remarks by David A. Decker, President of the Illinois Trial Lawyers Association, Illinois Trial Lawyers' Association Seminar on Medical Malpractice (August 10, 1985).

17. *Id.*

18. ILL. REV. STAT. ch. 110, §§ 2-1013 — 2-1714 (1985).

19. For a discussion of changes in the pleading and procedural rules of medical malpractice cases, see *supra* note 3 and accompanying text.

20. *See* TASK FORCE ON MEDICAL MALPRACTICE, *supra* note 2, at 4.

21. For a discussion of the sections of the 1985 Act which were designed to reduce the size of damage awards in medical malpractice cases see *infra* note 32 and accompanying text.

22. ILL. REV. STAT. ch. 110, § 2-1705(3)(i) (1985). For a discussion of the periodic payment provisions of the 1985 Act, see *infra* notes 88-89 and accompanying text.

23. For a discussion of the collateral source rule see *infra* note 26 and accompanying text.

24. For a discussion of the periodic payment provisions of the 1985 Act see *infra* notes 88-89 and accompanying text.

25. For a discussion of the limitations on attorney contingency fees see *infra* notes 125-126 and accompanying text.

ABROGATION OF THE COLLATERAL SOURCE RULE

The common law collateral source rule prohibited the introduction of evidence concerning other sources of compensation that plaintiffs received for the same injury.[26] Thus, under the common law rule, the amount of damages a plaintiff recovered in a medical malpractice suit could not be reduced by any compensation the plaintiff received for the same injury from medical insurance proceeds, lost wages paid by an employer, or disability income insurance proceeds.[27] The policy behind this rule is to prevent a physician tortfeasor from benefiting from the plaintiff's foresight.[28]

Concerned with reducing the size of medical malpractice awards, the medical societies lobbied for abolishment of the collateral source rule.[29] In response, many legislatures modified or abolished the common law rule.[30] In 1975, the Illinois legislature began

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26. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES: DAMAGES — EQUITY — RESTITUTION, § 98.10 (1973); 22 AM. JUR. 2D *Damages*, § 206 (1971). The collateral source rule has its origins in Monticello v. Mollison, 58 U.S. 152 (1854), *noted in* Comment, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741 (1964). One of the purposes of the rule is to deter or punish the tortfeasor. *Id.* at 741 n.6. Another underlying rationale for the rule is that the wrongdoer should not receive a windfall from any payments made by the plaintiff's employer. *See* Annot., 7 *ALR 3d* 516, 522 (1966). *See generally* Moceri & Messina, *The Collateral Source Rule in Personal Injury Litigation*, 7 GONZ. L. REV. 310 (1972) (discussing history and application of the collateral source rule in negligence actions) [hereinafter cited as *The Collateral Source Rule*].

27. *The Collateral Source Rule*, *supra* note 26, at 310.

28. *See* Keith, *supra* note 6, at 272 (citing Dumas Milner Chevrolet Co. v. Morphis, 337 S.W.2d 185 (Tex. Civ. App. 1960)).

29. *See* TASK FORCE ON MEDICAL MALPRACTICE, *supra* note 2, at 35. On February 21, 1985, the president of the Illinois Medical Society made a presentation to the task force arguing, among other things, for the abolishment of the collateral source rule in medical malpractice actions. *Id. See also* MALPRACTICE—NOBODY WINS—EVERYBODY PAYS 10 (Illinois State Medical Society 1985) (available in The John Marshall Law School Library) [hereinafter cited as MALPRACTICE—NOBODY WINS]. The Illinois Medical Society argued that the purpose of tort law is to make the victim "whole not wealthy." *Id.* at 10. Because the collateral source rule prevents a jury from hearing evidence of other payments the plaintiff received, a plaintiff receives the windfall of double recovery for an injury. *Id.* The Illinois Medical Society relied on a study by the Rand Corporation which concluded that a mandatory award reduction by collateral source payments have reduced malpractice awards by approximately 18%. *Id.*

30. *See* ARIZ. REV. STAT. ANN. § 12-565 (Supp. 1984) (evidence of collateral source payments admissible and accorded such weight as the trier of fact may decide); DEL. CODE ANN. tit. 18, § 6862 (Supp. 1984) (only evidence of collateral benefits received from public sources are admissible); FLA. STAT. ANN. § 768.50 (Supp. 1985) (requires a reduction of damage award by the amount of all collateral source payments); IOWA CODE ANN. § 147.136 (West. Supp. 1983) (damages may not include payments indemnified by any source except from members of claimant's immediate family); KAN. STAT. ANN. § 60-471(a) (Supp. 1984) (any evidence of benefits received from collateral sources excluding payments for insurance are admissible); 40 PA. CONS. STAT. ANN. § 1301.602 (Purdon Supp. 1985) (damage award reduced by any public collateral source of compensation); R.I. GEN. LAWS § 9-19-34 (Supp. 1979) (damage award reduced by sum equal to difference between benefits received minus

to erode the collateral source rule in medical malpractice suits when it provided for a reduction in the amount of the plaintiff's recovery could be reduced by fifty percent for any benefits paid from collateral sources for medical, hospital and nursing charges or lost wages.[31] The 1985 Act further eroded the collateral source rule, reducing the amount of recovery by 100 percent for benefits received for medical, hospital and nursing charges.[32] A reduction in damages, however, is not allowed if there is any right of recoupment for the benefits provided the plaintiff.[33] Moreover, the Act allows any insurance premiums or direct costs the plaintiff paid for two years prior to the injury to offset any reduction in damages.[34]

The sections of the Act pertaining to the abrogation of the collateral source rule can be interpreted according to the interpretation given to the 1975 Act. Both Acts are identical except for the percentage of reduction applied to each category of collateral source payments.[35] The 1975 Act was interpreted to permit monies received from collateral sources arising from legal obligations relating to a particular injury to reduce medical malpractice verdicts.[36] No reduction in the damage award was allowed for benefits or payments the plaintiff received from gratuitous sources.[37] This interpretation would also apply to payments from self insurance.[38] Self-insurance is

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amount paid to secure benefits).

31. ILL. REV. STAT. ch. 110, § 2-1205 (1979). Section 2-1205 provided:

> An amount equal to fifty percent of the benefits provided for medical charges, hospital charges, lost wages, private or governmental disability income programs, which had been paid, or which have become payable to the insured person by any other person, corporation, insurance company or fund in relation to a particular injury shall be deducted from any judgment in an action to recover for that injury based on an allegation of negligence or other wrongful act, not including intentional torts, on the part of a licensed hospital or physician . . . .

Id.

32. ILL. REV. STAT. ch. 110 § 2-1205 (Supp. 1985). This section of the 1985 Act retains the 1975 Act's requirement that the amount of recovery in medical malpractice actions be reduced by fifty percent of the benefits provided for lost wages, through private or government disability income programs. *Id.* However, the 1985 Act increased the 1975 Act's reduction for the amount of recovery for hospital, care taking charges, and medical charges from 50% to 100%. *Id.*

33. *Id.* § 2-1205(2).

34. *Id.* § 2-1205(4). This section was not part of the 1975 Act. Interestingly, another section was also added to the 1985 Act. Section 2-1205(5) provides: "There shall be no reduction for charges paid for medical expenses which were directly attributable to the adjudged negligent acts or omissions of the defendant found liable. *Id.* § 2-1205(3).

35. *See* ILL. REV. STAT. ch. 110, § 2-1205 (Supp. 1985). For a discussion of the percentage reductions applicable to each category of collateral source payments see *supra* note 32 and accompanying text.

36. *See* Longman v. Jasiek, 91 Ill. App. 3d 83, 90, 414 N.E.2d 520, 525 (1980).

37. *Id.*

38. The benefits a plaintiff receives from private or public insurance "arises by reason of a legal obligation." *See Longman*, 91 Ill. App. 3d at 90, 414 N.E.2d at 525. Therefore, any damages recovered by a medical malpractice plaintiff who has public

the practice of setting aside funds to meet losses instead of purchasing an insurance policy.[39] Therefore, the 1985 Act effectively creates two distinct classifications of medical malpractice plaintiffs: plaintiffs who receive benefits from collateral sources arising by reason of a legal obligation and plaintiffs who receive benefits through self insurance or gratuitous sources.[40]

The outcome of the equal protection challenges to the 1985 Act's abrogation of the collateral source rule hinges upon which equal protection standard of review is applied to the Act.[41] Traditionally, courts have used a two-tiered analysis to decide equal protection issues.[42] If a legislative classification involves a fundamental right or a suspect class the strict scrutiny standard is applied.[43] Under strict scrutiny, a legislative classification will be valid only if the state demonstrates a compelling governmental interest in making the classification.[44] When a fundamental right is not implicated, the "rational basis" test is employed.[45] Under this test, equal protec-

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or private insurance would be reduced in accordance with the provisions of § 2-1205 of the Act. ILL. REV. STAT. ch. 110, § 2-1205 (Supp. 1985). However, because the benefits a medical malpractice plaintiff receives from self-insurance or gratuitous sources do not arise by reason of a legal obligation, such plaintiffs are exempted from the requirements of § 2-1205 of the 1985 Act. *Id.*

39. BLACK'S LAW DICTIONARY 1220 (5th ed. 1981).

40. For a discussion of the classification of medical malpractice plaintiffs created by the 1985 Act, see *supra* note 38 and accompanying text.

41. For example, states which have invalidated statutes abrogating the collateral source rule have applied a heightened standard of equal protection. *See, e.g.*, Wentling v. Medical Anesthesia Service, 237 Kan. 503, 701 P.2d 939 (1985) (partial abrogation of collateral source rule violates the equal protection clause of the Kansas and U.S. Constitutions); Carson v. Mauer, 120 N.H. 925, 424 A.2d 825 (1980) (abrogation of collateral source rule violates equal protection clause of N.H. Constitution); Grayely v. Satayatham, 74 Ohio Op. 2d 316, 832 (1976) (abrogation of collateral source rule by Ohio malpractice law violates equal protection clause of Ohio Constitution). *Cf.* Jones v. State Bd. of Med., 97 Idaho 859, 555 P.2d 399 (1976) (applied substantial relationship test, but did not decide merits of equal protection attack). *But see* Eastin v. Bloomfield, 116 Ariz. 576, 570 P.2d 744 (1977) (abrogation of collateral source rule does not violate due process or equal protection clause of U.S. Constitution); Barne v. Wood, 37 Cal. 3d 174, 689 P.2d 446, 207 Cal. Rptr. 816 (1984) (upholding abolishment of collateral source rule against equal protection challenge); Rudolph v. Iowa Methodist Med. Ctr., 293 N.W.2d 55 (Iowa 1980) (special modification of the collateral source rule does not violate equal protection of law). *Crisis: Constitutional Implications*, 55 TEX. L. REV. 759, 771 (1977) [hereinafter cited as Redish]. The United States Supreme Court has used three standards in reviewing state legislation on equal protection grounds. For a discussion of these standards, see generally Gunther, *The Supreme Court, 1971 Term — Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972) [hereinafter cited as Gunther].

42. *See* Gunther, 86 HARV. L. REV. 1 (1972).

43. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (fundamental right); Loving v. Virginia, 388 U.S. 1 (1967) (suspect class).

44. Redish, *supra* note 42, at 770.

45. *See* Dandridge v. Williams, 397 U.S. 471, 485 (1970) (court applied "rational basis" standard in evaluating equal protection challenge); McGowan v. Maryland, 366 U.S. 420, 426 (1961) (utilized "rational basis" test in upholding legislative classifica-

tion is offended only if the legislative classification rest on grounds wholly unrelated to the achievement of the state's legislative purpose.[46] In recent years, the United States Supreme Court has recognized the extreme rigidity of these respective equal protection standards[47] and, accordingly, has employed an intermediate standard of equal protection scrutiny known as the "substantial relationship test."[48] Under this test, the legislative means employed are examined to determine whether the legislative classification has a fair and substantial relationship to the object of the legislation.[49]

The majority of state courts have applied the "rational basis" test in upholding the constitutionality of the medical malpractice legislation.[50] For example, the Iowa Supreme Court in *Rudolph v. Methodist Medical Center*[51] applied the "rational basis" test and

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tion on equal protection grounds).

46. In *Dandridge*, the court articulated the "rational basis" test as follows: "If the classification has some 'rational basis,' it does not offend the constitution simply because the classification is not made with mathematical niceties because in practice it results in some inequality." *Dandridge*, 397 U.S. at 471.

47. *See* Redish, *supra*, note 41, at 771.

48. The Supreme Court has applied the "substantial relationship" test in cases in which the legislative classification involved gender or illegitimacy. *See, e.g.*, Lalli v. Lalli, 439 U.S. 259 (1979) (court applied the "substantial relationship" test to uphold a legislative classification based upon illegitimacy); Craig v. Boren, 429 U.S. 190 (1976) (the "substantial relationship" test was applied to gender-based discrimination in an Oklahoma statute which regulated the sale of alcoholic beverages). *See also* Reed v. Reed, 404 U.S. 71 (1977) (the "substantial relationship" test was applied in holding that the Idaho probate code which discriminated against women violated the equal protection clause of the United States Constitution).

This intermediate standard has also been termed the "means scrutiny" test. *See* Gunther, *supra* note 42, at 39. *See also* Jones v. State Bd. of Med., 97 Idaho 859, 555 P.2d 399 (1976) (the term "means scrutiny" was used to describe the "substantial relationship" test). Under the "substantial relationship" test, a court does not defer to the legislature's judgment that a certain classification will further the object of the legislation. Rather, a court must closely scrutinize the factual assumptions underlying the relationship between the classification or means and the legislative purpose or ends. Redish, *supra* note 41, at 772.

49. *See* Reed v. Reed, 404 U.S. 71 (1977) (statement concerning the "substantial relationship" test). *But see* Redish, *supra* note 41, at 773 (questioned the continued viability of the "substantial relationship" test).

50. *E.g.*, Eastin v. Broomfield, 116 Ariz. 576, 570 P.2d 744 (1977) (court utilized the "rational basis" test in upholding medical malpractice legislation against equal protection challenge); Am. Bank & Trust Co. v. Community Hosp., 36 Cal. 3d 359, 683 P.2d 670, 240 Cal. Rptr. 671 (1984) ("rational relationship" standard applied to periodic payment of damage provisions of medical malpractice statute to decide equal protection issue); Everett v. Goldman, 359 So. 2d 1256 (La. 1978) (court employed the "rational basis" test to determine whether medical malpractice statute violates equal protection of law); Attorney General v. Johnson, 282 Md. 274, 385 A.2d 57 (1978) (court applied the traditional "rational basis" test in holing that medical malpractice statute did not violate equal protection of law), *appeal dismissed for want of substantial federal question*, 439 U.S. 805 (1978).

51. 293 N.W.2d 550 (Iowa 1980). *Rudolph* involved a medical malpractice action that resulted in a verdict for the plaintiff of over $500,000. The trial court denied the defendant's motion to admit evidence of the plaintiff's losses for medical to admit evidence of the plaintiff's losses for medical bills and wages which were indemnified

upheld the partial abrogation of the collateral source rule.[52] A growing majority of jurisdictions, however, have applied either strict scrutiny or the substantial relationship test to invalidate medical malpractice legislation on equal protection grounds.[53] Applying the "substantial relationship" test, the Kansas Supreme Court in *Wentling v. Medical Anesthesia Services*[54] invalidated a Kansas

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by insurance. *Id.* at 557. The trial court held that the Iowa statute which required the damages awarded in medical malpractice cases could not include losses indemnified by third parties, violated the equal protection clauses of the Kansas and United States Constitutions. *Id.*

52. The Iowa statute in *Rudolph* provided:

> In an action for damages for personal injury against a physician and surgeon . . . based on the alleged negligence of the practitioner . . . the damages awarded shall not include actual economic losses incurred or to be incurred in the future by the claimant by reason of the personal injury . . . to the extent that those losses are replaced or are indemnified by insurance, or by governmental employment, or service benefit programs or from any other source except the assets of the claimant or the members of the claimant's immediate family.

IOWA CODE ANN. § 147.136 (West Supp. 1983). In applying the "rational basis" test to the legislation, the *Rudolph* court considered whether the purpose of the legislative classification was rationally related to the achievement of the state's objective. *Rudolph*, 293 N.W.2d at 559. The *Rudolph* court reasoned that the objecture's purpose in modifying the collateral source rule was not to reduce medical malpractice insurance premiums. *Id.* at 558. Thus, under the "rational basis" test, the *Rudolph* court reasoned that reducing the size of malpractice awards by any insurance benefits the plaintiff received for the same injury was rationally related to the legislative objective. *Id.* at 559. Therefore, the *Rudolph* court concluded that the Iowa statute did not violate the equal protection clause of the United States Constitution. *Id.*

53. *E.g.*, Jones v. St. Bd. of Med., 97 Idaho 859, 555 P.2d 399, 400 (1976) (the "substantial relationship" test was applied to decide an equal protection challenge to medical malpractice statutes), *cert denied*, 431 U.S. 914 (1977); Wentling v. Anesthesia Servs., No. 56-984, slip op. Kansas (1985) (court employed the "substantial relationship" test in invalidating a Kansas statute abrogating the collateral source rule in medical malpractice cases); Carson v. Mauer, 120 N.H. 925, 424 A.2d 825, 831 (1980) (the "substantial relationship" test was used to invalidate the periodic payment provision of a medical malpractice statute). *Cf.* Arnenson v. Olson, 270 N.W.2d 125, 133 (N.D. 1978) (court applied a test similar to the "substantial relationship" test in holding that limitations on damages in a medical malpractice action violate the equal protection clauses of both state and federal constitutions); Boucher v. Sayeed, 459 A.2 d 87, 91 (R.I. 1983) (the "rational basis" test was employed in invalidating medical malpractice statute).

54. Wentling v. Medical Anesthesia Service, 237 Kan. 503, 701 P.2d 939 (1985). *Wentling* was a wrongful death action based upon the negligence of a nurse employed by the defendants. *Id.* The nurse administered a spinal anesthetic without the presence of a doctor. The patient, a pregnant woman 22 years of age, went into a coma and died several months later. *Id.* The defendants admitted liability and a jury awarded the plaintiff, the victim's husband, $768,000. *Id.*

The Kansas statute in *Wentling* provided in part that:

> [I]n any action for damages for personal injuries or death arising out of the rendering of or the failure to render professional services by any health care provider, evidence of any reimbursement or indemnification received by a party for damages sustained from such injury or death, excluding payments for insurance . . . shall be admissible for consideration by the trier of fact . . . .

KAN. STAT. ANN. § 60-471(a) (Supp. 1984).

The Kansas statute, like the Iowa statute in *Rudolph*, discriminated between classes of medical malpractice plaintiffs based upon whether they were covered by

statute which partially abrogated the collateral source rule. Thus, the constitutionality of this type of legislation turns on which standard of review a state court applies.

Illinois courts are not restricted to a federal standard when interpreting the Illinois constitution.[55] Therefore, Illinois courts are free to adopt the "substantial relationship" test as the standard of review to be applied to the Act. In fact, Illinois precedents support a higher level of judicial scrutiny. Traditionally, Illinois courts have afforded greater protection than the United States Supreme Court for discriminatory regulations that affect property and contract interests.[56] Illinois courts have often used the equal protection clause and the prohibition against special legislation of the Illinois constitution to invalidate discriminatory economic regulations.[57] In contrast, the United States Supreme Court has invalidated only one economic regulation on equal protection grounds since 1937.[58] In those

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insurance. *See id.* at 60-471(a); IOWA CODE ANN. § 147.136 (Supp. 1983). These statutes differed in that the Kansas statute's effect was to reduce the plaintiff's recovered by any gratuitous source of compensation the plaintiff received, whereas the Iowa statute reduced recovery by any insurance the plaintiff received. *Id.* The *Wentling* court found that the Kansas legislature's purpose in enacting malpractice reform was to reduce malpractice insurance premiums by limiting the size of medical malpractice verdicts. *Wentling*, 701 P.2d at 941. However, using the heightened substantial relationship standard of equal protection, the *Wentling* court reasoned that the statute's classification which discriminated between medical malpractice plaintiffs that received benefits from insurance, and those who received benefits from gratuitous sources did not substantially further the legislature's objective to reduce medical malpractice verdicts. *Id.* Thus, under the substantial relationship analysis, the Kansas medical malpractice statute denied certain malpractice plaintiffs the equal protection of law.

55. *See* Carson v. Mauer, 120 N.H. 925, 932, 424 A.2d 825, 831 (1980) (states are free to provide more rights than the United States Constitution).

56. *See* Turkington, *Equal Protection of the Laws in Illinois*, 25 DEPAUL L. REV. 385, 410 (1976) [hereinafter cited as Turkington]. Turkington has argued that there is a dramatic difference in the scope of protection between the federal and Illinois Constitutions in the area of discriminatory exercises of state police power that affect property and contract interests. *Id.* at 410.

57. *See, e.g.*, Wright v. Cent. DuPage Hospital Ass'n, 63 Ill. 2d 313, 330, 347 N.E.2d 736, 743 (1976) (invalidating as special legislation economic regulation of damages in medical malpractice actions); Grace v. Howelett, 51 Ill. 2d 478, 487, 283 N.E.2d 474, 479 (1972) (held that regulation of amount of damages recoverable in a negligence action violates the protection against special legislation of the Illinois Constitution); Fiorito v. Jones, 39 Ill. 2d 531, 540, 236 N.E.2d 698, 704 (1968) (invalidating an economic regulation on equal protection grounds, which taxed certain occupations while excluding others); Grasse v. Dealers Transport Co., 412 Ill. 179, 200, 106 N.E.2d 124, 135 (1952) (held that a workers' compensation statute which discriminated between types of employees who could sue third-party tortfeasors violated the equal protection of law). *Cf.* People v. McCabe, 49 Ill. 2d 338, 351, 275 N.E.2d 407, 414 (1971) (invalidated narcotic drug act because it classified marijuana as a hard drug).

58. Turkington, *supra* note 56, at 410. This case is Morey v. Doud, 354 U.S. 457 (1957) (court held unconstitutional a statute which exempted American Express money orders from certain licensing regulations), *reversed*, New Orleans v. Dukes, 427 U.S. 297 (1976).

cases where the Illinois Supreme Court invalidated economic regulations, the court examined whether the classification bore a "reasonable relationship to the object of the legislation."[59] While the language of this standard is similar to the federal standard which requires that the classification must be rationally related to the legislative objective,[60] the Illinois Supreme Court has applied the standard more vigorously than the Supreme Court.

For example, in *Fiorito v. Jones*,[61] the court invalidated, on equal protection grounds, an economic regulation which taxed certain occupations and services while excluding others, namely physicians. While there was no evidence to indicate the legislature's purpose for excluding certain occupations from the tax, the *Fiorito* court narrowly interpreted the overall objective of the Act as a revenue measure and concluded that excluding certain professions from the tax did not reasonably further this purpose.[62] This narrow reading of the legislative objective with close scrutiny of the legislative classifications or means is in sharp contrast to the Supreme Court's application of the "rational basis" test.[63] The Supreme Court gives great deference to the legislature when interpreting the legislative purpose of these classifications.[64] Illinois' stricter application of the "rational basis" test illustrates that Illinois courts are amendable to adopting heightened equal protection scrutiny to protect certain economic interests from discriminatory treatment.

This amendability is also apparent in Illinois cases decided under the prohibition against special legislation in the Illinois Constitution.[65] Even though Illinois has applied the "rational basis" test

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59. *E.g.*, Fiorito v. Jones, 39 Ill. 2d 531, 536, 236 N.E.2d 698, 702 (1968) (classifications must bear reasonable relationship to the object of the legislation).

60. *See* New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (court upheld an economic regulation against an equal protection challenge because the classification was rationally related to a legitimate state interest); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976) (court held that legislative classification was rationally related to the legislative objective).

61. 39 Ill. 2d at 531, 236 N.E.2d at 698.

62. *See id.*

63. For cases in which the Supreme Court has applied the "rational basis" test see *supra* notes 45-46 and accompanying text.

64. *See* McGowan v. Maryland, 366 U.S. 420, 426 (1961) (in evaluating equal protection challenges, state legislatures are presumed to have acted constitutionally). The Supreme Court even searches for conceivable objectives which might have motivated the legislature in establishing certain classifications especially when the purpose or objective is not expressed. *Id.* In *McGowan*, the Supreme Court stated that "statutory discrimination will not be set aside if any statement of fact can be reasonably conceived to justify it." *Id.*

65. *See, e.g.*, Wright v. Cent. DuPage Hosp. Ass'n, 63 Ill. 2d 313, 330, 347 N.E.2d 736, 743 (1976) (invalidated as special legislation limitations on damages in medical malpractice cases); Grace v. Howelett, 51 Ill. 2d 478, 487, 283 N.E.2d 474, 479 (1972) (applied a heightened standard of judicial scrutiny in invalidating an economic regulation as special legislation).

interchangeably when considering certain equal protection issues or special legislation challenges, Illinois courts have adopted a heightened level of scrutiny, under the guise of special legislation, whenever a legislative classification impairs certain state created rights.[66] The Illinois Supreme Court, for example, in *Grace v. Howelett*,[67] invalidated a no-fault insurance code that placed discriminatory limitations on the right to recover for pain and suffering in negligence actions arising out of the use of a motor vehicle.[68] In *Grace*, the plaintiff argued that the legislative classifications violated the equal protection and the special legislation clauses of the Illinois Constitution.[69] The *Grace* court refused to apply the "rational basis" test, determining that the proper test was whether a "general law can be made applicable."[70] In other words, if the classification contributes to the harm the legislation was intended to eliminate, a general law applicable to all classifications contributing to the harm can be made available.[71] Under this heightened standard of scrutiny, the no-fault insurance code was held to constitute a special law in violation of the Illinois constitution.[72]

Additionally, in *Wright v. Central DuPage Hospital Association*,[73] the Illinois Supreme Court applied a heightened standard of scrutiny in evaluating the constitutionality of the 1975 Act.[74] The 1975 Act established limitations on the amount of recovery for medical malpractice injuries.[75] The *Wright* court scrutinized the 1975 Act to determine whether the 1975 Act provided the victims of medical malpractice a "quid pro quo"[76] in return for limitations on their common law right to full recovery of damages.[77] Under the "quid pro quo" standard of scrutiny, the legislature cannot arbitrarily limit a common law right unless it provides a reasonable substitute

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66. *See* Anderson v. Wagner, 79 Ill. 2d 295, 315-16, 402 N.E.2d 560, 569 (1979) (arguing that the Illinois Supreme Court has applied equal protection standards when evaluating special legislation issues).

67. 51 Ill. 2d 478, 283 N.E.2d 474 (1972).

68. *Id.* at 487, 283 N.E.2d at 479.

69. *See id.* at 485, 283 N.E.2d at 478.

70. *Id.* at 487, 283 N.E.2d at 479.

71. Turkington, *supra* note 56 at 415.

72. *See Grace*, 51 Ill. 2d at 487, 283 N.E.2d at 479.

73. 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

74. *Id.* at 329-30, 347 N.E.2d at 74. For a discussion of *Wright* see generally Note, *Illinois Supreme Court Review — Constitutional Law — Medical Malpractice Statute Declared Unconstitutional*, 1977 U. ILL. L.F. 298. For a discussion of other provisions of the 1975 Act invalidated in *Wright*, see *infra* note 103 and accompanying text.

75. ILL. REV. STAT. ch. 70, § 101 (1975).

76. For a discussion of *quid pro quo* see *infra* note 78 and accompanying text.

77. The *Wright* court noted that full recovery of damages in a medical malpractice action was a common law right available in Illinois since 1860. *Wright*, 63 Ill. 2d at 327, 347 N.E.2d at 742.

in return.[78] Because the *Wright* court found that the 1975 Act did not provide a sufficient "quid pro quo," the 1975 Act was held to constitute a special law in violation of the Illinois Constitution.[79]

The *Wright* court's "quid pro quo" analysis highlights the court's close examination of the legislative means.[80] This close examination of legislative means is much greater than under the deferential "rational basis" standard which does not require any "quid pro quo," but merely requires that the legislative means be rationally related to the object of the legislation.

Applying standards which more closely resemble the "substantial relationship" test than the "rational basis" test, the decisions of *Grace* and *Wright* illustrate that the Illinois Supreme Court closely scrutinizes legislative classifications which infringe upon certain common law rights. Although *Grace* and *Wright* were decided under the prohibition against special legislation of the Illinois Constitution, the Illinois Supreme Court has applied the same level of scrutiny when considering challenges to legislation on equal protection grounds.[81] Thus, the adoption of the "substantial relationship" test would be consistent with the judicial policy of using the same level of scrutiny for both equal protection and special legislation challenges. In view of the scope of protection Illinois has afforded the right to full recovery of damages in medical malpractice actions Illinois should adopt the "substantial relationship test" as the equal protection standard of review to be applied to the 1985 medical malpractice Act.[82]

Application of the "substantial relationship test" to the Act will require judicial inquiry into whether the separate classification of

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78. *Id.* "Quid pro quo" literally means something given for something else. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (Marrian & Webster 1983). The *quid pro quo* doctrine in the law requires that before altering or abolishing any pre-existing common law right, the legislature must provide a reasonable alternative or "quid pro quo." *See* Redish, *supra* note 42, at 785. The *quid pro quo* doctrine has its origins in the seminal case of New York Central Railroad v. White, 243 U.S. 188 (1917). Redish, *supra* note 42, at 785.

79. *Wright*, 63 Ill. 2d at 329, 347 N.E.2d at 743.

80. *See id.*, 63 Ill. 2d at 327-28, 347 N.E.2d at 743.

81. *See* Anderson v. Wagner, 79 Ill. 2d 295, 315-16, 402 N.E.2d 560, 569 (1979) (applied the same standard interchangeably when considering equal protection and special legislation challenges).

82. Other jurisdictions have also recognized a compelling reason for applying the "substantial relationship" test whenever a common law right is involved. For example, in Carson v. Mauer, the New Hampshire Supreme Court applied the "substantial relationship" test to invalidate, on equal protection grounds, a state statute which abolished the common law collateral source rule. 120 N.H. 925, 424 A.2d 825 (1980). The *Carson* court reasoned that because the right to recover for bodily injuries was not a fundamental right, strict scrutiny was not appropriate. *Id.* at 932, 424 A.2d at 830. Nevertheless, the *Carson* court recognized that this common law right was sufficiently important to warrant greater protection against state action than other forms of economic regulation. *Id.*

medical malpractice plaintiffs bears a substantial relationship to the object of the legislation.[83] The legislative purpose of the 1985 Act is to lower medical malpractice insurance premiums by reducing the size of medical malpractice verdicts.[84] The Act creates a separate classification of medical malpractice plaintiffs whose verdicts are not reduced by collateral source payments from self insurance and gratuitous sources.[85] If collateral source payments from self insurance and gratuitous sources were considered in reducing the amount of the verdict, the size of the verdict would be reduced. This reduction would be in accord with the purpose of the Act.[86] The Act, is therefore, is under-inclusive. The 1985 Act creates a classification that contributes to the harm the legislation was intended to cure, because no reduction in the verdict is allowed for benefits the plaintiff receives from self insurance or gratuitous sources. Therefore, because the separate classification of medical malpractice victims does not have a fair and substantial relationship to the purpose of the legislation, the 1985 Act violates the victim's right to equal protection of the law under the Illinois Constitution.

Periodic Payment of Damages

Another plainly unconstitutional aspect of the 1985 Act is the requirement of periodic payment of damages in medical malpractice cases. Under the common law, a judgment creditor in a negligence action has the right to recover all past and future damages in a lump sum payment at the conclusion of trial.[87] The 1985 Medical Malpractice Act provides for periodic payment of future damages when the amount of damages exceeds $250,000 and alters this common law right in medical malpractice suits.[88] Thus, in serious cases of medical malpractice, injured plaintiffs will receive only a fraction of their future damages at the time of judgment.[89]

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83. Reed v. Reed, 404 U.S. 71, 76 (1971).

84. *See* Task Force on Medical Malpractice, *supra* note 2, at 3.

85. For a discussion of medical malpractice plaintiffs whose verdicts are not reduced by collateral source payments see *supra* note 38 and accompanying text.

86. The author does not imply or suggest that a reduction in the verdict by collateral source benefits received by gratuitous sources or self insurance is an appropriate legislative response to the objective of reducing medical malpractice premiums.

87. *See* 2 Harper & James, The Law of Torts, § 25.2 (1956).

88. Ill. Rev. Stat. ch. 110, § 2-1705 (1985). Section 2-1705 requires that in order to invoke the periodic payment provisions of the act, a party must make an effective election within 60 days before trial. *Id.* at § 2-1705(b). If the electing party is responding to a claim of over $250,000 in future damages shows that security can be provided for both past and future damages for the amount of the claim or $500,000, whichever is less, the election is effective. *Id.* at § 2-1705(c)(ii). Section 2-1205(c)(i) provides that all parties may consent to the periodic payment provisions of the Act even if the amount of future damages is less than $250,000. *Id.* at § 2-1205(c)(i).

89. Section 2-1708(5) requires the judge to calculate the "equivalent lump sum value" of all future damages and award, at the end of trial, that portion of the

The legislative purpose of the periodic payment provision is to reduce medical malpractice insurance premiums through a reduction in the cost of providing insurance.[90] The insurers' costs will be reduced because the insurance company will be able to invest the future portion of the victim's damage award and pay the victim out of the return on that investment.[91] Denying the victim the opportunity to invest the future portion of the damages, however, places seriously injured victims of medical malpractice in jeopardy of not being able to meet their future financial needs.[92] The Act provides that once the periodic payments are established the installments may not be adjusted in any manner.[93] Although the trier of fact may consider the effect of inflation[94] in determining future damages,[95] predicting the purchasing power of the dollar many years in the future is speculative at best. A lump sum payment of the future damages enables the victim of medical malpractice to invest the funds in secure financial instruments that will provide returns sufficient to keep pace with inflation.[96] However, because the periodic payments are frozen

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equivalent lump sum value which does not exceed $250,000. ILL. REV. STAT. ch. 110, § 2-1708(c) (1985). The "equivalent lump sum value" is determined by applying a discount factor of six percent to all future economic damages. *Id.* at § 2-1712. In other words, the present value of the future economic damages is determined. Next, the present value of future economic damages is added to the value of all non-economic damages without discounting the non-economic damages to present value. *Id.* The sum of these two numbers equals the "equivalent lump sum value of all future economic damages." The formula may be expressed as follows: The equivalent lump sum value of future damages (E.L.S.) equals future non-economic damages plus future economic damages discounted to present value by six percent.

90. *See* TASK FORCE ON MEDICAL MALPRACTICE, *supra* note 2, at 3.

91. American Bank & Trust Co. v. Comm. Hosp., 36 Cal. 359, 367, 683 P.2d 670, 678 (1984).

92. *See* Carson v. Mauer, 120 N.H. 925, 940, 424 A.2d 825, 838 (1980). *But see* American Bank & Trust Co. v. Comm. Hosp., 36 Cal. 3d 359, 366, 683 P.2d 670, 675 (1984) (periodic payment of future damages insures that money will be available to meet expenses or losses in the future).

93. ILL. REV. STAT. ch. 110, § 2-1709 (1985). *Contra* FLA. STAT. ANN. § 768.51 (West Supp. 1985) (court may adjust the periodic payments in the future). *Cf.* DEL. CODE ANN. tit. 18 § 6862 (Supp. 1984) (each periodic payment includes a payment of interest on the unpaid balance).

94. *See* Milis v. Chgo. Transit Auth., 1 Ill. App. 2d 236, 244, 117 N.E.2d 401, 404 (1954) (decline in the value of the purchasing power of the dollar must be considered in determining damages).

95. Section 2-1707(a) provides that "future damages must be calculated by the trier of fact without discounting future damages to present value." ILL. REV. STAT. ch. 110, § 2-1707(a) (1985). Section 2-1706 requires that the trier of fact make "special findings" specifying the amount of any past damages and itemizing the amount of future damages in the following categories: (1) medical and other costs of health care; (2) all other economic costs; (3) non-economic loss. *Id.* at § 2-1706. This section also requires the trier of fact to determine the number of years each element of these damages will accrue. *Id.* The periodic payments will be made for that number of years. *Id.*

96. *See Carson*, 120 N.H. at 940, 424 N.W. at 838. For example, the injured malpractice victim could invest a lump sum damage award into certificates of deposit or in a money market account of a commercial bank which are guaranteed by the

at the time of judgment, the periodic payment provision of the Act shifts the entire risk of underestimating inflation to the injured victim.[97] The Act, therefore, unreasonably discriminates against the medical malpractice victim in favor of the negligent tortfeasor.

Moreover, the Act also discriminates against the most gravely injured victims of medical malpractice in favor of those victims who suffer lesser injuries.[98] In fact, the Act creates two classifications of medical malpractice plaintiffs: plaintiffs whose future damages are $250,000 or less and plaintiffs whose injuries are greater than $250,000.[99] Although the Illinois Supreme Court has yet to decide the constitutionality of the Act, Illinois precedents cast serious doubt on the validity of the periodic payment provisions of the Act.[100]

The Illinois Supreme Court has addressed the constitutionality of medical malpractice reform legislation.[101] In *Wright v. Central DuPage Hospital Association*,[102] the court invalidated the 1975 medical malpractice act which created similar classifications of med-

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Federal Deposit Insurance Corp. Another investment alternative would be to purchase a variable rate annuity from a secure and established insurance company.

97. *See* American Bank & Trust v. Comm. Hosp., 36 Cal. 3d 359, 375, 683 P.2d 670, 683 (1984) (Mosk, J., dissenting).

98. Because of the $250,000 threshold of future damages necessary to "trigger" an election for periodic payments, typically only malpractice cases with damages in excess of $600,000 will be subject to the periodic payment provisions of the Act. Remarks of Eugene I. Pavalon, Illinois Trail Lawyers Association Seminar on Medical Malpractice (August 10, 1985). Thus, only very seriously injured malpractice victims will be affected by the 1985 Act.

99. *See* ILL. REV. STAT. ch. 110, § 2-1705 (1985).

100. *See* Wright v. Cent. DuPage Hospital Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976) (invalidated the medical malpractice Act of 1975). Precedents of other states also cast doubt on the constitutionality of the periodic payment provisions of the 1985 Act. *E.g.*, Carson v. Mauer, 120 N.H. 925, 424 A.2d 825 (1980) (periodic payment of damages over $50,000 in medical malpractice cases violates equal protection of the law). *Cf.* Wentling v. Med. Anesthesia Serv. Inc., No. 56-984 slip op. (Kan. 1985) (classification of medical malpractice plaintiffs by statute abrogating collateral source rule based upon whether plaintiffs are covered by an insurance policy violates equal protection clauses of the Kansas and United States Constitutions); Armenson v. Olson, 270 N.W.2d 125 (N.D. 1978) (legislative classification imposing a $500,000 limitation on damages in medical malpractice actions violates the equal protection clause of the North Dakota Constitution). *Contra*, American Bank & Trust Co. v. Comm. Hosp., 236 Cal. 3d 359, 683 P.2d 670 (1984) (periodic payment provision of medical malpractice statute does not deny equal protection of law); State *ex rel.* Strykoski v. Wilkie, 81 Wis. 2d 491, 261 N.W.2d 434 (1978) (periodic payment of future damages over $225,000 in medical malpractice suit was not unreasonable nor a denial of equal protection of the law).

101. *See Wright*, 63 Ill. 2d 313, 347 N.E.2d 736. Although the Illinois Supreme Court has not addressed the constitutionality of the 1985 Act, a constitutional challenge to the 1985 Act was filed in Cook County Circuit Court four hours after the governor signed House Bill 1604. *See* Bernier v. Burris, No. 85-L-30776 (Cir. Ct. Cook County 1985).

102. 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

ical malpractice plaintiffs.[103] The 1975 Act established limitations on recovery for medical malpractice injuries of $500,000.[104] The plaintiff in *Wright* contended that the 1975 Act unreasonably discriminated against seriously injured victims of medical malpractice whose damages exceeded the statutory limitation in favor of those victims with lesser injuries.[105] The *Wright* court agreed, holding that the $500,000 statutory limitation was a "special law" in violation of section 13, Article 4 of the Illinois Constitution.[106]

In reaching its decision, the *Wright* court's analysis focused on whether the disadvantaged class of medical malpractice plaintiffs received a "quid pro quo" in return for relinquishing their common law right to full damage recovery.[107] The *Wright* court distinguished the malpractice act of 1975 from workers compensation statutes which also placed limitations on the amount of recovery.[108] The court reasoned that workers compensation statutes provided a "quid pro quo": seriously injured workers gave up their common law rights to full recovery of damages in a negligence action in return for em-

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103. *Id.* at 330, 347 N.E.2d at 743. In addition to limits on the amount of damages in medical malpractice actions, the 1975 Act created review panels to screen medical malpractice cases. ILL. REV. STAT. ch. 110, §§ 58.3 — 58.9 (1975). These review panels were almost identical to the review panels created by the 1985 Act. *See* ILL. REV. STAT. ch. 110, §§ 2-101 — 2-1019 (1985). The review panel procedures of the 1975 Act were invalidated on the grounds that they violated the separation of powers requirement and the right to trial by jury under the Illinois Constitution. Wright v. Cent. DuPage Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976). *Cf.* Aldana v. Holub, 381 S.2d 231 (Fla. 1980) (review panels violate due process of law because the panels are unworkable in their practical operation); Mattos v. Thompson, 491 Pa. 385, 421 A.2d 190 (1980) (operationally, review panels violate right to trail by jury); Boucher v. Sayeed, 459 A.2d 87 (R.I. 1983) (applied the strict scrutiny standard to invalidate review panels on equal protection grounds). *Contra* Johnson v. St. Vincent Hosp. Inc., 404 N.E.2d 585 (Ind. 1980) (creation of review panels in medical malpractice actions do not infringe on right to trial by jury). For a discussion of review panels in medical malpractice suits, see generally Comment, *Medical Malpractice Screening Panels: A Judicial Evaluation of Their Practical Effect*, 42 U. PITT. L. REV. 939 (1981).

104. ILL. REV. STAT. ch. 70, § 101 (1975), *held unconstitutional in*, Wright v. Cent'l Du Page Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976). This section provided that: "In all actions in which the plaintiff seeks damages on account of injuries by reason of medical, hospital, or other malpractice, the maximum recovery to which the plaintiff may be entitled or for which judgment may be rendered for any plaintiff is $500,000." *Id.* For a discussion of the constitutionality of limitations on damages in medical malpractice, see, e.g., Redish, *supra* note 42 at 759 (discussing equal protection and due process issues surrounding limitations on damages); Taylor & Shields, *The Limitation on Recovery in Medical Malpractice Negligence Causes in Virginia*, 16 U. RICH. L. REV. 799, 848 (1982) (arguing that limitation on recovery in medical malpractice cases violates equal protection of law); Note, *Constitutionality of the Indiana Malpractice Act: Reevaluated*, 19 VAL. U. L. REV. 493 (1985) (arguing for a heightened standard of judicial scrutiny when deciding the constitutionality of limitations on damages).

105. *Wright*, 63 Ill. 2d at 325, 347 N.E.2d at 741.

106. *Id.* at 330, 347 N.E. at 743.

107. *Id.* at 327-28, 347 N.E. at 742.

108. *Id.*

ployer liability without regard to fault.[109] The *Wright* court rejected the defendant's contention that the medical malpractice act of 1975 provided a societal "quid pro quo" of lower medical costs for all patients sufficient to satisfy the unequal treatment of medical malpractice victims.[110] Although the *Wright* court expressly refrained from holding that the legislature is always required to provide a "quid pro quo" when abolishing a common law right, the holding in *Wright* illustrates that a common law right denied arbitrarily, without an accompanying "quid pro quo," constitutes a special law in violation of the Illinois Constitution.[111]

Applying the rationale of *Wright*, the periodic payment provisions of the 1985 Act constitutes a special law in violation of the Illinois Constitution. The 1985 Act denies the most seriously injured medical malpractice victims their common law right to a lump sum payment for their damages.[112] Like the statute invalidated in *Wright*, the 1985 Act denies this right without any concomitant "quid pro quo."[113] Malpractice victims with future damages over $250,000 are burdened with the entire risk that inflation and other unforeseen consequences will render the periodic payments inadequate to meet their needs. Yet, these victims derive no advantages in return.[114] Moreover, the benchmark of $250,000 for determining which medical malpractice victims must submit to the periodic payment of damages is arbitrary.[115] The amount was chosen as a legislative compromise and thus bears no substantial relationship to the legislative purpose of the Act.[116] Because the periodic payment provisions of the 1985 Act arbitrarily denies seriously injured malpractice victims their right to lump sum payment of damages without an

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109. *Wright*, 63 Ill. 2d at 326, 347 N.E.2d at 742. For a discussion of the *quid pro quo* doctrine see *supra* note 78 and accompanying text.

110. *Id.*

111. The Illinois Constitution provides that: "The General Assembly shall pass no special law or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter of judicial determination." ILL. CONST. art. IV, sec. 13.

112. A judgment creditor in a malpractice action has the right to recover all past and future damages in a lump sum payment at the time of judgment. *See* HARPER & JAMES, THE LAW OF TORTS, § 25.2 (1956).

113. For a discussion of the *quid pro quo* doctrine see *supra* note 78 and accompanying text.

114. Critics argue that the periodic payment provisions provide the victim of medical malpractice the benefit that they will always have monthly income available to meet their financial needs. State *ex rel.* Strykowski v. Wilkie, 81 Wis. 2d 491, 510, 261 N.W.2d 434, 443 (1978). However, an injured victim could receive the same benefit by purchasing a variable rate annuity which would provide regular monthly income with a built-in hedge against inflation.

115. *See Wright*, 63 Ill. 2d at 330, 347 N.E.2d at 743 ($500,000 limit on damages in medical malpractice actions held to be arbitrary).

116. Senate Bill 959 and House Bill 1600 sponsored by the Illinois State Medical Society required that all verdicts in excess of $50,000 be paid periodically.

accompanying "quid pro quo," the 1985 Act constitutes a special law in violation of the Illinois Constitution.

The constitutional infirmities of the 1985 Act can be cured if the Act was amended so as to conform with the provisions of the Model Periodic Payment of Judgment Act ("Model Act").[117] The Model Act was developed by a national conference of commissioners on uniform state law to assist state legislatures in developing a periodic payment system in tort actions.[118] Section 7(a) of the Model Act requires future periodic payments to be adjusted to take into account fluctuations in the purchasing power of the dollar.[119] The annual percentage adjustment in periodic payments is based on the discount rate for United States 52 week treasury bills.[120] Because the discount rate on treasury bills mirrors the national rate of inflation, victims of medical malpractice are assured that periodic payments will be adequate to meet their future needs.[121] Although the Model Act abrogates the common law right to a lump sum payment of damages, the Model Act is constitutional because the victim of medical malpractice receives an adequate "quid pro quo" in return.[122] Under a lump sum payment, any interest the plaintiff earns is subject to federal income tax.[123] The Model Act, however, exempts from taxation the interest applied to adjust the periodic payments.[124] This benefit is sufficient to satisfy the requirements of *Wright* because the plaintiff's lost opportunity to earn a higher rate of return than that available under United States Treasury Bills is offset by the tax savings received under the deferred payment provisions of the Model Act. If the provisions of the Model Act were adopted, the 1985 Act's provisions regarding periodic payments would be constitutional.

CONSTRAINTS ON ATTORNEY CONTINGENCY FEES

Another pernicious aspect of the Act is the establishment of

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117. 14 U.L.A. 20 (Supp. 1980).

118. Plant, *Periodic Payment of Damages For Personal Injuries*, 44 LA. L. REV. 1327, 1333 (1984) [hereinafter cited as Plant].

119. MODEL PERIODIC PAYMENT OF JUDGMENTS ACT, § 7(a), (b) (Supp. 1985).

120. *See* Plant, *supra* note 118 at 1335.

121. *Id.*

122. For a discussion of the "quid pro quo" doctrine see *supra* note 78 and accompanying text. *See also* Wright v. Cent. DuPage Hosp. Ass'n, 63 Ill. 2d 316, 347 N.E.2d 736, 742-43 (1976).

123. Generally, although the lump sum damage award is not included in the taxpayers gross income, any interest income earned from investing the damage award is taxable. Plant, *supra* note 118 at 1329 (citing I.R.C. § 140(a)(2) (1982)).

124. The Internal Revenue Code was amended to exclude the periodic payments comprised of the principal amount from the settlement and the investment income from the taxpayers gross income. Plant, *supra* note 118 at 1330.

limitations on attorney contingency fees[125] in medical malpractice actions.[126] These limitations do little to further the legislative purpose for which they were enacted.[127] Moreover, the limitations on attorney contingency fees violate the medical malpractice plaintiff's first amendment right to petition, interfering with their ability to obtain adequate legal representation.[128]

In medical malpractice suits, virtually all plaintiffs exercise their constitutional right to counsel under a contingency fee system.[129] Under a contingency fee system, attorneys are compensated based on a percentage of any award obtained for the plaintiff's injury.[130] Thus, attorneys receive no compensation for their efforts if a

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125. Section 2-1114 establishes a sliding scale for contingent fees in medical malpractice actions. ILL. REV. STAT. ch. 110, § 2-1114 (1985). This section provides that "the total contingent fee for plaintiff's attorney or attorneys shall not exceed . . . 33⅓% of the first $150,000 of the sum recovered; 25% of the next $850,000 of the sum recovered; and 20% of any amount recovered over $1,000,000 of the sum recovered." *Id.* at § 2-1114(a).

126. Many states have enacted some form of limitations on attorneys contingent fees. *E.g.*, ARIZ. REV. STAT. ANN. § 12-568 (Supp. 1985) (court determined reasonableness of attorneys fees); DEL. CODE ANN. tit. 18, § 6862 (Supp. 1984) (35% of the first $100,000 of the sum recovered, 25% of the next $100,000 of the sum recovered and 10% of any sum over $200,000); FLA. STAT. ANN. § 768.56 (Supp. 1985) (court awards reasonable attorneys fees to the prevailing party); HAWAII REV. STAT. § 671-2 (Supp. 1985) (reasonable attorneys fees approved by court); IDAHO CODE § 32-4213 (Supp. 1984) (attorney fees limited to 40% of amount recovered plus any amount over 40% presumed unreasonable); IND. CODE ANN. § 16-9.5-5-1 (Supp. 1985) (attorneys fees on award paid from patients compensation fund may not exceed 15%); IOWA CODE ANN. § 147.138 (Supp. 1985) (court determines reasonableness of any contingent fee arrangement); KAN. STAT. ANN. § 60-471 (Supp. 1985) (compensation for reasonable attorney fees approved by court); MD. CTS. & JUD. CODE ANN. § 3-2A-07 (Supp. 1985) (attorneys fees approved by arbitration panel); 40 PA. CONS. STAT. ANN. § 1301.604 (Supp. 1985) (30% of the first $100,000 of the amount recovered, 25% of the next $100,000 and 20% of any amount over $200,000).

127. Limitation on attorneys contingent fees purportedly serve several legislative objectives. One purpose is to reduce the size of the damage award in medical malpractice actions. *See* MALPRACTICE — NOBODY WINS, *supra* note 29, at 10. Another purpose is to discourage the filing of frivolous law suits. *Id.* Finally, another purpose is to increase the medical malpractice victim's share of the amount recovered. *See* TASK FORCE ON MEDICAL MALPRACTICE, *supra* note 2, at 7 (stated intent of task force was to return a greater portion of malpractice award to the victim).

128. The limitation on attorneys contingent fee provisions of § 2-1114 are also subject to attack under the equal protection clause of the United States and Illinois Constitution and the prohibition against special legislation of the Illinois Constitution. These issues, however, are beyond the scope of this comment.

129. *See* Schwartz & Mitchell, *An Economic Analysis of The Contingent Fee in Personal-Injury Litigation*, 22 STAN. L. REV. 1125 (1970) (contingent fees have become almost exclusive form of pricing) [hereinafter cited as Schwartz & Mitchell]; Comment, *Medical Malpractice Legislation: The Kansas Response To The Medical Malpractice Crisis*, 23 WASHBURN L.J. 566, 595-600 (1984) (highlighting Kansas medical malpractice statute and proposals by other states to remedy the medical malpractice crisis) [hereinafter cited as *The Kansas Response To The Medical Malpractice Crisis*]. *See generally* Comment, *Of Ethics and Economics, Contingent Percentage Fees For Legal Services*, 16 AKRON L. REV. 747 (1983).

130. *The Kansas Response To The Medical Malpractice Crisis*, *supra* note 129, at 595.

medical malpractice case is unsuccessful.[131] The Act establishes a sliding fee scale for attorney contingent fees in medical malpractice cases.[132] The Act limits the contingent fee to 33-⅓% of the first $150,000 recovered, 25% of the next $850,000 and 20% of any amount recovered over $1,000,000.[133] One of the asserted purposes of limiting attorney contingent fees is to reduce high damage awards.[134] Purportedly, juries tend to inflate medical malpractice verdicts to compensate for the attorney's contingency fee.[135] Even assuming this rather dubious effect of the contingency fee system, the Act's sliding fee scale will not decrease the size of medical malpractice awards.[136]

A major assumption of the attorney fee limitation argument is that jurors will have full knowledge of the intricacies of the sliding fee scale. Presumably, because the jury knows that the Act limits the attorneys' fee, the jury will not have to inflate the damage award as to compensate for the attorney's fee. The Act assumes that jury members have knowledge of the medical malpractice Act's arcane provisions.[137] This assumption is contradicted in practice because evidence of the attorney's fee is not admissible at trial.[138] Therefore, because the jury does not consider the Act's limitations on attorney's fees in assessing damages, the Act will not reduce the size of the damage award.

In addition to reducing the size of the damage award, another alleged purpose of the limitations on attorney's fees is to discourage the filing of frivolous and unmeritorious lawsuits.[139] Proponents of the Act maintain that the contingent fee system encourages attor-

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131. *Id.*

132. ILL. REV. STAT. ch. 110, § 2-1114 (1985).

133. *Id.* § 2-1114(a).

134. *See* MALPRACTICE — NOBODY WINS, *supra* note 29, at 8. *See also The Kansas Response To The Medical Malpractice Crisis, supra* note 126, at 598 (jury's awareness that contingent fee will take a large portion of the victim's damage award causes juries to inflate award to compensate for the attorney's fee). *But see* Comment, *California's Medical Injury Compensation Reform Act: An Equal Protection Challenge*, 52 S. CAL. L. REV. 829, 943 (1979) (no direct empirical evidence that juries consider the size of attorneys fees at arriving at a verdict) [hereinafter cited as Comment, *MICRA and Equal Protection*].

135. For a discussion of the argument that juries inflate verdicts to compensate for the attorney's contingency fee see *supra* note 134 and accompanying text.

136. *See* Comment, *MICRA and Equal Protection, supra* note 134, at 943, n.6 (in Great Britain, where attorney contingent fees are totally prohibited, medical malpractice insurance premiums have increased 300% since 1971).

137. *See id.* at 943 (jurors are not aware of the details of medical malpractice acts).

138. *See* Krouse v. Graham, 19 Cal. 3d 59, 79-82, 562 P.2d 1022, 1033-34 (1977) (jury may not consider attorneys fees in assessing damages).

139. For a discussion of the legislative purposes of the limitations on attorney contingent fees see *supra* note 127 and accompanying text. *See also The Kansas Response To The Medical Malpractice Crisis, supra* note 126, at 595 (critics of the contingent fee system argue that the contingent fee system encourages the filing of frivolous law suits).

neys and plaintiffs to bring suits they otherwise would not have filed.[140] Objective evidence shows, however, that the contingent fee system does not encourage frivolous lawsuits.[141] Moreover, even if attorneys were encouraged by a contingent fee to bring a frivolous lawsuit, the sliding scale on attorneys' fees imposed by the Act would have no deterrent effect. Under the Act, the attorney's fee in cases with damages under $150,000 is 33⅓% of the sum recovered.[142] The customary contingency fee before the statute was enacted was also 33⅓%.[143] Because a frivolous lawsuit would typically involve an amount under $150,000, an attorney pursuing a frivolous lawsuit would earn an identical contingent fee under the Act as they would have earned before.[144] Therefore, the limitations on attorney contingency fees cannot possibly deter frivolous or non-meritorious lawsuits.

Although the Act's limitations on attorney contingency fees would have no effect in deterring frivolous lawsuits, these limitations act as barriers to truly meritorious medical malpractice cases. These cases involve difficult aspects of proof requiring many hours of the attorney's labor.[145] If the client does not prevail, the attorney receives no fee[146] and, therefore, the attorney suffers a significant loss for the many hours of the effort expended. The attorney's expectation of profit if the client prevails, however, counter-balances the risk of loss.[147] Thus, the willingness of an attorney to accept a serious medical malpractice case is a function of the amount of profit the attorney expects to earn on the case.[148]

The Act's limitations on attorney contingent fees drastically reduces the attorney's profit in serious medical malpractice cases over $150,000.[149] In cases over $150,000 the attorney's fee is reduced

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140. Comment, *The Kansas Response To The Medical Malpractice Crisis, supra* note 129, at 596.

141. *See id.* at n.265 (citing the H.E.W. Report on medical malpractice); Comment, *Recent Medical Malpractice Legislation—A First Checkup*, 50 TUL. L. REV. 655, 671 (1976) (H.E.W. study indicates contingent fee system discourages filing of non-meritorious lawsuits because these suits are not profitable) [hereinafter cited as Comment, *A First Checkup*].

142. ILL. REV. STAT. ch. 110, § 2-1114(a) (1985).

143. Comment, *The Kansas Response to the Medical Malpractice Crisis, supra* note 129, at 595 n.259 (citing H.E.W. Report on medical malpractice—customary contingent fee is 33⅓% of the amount recovered).

144. *Id.*

145. Roa v. Lodi Med. Group, 37 Cal. 3d 920, 934, 695 P.2d 164, 177 (1985) (Bird, J., dissenting).

146. Schwartz & Mitchell, *supra* note 129, at 1125.

147. *Id.* at 1153.

148. *Id.* at 1150 (lawyers expect a higher rate of return as compensation for the risk inherent in contingent fee arrangements).

149. *See* ILL. REV. STAT. ch. 110, § 2-1114 (1985) (limitations on attorneys contingent fee in medical malpractice cases).

by 25% of the fee available in cases with damages under $150,000.[150] The fee reduction is even greater in cases with damages over $850,000. In such cases, the fee is reduced by 40% of the fee available in cases with damages under $150,000.[151] Because the limitations on attorney contingent fees reduce the profit margin in serious medical malpractice cases, attorneys are dissuaded from handling meritorious medical malpractice cases.[152] As a result, many seriously injured malpractice victims will be unable to secure competent counsel.[153] These practical impediments in bringing a meritorious lawsuit strongly suggest that the actual rationale underlying the limitations on attorneys' fees is to insulate negligent health care providers from valid claims.[154]

The practical effect of insulating health care providers from meritorious claims violates fundamental first amendment rights of the medical malpractice plaintiffs and renders this section of the Act unconstitutional. The first amendment to the United States Constitution guarantees the right to petition the government and the right to freedom of speech.[155] The right to petition includes the right of access to the courts in a civil action to obtain monetary compensation.[156] The United States Supreme Court has recognized that the First Amendment would be a hollow promise if it left government to destroy or erode its guarantees by indirect restraints merely because they were enacted for the purpose of dealing with some evil within the state's legislative competence.[157] Restricting the ability of medical malpractice plaintiffs to obtain competent legal representation, indirectly restrains medical malpractice plaintiffs' first amendment right to access to the courts.[158] The Supreme Court in *National Association of Radiation Survivors v. Walters*,[159] has effectively deter-

150. *Id.*

151. *Id.*

152. Comment, *A First Checkup*, *supra* note 141, at 671.

153. *Roa*, 37 Cal. 3d at 934, 695 P.2d at 177 (1985) (Bird, J., dissenting).

154. *See* Comment, *A First Checkup*, *supra* note 141, at 671 (the underlying rationale for limitations on contingent fees is to reduce the number of medical malpractice suits).

155. U.S. CONST. amend. I.

156. *See, e.g.*, Mineworkers v. Ill. Bar Ass'n, 389 U.S. 217, 223 (1967) (right to petition not limited to religious or political activities); R.R. Trainman v. Virginia Bar, 377 U.S. 1, 8 (1964) (first amendment right to petition guarantees access to courts to obtain compensation for the victims of industrial accidents).

157. United Mineworkers of Am. v. Ill. Bar Ass'n, 389 U.S. 217, 222 (1967).

158. *See Roa*, 37 Cal. 3d at 934, 695 P.2d at 177 (Bird, J., dissenting).

159. In *Walters*, the United States District Court issued a preliminary injunction restraining the enforcement of a ten dollar federal statutory limitation on attorneys' fees in cases of veterans pursuing claims against the Veterans Administration. National Ass'n of Radiation Survivors v. Walters, 589 F. Supp. 1302 (1984), *rev'd*, 105 S. Ct. 3180 (1985).

In deciding whether to issue the preliminary injunction, the District Court reasoned that the first amendment guarantees an individual's right to obtain competent

mined when limitations on attorneys' fees would restrain the first amendment right of access to the courts.[160] The *Walters* court rationale illustrates that if a fee limitation acts to deny a plaintiff the ability to make a meaningful presentation of a claim, the fee limitation is unconstitutional.[161]

In making this determination, the Court applied the balancing test[162] of *Matthews v. Eldridge*.[163] This test requires a balancing of the private interest that will be affected, the risk of an erroneous deprivation of the private interest through the procedure used and the government interest.[164] In applying this test to the Act's limitations on attorneys' fees, the private interest affected is a medical malpractice plaintiff's right to be compensated for ones injury.[165] In many instances, victims of serious medical malpractice are left with physical or mental impairment which prevents them from living normal productive lives. Without compensation through a private action, the victim would be left without any means of self support. In cases where the victim is not fully impaired, compensation is necessary to cover the cost of medical treatment for the injury. Thus, the private interest in compensation for medical malpractice injuries is great.

The second factor, the risk of erroneous deprivation of such interest also weighs heavily against any limitations on attorneys' fees. The attorney's role in a complex medical malpractice action is essential to the maintenance and success of the claim. Because the limitations on attorney contingency fees reduce the profit margin in medical malpractice cases, attorneys are dissuaded from handling medical malpractice cases.[166] Without an attorney, a victim of medi-

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legal representation necessary to exercise ones right of access to the courts. *Id.* at 1325. The Supreme Court reversed holdings that the federal statutory limitations on attorneys' fees did not violate the first amendment. *Walters*, 105 S. Ct. at 3197.

160. *See Walters*, 105 S. Ct. at 3196-97.

161. In addition to their first amendment claim, the plaintiffs in *Walters* argued alternatively that the federal limitation on attorneys' fees violated the due process clause of the fifth amendment of the United States Constitution. *Id.* at 3189. The Supreme Court reasoned that the plaintiffs' due process claim was essentially inseparable from their first amendment claim because the plaintiffs' theory for both claims was that they were denied meaningful access to the courts to present claims. *Id.*

162. Because the Supreme Court viewed the plaintiffs' due process and first amendment claims as essentially involving the same issue, the Court applied its procedural due process balancing test analysis to dispose of the first amendment issue in two paragraphs of the opinion. *See id.* at 3196-97. Thus, the Court in effect adopted a due process analysis for the first amendment issue.

163. 424 U.S. 319 (1976).

164. *Id.* at 335.

165. Since 1860, Illinois has recognized the importance of this private interest in allowing recovery for medical malpractice injuries. *See* Rickey v. West, 23 Ill. 329 (1860) (Abraham Lincoln appeared as council for defendant in medical malpractice action).

166. Comment, *A First Checkup*, *supra* note 141, at 671. The Act's limitations

cal malpractice can not make a meaningful presentation of his claim. Not only is the plaintiff unfamiliar with the adversary system, but, any physical impairment the medical malpractice caused may prevent the victim from making a claim at all.

Finally, the government interest is not furthered, in any way, by limitations on attorney contingency fees. As previously discussed, the fee limitations of the Act will not reduce medical malpractice verdicts because juries can not consider fee limitations in assessing damages.[167] Moreover, because the Act does not alter the customary contingency fee in cases with damages under $150,000, the Act will not discourage the filing of frivolous and unmeritorious lawsuits.[168]

On balance, all three factors weigh heavily in favor of medical malpractice plaintiffs. The Act's limitations on attorney contingency fees, prevents a plaintiff from making a meaningful presentation of his claim. Therefore, the Act unconstitutionally violates the first amendment guarantee of access to the courts.

CONCLUSION

The 1985 Act is unconstitutional. The Act discriminates against a narrow class of tort victims in favor of a powerful group of medical tortfeasors whose lobbying efforts have persuaded the Illinois legislature, in the name of public healthcare, to insulate them from the consequences of their negligence acts. The Illinois Supreme Court considered and rejected this false cry ten years ago in *Wright v. Central DuPage Hospital Association,* when the court invalidated the 1975 Act.

An unconstitutional exercise of a state's police power does not become constitutional simply because ten years have elapsed. Despite some new provisions, the 1985 Act violates the equal protec-

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on attorney contingency fees greatly reduces the attorney's income in medical malpractice cases over $150,000. *See* ILL. REV. STAT. ch. 110, § 2-1114 (1985). In cases with recovery over $150,000, the attorney's fee is reduced by 25% of the fee available in cases with damages under $150,000. *Id.* The income reduction is more drastic in cases with damages over $850,000. In these cases, the attorney's income is reduced by 40% of the income available in cases with damages under $150,000. *Id.*

167. *See* Krouse v. Graham, 19 Cal. 3d 59, 79-82, 562 P.2d 1022, 1033-34 (1977) (jury may not consider attorneys' fees in assessing damages).

168. The customary contingency fee before the Act was 33-⅓%. Comment, *The Kansas Response to the Medical Malpractice Crisis, supra* note 129, at 595 n.259 (citing H.E.W. Report on Medical Malpractice—customary contingency fee is 33-⅓% of the amount recovered). Under the Act, the attorney's fee in cases with damages under $150,000 is also 33-⅓% of the amount recovered. ILL. REV. STAT. ch. 110, § 2-1114(a) (1985). Because an unmeritorious lawsuit would involve an amount under $150,000, an attorney bringing a frivolous lawsuit would earn the same fee under the Act as she would have earned before. Therefore, the Act's limitations on attorney contingency fees can not possibly serve the government's interest in reducing the frivolous and unmeritorious lawsuits.

tion clause and prohibition against special legislation in the Illinois Constitution. Moreover, the Act infringes upon fundamental first amendment guarantees of access to the courts. Therefore, the Illinois Supreme Court should invalidate the 1985 Act. Ten years after *Wright*, the Illinois legislature still has not gotten it right. In fact it is doubtful if the legislature can ever constitutionally get it right.

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