TARGET DEFENDANTS AND TORT LAW REFORM: A PERSPECTIVE ON MEDICAL MALPRACTICE AND MUNICIPAL LIABILITY

The great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders.[1]

INTRODUCTION

One salient feature of the American tort system is that certain identifiable groups have a propensity for being sued. These groups, which include municipal corporations, health care providers, and a number of other professions and occupations are often referred to under the generic heading of *target defendants*.[2] Because of their litigation-attracting characteristic, target defendants have necessarily become heavily dependent on liability insurance to protect themselves from potential losses from adverse judgments in judicial proceedings. As such, partially due to the relationship between target defendants and insurance, indemnification has come to play a vital role in the tort process.[3] Consequently, liability insurance, originally conceived as auxiliary to the tort system,[4] now materially impacts tort law.[5] Recognition of the relationship between tort law and liability insurance is prerequisite to the understanding of several problems currently confronting both systems.

Since the mid-1970's the United States has struggled with a

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1. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 92-93 (1921).

2. Loosely defined, target defendants represent a class of potential defendants who demonstrate a high propensity for being sued in tort. Target defendants are generally considered to be "deep pocket" defendants. *See, e.g.*, Eikenberry, *Governmental Tort Litigation and the Balance of Power*, 45 PUB. AD. REV. 724, 743 (1985); Shapiro, *The Naked Cities*, NEWSWEEK, Aug. 26, 1985, at 22, 23; Work, *As Liability-Insurance Squeeze Hits Everyone—*, U.S. NEWS AND WORLD REPORT, Oct. 7, 1985, at 56.

3. *See, e.g.*, Hawkins, *Retaining Traditional Tort Liability in the Nonmedical Professions*, 1981 B.Y.U. L. REV. 33, 44-45.

4. *See* W. PROSSER, W. KEETON, D. DOBBS, R. KEETON & D. OWEN, THE LAW OF TORTS § 82 (5th ed. 1984) [hereinafter W. PROSSER & W. KEETON].

5. *See, e.g.*, U.S. DEP'T OF HEALTH, EDUC. & WELFARE, MEDICAL MALPRACTICE: REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE 38-47 (1973).

medical malpractice "crisis."[6] The most prominent manifestation of this crisis has been extraordinarily high premiums for medical malpractice insurance.[7] High premiums have arguably caused corresponding increases in medical care costs, resulting in a reduction of available services.[8] The cause of the crisis, according to the prevailing argument of the medical profession and malpractice insurance carriers, is the tort system, which encourages litigation and nurtures excessive damage awards.[9]

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6. *See, e.g., id.* at 73-88; Schwartz & Komesar, *Doctors, Damages and Deterrence: An Economic View of Medical Malpractice*, 298 NEW ENG. J. MED. 1282 (1978).

7. *See, e.g.*, Adams & Zuckerman, *Variation in Growth and Incidence of Medical Malpractice Claims*, 9 J. HEALTH POL., POL'Y & L. 475, 475-79 (1984).

8. The California Medical Injury Reform Act (MICRA) is based on this premise. The preamble to MICRA states:

> 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 in the health delivery system, severe hardships for the medically indigent, and 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.

1975 Cal. Stat. 4007 (Second Ex. Sess. 1975-76).

It should be noted, however, that at least one researcher has questioned the role of malpracatice insurance premiums in the increasing cost of medical care, and has concluded, with some qualification, that "[t]he belief that malpractice insurance has been a major factor contributing to the high and rising cost of health care is clearly exaggerated." P. DANSON, MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY 187 (1985). *See also infra* note 203.

Regardless of the precise relationship between malpractice premiums and the cost of health care, some diminution of available services may be a positive feature. Economic pressures due to increased premiums may have the effect of causing physicians to concentrate their efforts within their primary area of competence, and, as such, incompetent practitioners may be "weeded out" of certain specialties. Schwartz & Komesar, *supra* note 6, at 1287; *see infra* text accompanying notes 223-25.

9. *See, e.g.*, Neubauer & Henke, *Medical Malpractice Legislation: Laws Based on a False Premise*, TRIAL, Jan., 1985, at 64. However, there is literature suggesting that although a positive correlation exists between the amount of malpractice litigation and damage awards, and the increase in health care costs and reduction in available services, there is not necessarily a direct cause and effect relationship between malpractice litigation and the medical malpractice crisis (at least not the relationship suggested by insurance carriers) which will support the argument that the sole, or even primary, cause of the crisis is litigation. Trial lawyer William M. Shernoff suggests that the crisis most immediately responsible for California's MICRA, stemmed from "drastic increases in [medical malpractice] insurance rates that turned out to be not so justified." W. SHERNOFF, PAYMENT REFUSED 187 (1986). The crisis to which Shernoff refers arguably resulted, in part, from overcharges on premiums by an insurance company, which were not a function of excessive litigation or high damage awards. These overcharges, after a group of doctors threatened suit, ultimately yielded a refund settlement with "an estimated value of between $50 million and $61 million . . . ." *Id.*

Moreover, some commentators suggest that "[i]t could conceivably be the case that the rising level of malpractice payments indicates that justified claims that previously would have gone uncompensated are now being paid. In such a case, the rising costs could reflect

In response to concerted lobbying efforts by health care providers and their insurers, most state legislatures have either enacted or proposed laws which restrict the availability and size of damage awards for victims of medical malpractice, restrict the amount of attorneys' fees, or take other steps designed to limit suits and control awards.[10]

The medical malpractice crisis is neither a unique nor an isolated phenomenon; rather, it is one of the series of *crisis-legislation sequences*[11] which threaten to erode the established system of tort law.[12] The most contemporary of these crises concerns municipal liability and the uninsurability of municipal corporations.[13]

As with the medical malpractice crisis, those affected by the current dilemma in municipal liability have identified the tort system as the root of the problem.[14] A two-fold premise associated with these crises is that the fault lies in the tort system, and that limitations on the rights of victims are necessary in order to alleviate the problem. Without more, acceptance of this premise requires a *leap of faith* because the means-end connection is essentially unsupported. The premise fails because it is neither guaranteed nor likely that limiting the rights of victims will produce the benefits envisioned by the legislatures. Moreover, the premise is based on the erroneous assumption that the exercise of victims' rights is the exclusive cause of the liability insurance crisis.[15]

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an improved allocation of resources." Zeckhauser & Nichols, *Lessons from the Economics of Safety*, in THE ECONOMICS OF MEDICAL MALPRACTICE 21 (S. Rottenberg ed. 1978).

10. *See, e.g.*, A. TOBIAS, THE INVISIBLE BANKERS 26 (1982); Learner, *Restrictive Medical Malpractice Compensation Schemes: A Constitutional "Quid Pro Quo" Analysis to Safeguard Individual Liberties*, 18 HARV. J. ON LEGIS. 143, 148-49; Silas, *Tort Reform: The Year's Hottest Issue*, B. LEADER, July-Aug., 1986, at 15.

11. For the purposes of this note, *crisis-legislation sequence* describes the process through which an ostensibly serious problem or crisis is identified and addressed by urgent legislative action intended to remedy the problem. The product of such a sequence is *crisis legislation*. An inherent problem with crisis-legislation sequences is the danger of hasty and improvident attempts at "quick-fixes" to complex problems of elusive or multifarious origin. *See, e.g.*, Hunter & Borzilleri, *The Liability Insurance Crisis*, TRIAL, Apr., 1986, at 43.

12. *See, e.g.*, Londrigan, *The Medical Malpractice "Crisis": Underwriting Losses and Windfall Profits*, TRIAL, May 1985, at 22, 25.

13. *See, e.g.*, Eikenberry, *supra* note 2, at 742; Shapiro, *supra* note 2, at 22; *The Impending Drought of Municipal Liability Insurance*, NYSAC NEWS (New York Association of Counties), Dec., 1985, at 1, 10 [hereinafter NYSAC NEWS].

14. *See, e.g.*, Eikenberry, *supra* note 2, at 743; Hunter & Borzilleri, *supra* note 11, at 43.

15. *See* Neubauer & Henke, *supra* note 9, at 68-69; *see also* American Bank & Trust Co. v. Community Hosp. of Los Gatos-Saratoga, Inc., 36 Cal. 3d 359, 380-82, 683 P.2d 670, 684-85, 204 Cal. Rptr. 671, 685-86 (1984) (Mosk, J., dissenting) [hereinafter *American Bank*

Currently, state legislatures throughout the country are contributing to a growing body of crisis legislation.[16] However, there is notable concern among the judiciary and commentators that harried responses to the perceived crises may cause irreparable harm to individual rights without actually addressing the problem.[17]

In the mid-1970's the California and New Hampshire Legislatures were among those passing bills limiting the rights of plaintiffs in medical malpractice cases.[18] Although the California and New Hampshire laws were similar in form and content, the California Supreme Court upheld the constitutionality of that state's legislation,[19] while the New Hampshire Supreme Court invalidated the New Hampshire Act as unconstitutional.[20] The results in these two states evince emerging jurisprudence in which state courts have attempted to find an appropriate standard for measuring the rights of tort victims in relation to constitutional and public policy concerns.[21]

II] (statutory limitations on victims' rights failed to produce benefits envisioned by the legislature).

16. *See, e.g.*, Silas, *supra* note 10, at 15:

> "Tort reform" has consumed more time, energy and emotions than any other issue this year in state legislatures from coast to coast. Roughly 44 states introduced nearly 2,200 bills proposing changes in their tort systems, with provisions ranging from limiting damage awards to others relating to the qualifications of expert witnesses . . . .

Id. (citing Association of Trial Lawyers of America).

17. *See* Fein v. Permanente Medical Group, 38 Cal. 3d 137, 172-74, 695 P.2d 665, 690-92, 211 Cal. Rptr. 368, 393-95 (1985) (Bird, C.J., dissenting); W. SHERNOFF, *supra* note 9, at 187; Hunter & Borzilleri, *supra* note 11, at 46; Neubauer & Henke, *supra* note 9, at 68.

18. CAL. CIV. CODE §§ 3333.1-3333.2 (West Supp. 1986); N.H. REV. STAT. ANN. §§ 507-C:1-10 (1983 & Supp. 1986); *see, e.g.*, Londrigan, *supra* note 12, at 25: "In 1975 medical malpractice problems reached crisis proportions in many states. . . . As a result, 52 states and territories passed remedial legislation in a two year period beginning in 1975 and ending in 1976." *Id.* (citing NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS (NAIC), MALPRACTICE CLAIMS, MEDICAL MALPRACTICE CLOSED CLAIMS 1975-1978 3 (Sept. 1980)).

19. *Fein*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368; Roa v. Lodi Medical Group, Inc., 37 Cal. 3d 920, 695 P.2d 164, 211 Cal. Rptr. 77 (1985).

20. Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980).

21. Some problems arise as to the precise constitutional classification of the rights of tort victims. It has been held that "a plaintiff has no vested property right in a particular measure of damages." *Fein*, 38 Cal. 3d at 166, 695 P.2d at 686, 211 Cal. Rptr. at 389. More specifically, "the right to recover for one's injuries is not a fundamental right." *Carson*, 120 N.H. at 931, 424 A.2d at 830 (citing Estate of Cargill v. City of Rochester, 119 N.H. 661, 666, 406 A.2d 704, 707 (1979)). However, the right to recover in tort has been described as "an important substantive right" deserving some sort of heightened protection. *Id.* at 931-32, 424 A.2d at 830 (citations omitted); *see also* Briscoe v. Rutgers, 130 N.J. Super. 493, 497, 327 A.2d 687, 690 (1974) (modification of measure of damages which has the effect of destroying underlying right to a remedy is invalid).

This note investigates the crisis-legislation sequence as it relates to target defendants and tort victims in the areas of medical malpractice and municipal liability. While there may be fundamental differences between the ongoing malpractice crisis and the developing municipal liability crisis, there are sufficient core similarities which make such a comparative discussion beneficial. The most striking similarity between defendants in medical malpractice litigation and in municipal liability litigation is their status as target defendants.[22] Moreover, many fundamental issues, concerning victims' rights, now confronting state courts and legislatures mirror issues addressed during the breakdown of the concept of governmental immunity.[23]

The note focuses on recent legislation, case law, and commentary, with particular emphasis on cases in California and New Hampshire. The California cases include *Fein v. Permanente Medical Group*[24] and *Roa v. Lodi Medical Group, Inc.*,[25] in which the California Supreme Court upheld the constitutionality of state malpractice legislation. The New Hampshire cases are *Carson v. Maurer*[26] and *Estate of Cargill v. City of Rochester.*[27] In *Carson*, the New Hampshire Supreme Court invalidated medical malpractice legislation as unconstitutional,[28] while in *Cargill*, the court upheld the constitutionality of legislation limiting tort recovery against municipal corporations.[29] Although these cases are a primary focus, the note draws from the case law of several jurisdictions.

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22. *See, e.g.*, Granelli, *The Attack on Joint and Several Liability*, 71 A.B.A. J. 61, 63 (1985).

23. During the past thirty years there has been a movement among the states to make local governments amenable to suit in tort. This movement has effectively resulted in the abolition of general governmental immunity for municipalities. *See infra* notes 122-64 and accompanying text.

24. 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368.

25. 37 Cal. 3d 920, 695 P.2d 164, 211 Cal. Rptr. 77.

26. 120 N.H. 925, 424 A.2d 825.

27. 119 N.H. 661, 406 A.2d 704 (1979).

28. *Carson*, 120 N.H. at 946, 424 A.2d at 839. The New Hampshire Legislature has subsequently passed a major tort reform act that includes a number of limitations on the rights of tort victims, similar to, but not as restrictive as, those involved in *Carson*. 1986 N.H. Laws 227. The new Act, however, which applies to tort actions generally—rather than exclusively to medical malpractice actions—seems to have been designed to avoid the constitutional deficiencies (especially regarding equal protection) which were identified by the court in *Carson*. This legislation ultimately does not affect the validity of the court's analysis, and, thus, allows New Hampshire to remain a proper subject for consideration.

29. *Cargill*, 119 N.H. at 669, 406 A.2d at 709.

This note specifically considers the compensation and deterence goals of tort law, the purpose and impact of liability insurance within tort law, and the economic and constitutional concerns faced by the courts and the legislatures. Finally, the note suggests a principled judicial approach for evaluating tort victims' rights, along with a method for conscientious legislative consideration of the crisis-legislation sequence.

I. PERSPECTIVE

A. Two Goals of Tort Law

To fully consider the relationship among target defendants, liability insurance crises, and the rights of tort victims, it is necessary to understand the role of tort law in the American legal and social systems. Tort law serves two primary functions:[30] (1) to compensate victims of the wrongful acts of others, and (2) to deter undesirable or harmful conduct.[31] Given these purposes, tort law acts as a conduit for public policy, and in this capacity it both shapes and reflects certain societal standards.[32]

Too frequently, however, there is a tendency to focus solely on compensation, resulting in a restrictive view of tort law as a system existing merely for the resolution of private disputes.[33] When courts, or legislatures, take such a narrow view, they can less effectively control decisions, the results of which may ultimately be contrary to public policy. When crisis legislation is introduced to solve social problems, such as the rising costs of liability insurance, significant constitutional and public policy issues are necessarily implicated. If the legislatures or reviewing courts view too narrowly the scope of the problem or the ramifications of their decisions, important rights may be lost without the desired individual or societal gain.[34]

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30. O. HOLMES, THE COMMON LAW 144 (1881).

31. *Id.*; G. CALABRESI, THE COST OF ACCIDENTS 26-27 (1970).

32. *See* W. PROSSER & W. KEETON, *supra* note 4, § 3, at 15.

33. *See, e.g.*, R. POSNER, ECONOMIC ANALYSIS OF LAW, § 6.16, at 154 (2d ed. 1977); Schwartz & Komesar, *supra* note 6, at 1282.

34. *Cf.* G. CALABRESI, *supra* note 31, at 44. Professor Calabresi suggests that "primary cost reduction [deterrence] can—indeed must—be an important aim of whatever system of [tort] law governs . . . . *Id.* Moreover, Calabresi notes that a compensation oriented system which fails to adequately consider the important role of deterrence, "may be totally unacceptable." *Id.*

B. Liability Insurance

As indicated earlier, increases in the cost and unavailability of liability insurance have provided the major impetus for tort reform.[35] The crisis dimension of the liability insurance problem is reflective of the vital role which this kind of insurance plays in the tort system.[36] As such, it is curious to note that a skeptical judicial eye was cast on the introduction of liability insurance as a way of indemnifying someone who has acted negligently.[37] Central to the initial concerns over the introduction of such insurance was the fear that the deterrent aspect of tort law would be diminished.[38] Specifically, because liability insurance protects the wrongdoer (albeit the wrongdoer who has the foresight to purchase a policy) from the full cost of his or her negligent conduct, incentives to act carefully are reduced.[39] While there is some debate as to the overall impact of liability insurance, there is a fair consensus suggesting that it has generally been a positive and necessary feature of negligence law.[40] In fact, it has been suggested that the tort system may not have endured without the introduction of liability insurance.[41] With this in mind, it is easy to see why the current state of liability insurance has prompted both public concern and legislative action.

During the first major medical malpractice crisis in the mid-1970's, physicians in California, for example, faced premium increases of more than 300% from one year to the next, or, in some instances, even a complete loss of coverage.[42] As a consequence of this situation, "[a] number of doctors left the state; others . . . quit practice[,] [and] [m]any participated in a doctor's [sic] strike" which drew national attention and ultimately helped precipitate medical malpractice reform by the state legislature.[43] Currently,

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35. *See supra* note 10. Specifically, Faye A. Silas has observed that: "In most cases, skyrocketing insurance rates and the inability to get insurance by many professions and industries put pressure on legislators to change tort systems. The measures were also proposed because of concern about the increased litigation and charges of high damage awards." Silas, *supra* note 10, at 15.

36. *See* Hawkins, *supra* note 3, at 42-46.

37. *See* W. PROSSER & W. KEETON, *supra* note 4, § 82, at 584-91.

38. *Id.* at § 82, at 585.

39. *Id. See also* R. POSNER, *supra* note 33, § 6.16, at 154; Schwartz & Komesar, *supra* note 6, at 1287.

40. *See* Hawkins, *supra* note 3. *But see* Londrigan, *supra* note 12; Schwartz & Komesar, *supra* note 6, at 1287; W. SHERNOFF, *supra* note 9, at 181-93.

41. Hawkins, *supra* note 3, at 44.

42. *See, e.g.*, W. SHERNOFF, *supra* note 9, at 183.

43. *Id.*

the medical profession claims to be in the midst of a crisis similar to that of the mid-1970's. Additionally, insurance problems have spread to other professions, occupations and, importantly from the standpoint of this note, to local government.[44]

In recent years the cost of liability insurance for many municipal corporations has increased in multiples of 100%.[45] Such increases have prompted local governments to curtail services and even to operate without insurance.[46] Moreover, a trend is developing in which small town municipal officers are resigning their positions in order to avoid personal liability for the tort settlements of their uninsured towns.[47] What has developed, then, is an insurance system designed to indemnify negligent individuals as a primary function, and to compensate injured victims as a subsidiary function, but which, according to the insurance industry, can no longer operate without substantial changes in, and artificial limitations on, the very tort system which fostered its existence and its growth.

II. Crises, Responses, and Review

Crisis legislation is neither a new nor a necessarily undesirable feature of the American legal and political process. In fact, it may very well demonstrate legislative ability to act quickly and decisively in the face of serious social, economic, or political problems. There are, however, serious and legitimate concerns over the use and the potential abuse of such drastic measures.[48]

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44. *See supra* note 13 and accompanying text.

45. *See* Shapiro, *supra* note 2, at 22; Work, *supra* note 2, at 56. In March, 1985, The League of California Cities compiled a sampling of premium increases ranging from 191%-472%. League of California Cities, Press Release (March, 1985). Also, in 1985 "[o]ver 163 [New York] towns . . . reported a premium increase of up to 100%; over 42 [New York] towns . . . reported an increase of up to 400% or more over the last year." NYSAC News, *supra* note 13, at 1.

46. *See, e.g.*, Work, *supra* note 2, at 56.

47. *Id.*

48. *See, e.g., American Bank II*, 36 Cal. 3d at 387, 683 P.2d at 688-89, 204 Cal. Rptr. at 689-90 (Bird, C.J., dissenting); Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973). Automobile guest statutes provide a particularly helpful view of improvident crisis legislation. State legislatures began adopting guest statutes in 1927, and, as Prosser suggests, "[t]he statutes are generally acknowledged to have been the result of persistent and effective lobbying on the part of liability insurance companies." W. Prosser & W. Keeton, *supra* note 4, § 34, at 215. The statutes received severe criticism by the trial bar and by commentators for nearly forty years, before state supreme courts began invalidating them in 1969. *Id.* at § 34, at 216. Perhaps the most important invalidation of a state automobile guest statute was the California Supreme Court's decision in *Brown v. Merlo*. *Id.* In *Brown*,

The key features of a crisis-legislation sequence are: (1) a crisis (real or imagined), and (2) a sudden, often sweeping, legislative response aimed at curtailing the crisis. A serious concern associated with any crisis-legislation sequence is that " '[a] crisis can be a truly marvelous mechanism for the withdrawal or suspension of established rights . . . .' "[49] However, while judicial review is available to protect individual rights under such circumstances, a problem arises in identifying the appropriate standard to be used by a reviewing court in appraising the constitutionality of the measure in question. This problem is particularly troublesome when the rights affected are not *fundamental*[50] or when the group affected is not a *suspect class*,[51] but yet, the rights affected are not merely *economic* rights.[52] Such is the case in tort law, where neither the victims nor their rights fit easily into the rather rigid framework of the standard two-tier system of judicial scrutiny.[53]

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the court was critical of the guest statute, holding that it amounted to a violation of state and federal equal protection guarantees. *Brown*, 8 Cal. 3d at 882, 506 P.2d at 231, 106 Cal. Rptr. at 407. The court reasoned that the classifications created by the guest statute which allowed recovery by some plaintiffs but not by others similarly situated, did "not bear a substantial and rational relation to the statute's purpose of protecting the hospitality of the host-driver and of preventing collusive law suits." *Id.* State experiences with guest statutes parallel significantly the current crises. It is worth noting that, like guest statutes, identification of the current crises and the current push for reform emanate from the liability insurance industry.

49. *Fein*, 38 Cal. 3d at 168, 695 P.2d at 687, 211 Cal. Rptr. at 390 (Bird, C.J., dissenting) (quoting Jenkins & Schweinfurth, *California's Medical Injury Compensation Reform Act: An Equal Protection Challenge*, 52 S. CAL. L. REV. 829, 935 (1979)).

50. BLACK'S LAW DICTIONARY defines fundamental rights as: "[t]hose which have their origins in the express terms of the Constitution or which are necessarily to be implied from those terms." BLACK'S LAW DICTIONARY 607 (5th ed. 1979).

51. The concept of suspect class was enunciated in United States v. Carolene Products Co., 304 U.S. 144 (1938). In *Carolene Products*, Justice Stone, writing for the Court, suggested that legislation impacting primarily upon "discrete and insular minorities" might demand "searching judicial scrutiny." *Id.* at 152-53 n.4.

52. In Williamson v. Lee Optical Co., 348 U.S. 483 (1955), the United States Supreme Court recognized that limitations on an individual's economic rights do not command the same strict scrutiny on review as do limitations on an individual's more fundamental rights.

53. The standard two-tier system of judicial review is illustrated by the majority's approach in *Fein* and *Roa*. *Fein*, 38 Cal. 3d at 161, 695 P.2d at 682, 211 Cal. Rptr. at 385 n.19; *Roa*, 37 Cal. 3d at 932, 695 P.2d at 171, 211 Cal. Rptr. at 84 n.9. When the two-tier system of review is used, legislation is only given the strictest scrutiny by a reviewing court if it affects some fundamental right or impacts a suspect class. Otherwise, the judicial review warranted is equivalent to the highly deferential rational basis approach taken by the United States Supreme Court in Williamson v. Lee Optical Co., 348 U.S. 483. Under this approach, a court will sustain legislation if it is arguably related to a legitimate governmental goal.

Prior to *American Bank II*, however, the California Supreme Court utilized a *realistic rational basis approach* under which the court required the legislature to have *actually*

A. Medical Malpractice

The medical malpractice crisis is perhaps best understood as the most prominent sub-crisis of a broader liability insurance crisis.[54] The breadth and scope of the legislative response to the medical malpractice aspect of this problem has been tremendous: "At no time in the history of the United States have the state legislatures moved with such unanimity or with greater rapidity. Between 1974 and 1976, every state in the union passed some malpractice law."[55]

In 1975 the California State Legislature passed the Medical Injury Compensation Reform Act (MICRA).[56] Through this Act, the legislature altered fundamentally the rights of victims of medical malpractice. A special statute of limitations was created for actions against health care providers, damages for non-economic loss were limited to $250,000, the collateral source rule[57] was effectively abolished, a periodic payment plan was established for awards for future damages greater than $50,000, and limitations were placed on attorneys' contingent fees.[58] As indicated in the preamble, a primary purpose of these alterations of the common law was to reduce the amount of medical malpractice litigation and awards. Such reductions were intended to lower, correspondingly, the cost of medical malpractice premiums.[59]

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demonstrated a rational relationship between the challenged act and some governmental purpose. *See, e.g.*, Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388. Other states (apparently recognizing the inadequacy of the two-tier system) have incorporated a middle-tier level of review. Middle-tier scrutiny is deemed appropriate for consideration of limitations on rights which are important, although not rising to the level of fundamental rights. *See, e.g., infra* notes 85-93 and accompanying text.

54. *See, e.g.*, Hunter & Borzilleri, *supra* note 11, at 43.

55. A. TOBIAS, *supra* note 10, at 26.

56. CAL. CIV. CODE §§ 3333.1-3333.2 (West Supp. 1986).

57. BLACK'S LAW DICTIONARY describes the collateral source rule as follows:

> Under this rule, if an injured person receives compensation for his injuries from a source wholly independent of the tort-feasor, the payment should not be deducted from the damages which he would otherwise collect from the tort-feasor. In other words, a defendant tortfeasor may not benefit from the fact that the plaintiff has received money from other sources as a result of the defendant's tort, *e.g.*, sickness and health insurance.

BLACK'S LAW DICTIONARY, *supra* note 50, at 238 (citation omitted).

58. *See* CAL. CIV. CODE § 667.1 & §§ 3333.1-3333.3, (West 1975).

59. The benefits which the California Legislature sought to obtain through the passage of MICRA were to accrue based upon certain assumptions. Included in these assumptions was the belief that reduced insurance company costs would be passed on to medical care providers. This, however, is not required by the Act. *See, e.g., American Bank II*, 36 Cal. 3d at 380-84, 683 P.2d at 684-85, 204 Cal. Rptr. at 685-86 (Mosk, J., dissenting). Additionally,

In 1977, the New Hampshire State Legislature passed medical malpractice legislation which was essentially the same as California's MICRA.[60] The statement of findings and purpose for the New Hampshire Act indicated that the legislature found that:

> [S]ubstantial increases in the incidence and size of claims for medical injury pose a major threat to effective delivery of medical care in the state and that the risks and consequences of medical injury must be stabilized in order to encourage continued provision of medical care to the public at reasonable cost, the continued existence of medical care institutions and the continued readiness of individuals to enter the medical care field.[61]

As noted by the New Hampshire Supreme Court, the legislation "was intended to codify and stabilize the law governing medical malpractice actions and to improve the availability of adequate liability insurance for health care providers at a reasonable cost."[62]

California and New Hampshire provide very suitable subjects for comparison, not merely because the enacted legislation was essentially identical, but more importantly, because the New Hampshire legislation has since been held unconstitutional,[63] while the California legislation has been upheld.[64] The process of judicial review in these two states provides insight into the specific problem of reviewing malpractice legislation, and also into the general problem of classifying the victims and the rights of the victims involved in tort litigation.

The right to recover in tort is not a fundamental right.[65] Therefore, when a state legislature places limitations on this right the limitations are not subject to the strict scrutiny analysis which would be applied to a right properly classified as fundamental.[66] Additionally, neither tort victims generally nor the victims of spe-

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the reduction in premium costs was to reduce the cost and increase the availability of medical services to the consumer, assuming that medical care providers would pass their savings on to the consumer, which is not required by the Act. *Id.*

60. *Compare* N.H. REV. STAT. ANN. § 507-C (1977) *with supra* note 58 and accompanying text.

61. 1977 N.H. Laws 417:1.

62. *Carson*, 120 N.H. at 930, 424 A.2d at 830.

63. *Id.* at 945-46, 424 A.2d at 839.

64. *See supra* notes 24 & 25 and accompanying text.

65. *Carson*, 120 N.H. at 931, 424 A.2d at 830.

66. *Id.*

cific torts are properly classified as a suspect class.[67] However, the specific right to recover for injuries resulting from another's negligence is, in the words of the New Hampshire Supreme Court, "an important substantive right."[68] The importance of this right is seen not only from a purely compensatory perspective, but also as a function of the close relation it bears to other rights which are fundamental.[69] Not only is the right to be compensated for injuries closely related to fundamental rights, but additionally, it does not logically fit into the "commercial" rights description which is characteristic of the rational basis standard of judicial review.[70]

In her dissenting opinion in *American Bank and Trust Company v. Community Hospital of Los Gatos-Saratoga, Inc. (American Bank II)*,[71] Chief Justice Bird of the California Supreme Court accepted the plaintiff's position which stressed the need for "careful judicial scrutiny"[72] of legislation curtailing the rights of tort victims. The chief justice was concerned that "[v]arious inherent characteristics of the burdened group prevent it from adequately advancing its interests in the political process."[73] Chief Justice Bird noted the following characteristics:

1. Those affected are members of an "extraordinarily small group . . . singled out to carry the burden of a general 'crisis.' "[74]
2. "Membership is the group is *involuntary*."[75]
3. "The group is 'selected' at random, ensuring that its members will be scattered and isolated from one another."[76]
4. At the time that such legislation is passed, the individuals who will ultimately make up the group "are unaware of that fact."[77]

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67. *See supra* note 51 and accompanying text.

68. *Carson*, 120 N.H. at 931-32, 424 A.2d at 830 (citations omitted).

69. Courts have generally tended to afford greater protection to rights, not themselves fundamental, but still closely related to fundamental rights. *See, e.g.*, Brown v. Board of Educ., 349 U.S. 294 (1955); Dandridge v. Williams, 397 U.S. 471 (1970) (Marshall J., dissenting).

70. *See, e.g., American Bank II*, 36 Cal. 3d at 398, 683 P.2d at 695-96, 204 Cal. Rptr. at 696-97.

71. 36 Cal. 3d 359, 683 P.2d 670, 204 Cal. Rptr. 671.

72. *Id.* at 397, 683 P.2d at 695, 204 Cal. Rptr. at 696 (Bird, C.J., dissenting).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

5. The ultimate harm falls on "a few identifiable individuals," who have "little incentive to seek legislative reform."[78]

Additionally, the chief justice noted that "the affected interest is personal, not commercial, in character."[79] This observation focuses attention on the strained analysis which is required to classify such rights as economic rights in the same genre as those implicated in the well known case of *Williamson v. Lee Optical Co.*[80]

Carson v. Maurer was a consolidation of six cases which were brought to challenge the constitutionality of New Hampshire's medical malpractice reform measure.[81] The law was attacked as a violation of the equal protection guarantees of both the United States and the New Hampshire Constitutions.[82] In *Carson*, the court first considered the plaintiffs' claims regarding improper classifications inherent in the Act. The court found that there were four classifications established by the statute:

> First, it confers certain benefits on tortfeasors who are health care providers that are not afforded to other tortfeasors. Conversely, it distinguishes between those tort claimants whose injuries were caused by medical malpractice and all other tort claimants. The statute also distinguishes between medical malpractice victims whose non-economic loss exceeds $250,000 [the statutory limit] and those whose non-economic loss is $250,000 or less and between malpractice victims whose future damage awards exceed $50,000 and those who are awarded $50,000 or less for future damages.[83]

Recognizing these classifications, the court addressed the question as to whether they violated "the equal protection mandate that 'those who are similarly situated be similarly treated.' "[84] The court acknowledged that because no fundamental rights were at issue, and because the classifications involved no suspect class, strict scrutiny analysis was not appropriate.[85] However, the court emphasized that traditional rational basis analysis was also an in-

78. *Id.*
79. *Id.* at 398, 683 P.2d at 695, 204 Cal. Rptr. at 696 (Bird, C.J., dissenting).
80. 348 U.S. 483; *see supra* notes 52-53.
81. 120 N.H. 925, 424 A.2d 825.
82. *Id.* at 930-31, 424 A.2d at 830.
83. *Id.* at 931, 424 A.2d at 830.
84. *Id.* (quoting *Cargill*, 119 N.H. at 665, 406 A.2d at 706).
85. *Id.*

appropriate standard of review for legislation which impaired an "important substantive right."[86]

Essentially, the court applied the test used by the United States Supreme Court in *Royster Guano v. Virginia*,[87] in which the Court stressed that although states might legitimately establish classifications for the purposes of legislation, such classifications "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[88] The *Royster Guano* test utilizes a middle-tier scrutiny which requires that "the ground of difference upon which the discrimination is rested has [a] fair [and] substantial relation to [a] proper object to be accomplished by the legislation."[89] Since it was decided in 1919, *Royster Guano* has not significantly influenced United States Supreme Court jurisprudence.[90] However, the *Royster Guano* test has demonstrated a certain vitality among state supreme courts when applied to state constitutional challenges.[91]

In determining the reasonableness of the medical malpractice limitations, the New Hampshire Supreme Court indicated that "[w]hether the . . . statute can be justified as a reasonable measure in furtherance of the public interest depends upon whether the restriction of private rights sought to be imposed is not so serious that it outweighs the benefits sought to be conferred upon the general public."[92] The court stressed that it would not engage in an independent examination of the factual basis for the legislative justification for the statute, but would consider solely "whether the statute has a fair and substantial relation to this legitimate legislative objective and whether it imposes unreasonable restrictions on private rights."[93] After considering each challenged provision of the legislation, the court determined that those sections were un-

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86. *Id.* at 931-32, 424 A.2d at 830.

87. 253 U.S. 412 (1920).

88. *Id.* at 415.

89. *Id.* at 416.

90. *See, e.g., Dandridge*, 397 U.S. 471; *Williamson*, 348 U.S. 483. *But see*, Reed v. Reed, 404 U.S. 71 (1971).

91. *See, e.g., Carson*, 120 N.H. at 932, 424 A.2d at 831; *Brown*, 8 Cal. 3d at 861, 506 P.2d at 216, 106 Cal. Rptr. at 392.

92. *Carson*, 120 N.H. at 933, 424 A.2d at 831 (citations omitted).

93. *Id.*, 424 A.2d at 832.

constitutionally discriminatory and therefore could not stand.[94]

Specifically, the court determined the following:

Notice Requirement—The statutory requirement that the plaintiff in a malpractice action give the defendant sixty days notice prior to filing suit was unconstitutional because it set "procedural traps" for plaintiffs in malpractice actions that were not imposed on other types of tort victims. This, the court held, did not "fairly and substantially relate to any legitimate legislative objective."[95]

Collateral Source Rule—The court first determined that statutory abolition of the collateral source rule was improper because it "arbitrarily and unreasonably" discriminated among tortfeasors "in favor of the class of health care providers."[96] The court also stressed that "[a]lthough the statute may promote the legislative objective of containing health care costs, the potential cost to the general public and the actual costs to many medical malpractice plaintiffs is simply too high."[97]

Pain and Suffering—Considering the $250,000 cap on pain and suffering, the court held that this limitation was unreasonable because: "First, paid-out damage awards constitute only a small part of total insurance premium costs. Second, and of primary importance, few individuals suffer noneconomic damages in excess of $250,000."[98] The court also stressed that not only was the cap inadequate to compensate persons with meritorious claims, but it placed an especially heavy burden on " 'the most seriously injured claimants.' "[99]

Periodic Payments—The court held that the provision ena-

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94. *Id.* at 946, 424 A.2d at 839. New Hampshire's new tort reform Act, 1986 N.H. Laws 227, apparently represents the legislature's attempt to overcome the constitutional difficulties identified by the New Hampshire Supreme Court in *Carson*. Under the new Act, limitations on damages for noneconomic loss, as well as restrictions on attorneys' fees and statute of limitations are applicable to all tort victims, not only plaintiffs suing for medical malpractice. 1986 N.H. Laws 227:12-13. Under this plan, all tort victims are, thus, arguably treated equally.

95. *Id.* at 937, 424 A.2d at 834.

96. *Id.* at 940, 424 A.2d at 836.

97. *Id.* at 940-41, 424 A.2d at 836.

98. *Id.* at 941, 424 A.2d at 836 (quoting Jenkins & Schweinfurth, *California's Medical Injury Compensation Reform Act: An Equal Protection Challenge*, 52 S. CAL. L. REV. 829, 951 (1979)).

99. *Id.* at 941-42, 424 A.2d at 837 (quoting Arneson v. Olsen, 270 N.W.2d 135, 135-36 (N.D. 1978)).

bling periodic payments "unreasonably discriminate[d] in favor of health care defendants and unduly burden[ed] seriously injured malpractice plaintiffs."[100]

Attorney's Fees—The limitation on attorney contingent fees was held unconstitutional because it "unjustly discriminate[d] by interfering with the freedom of contract between a single class of plaintiffs and their attorneys."[101]

The New Hampshire Supreme Court reached its decision in *Carson* through a conscientious, well reasoned application of equal protection analysis not unlike the analysis used by the California Supreme Court in *American Bank and Trust Co. v. Community Hospital of Los Gatos-Saratoga, Inc.* (*American Bank I*).[102] In *American Bank I*, the court concluded that the provision of MICRA permitting a judgment for periodic payments violated federal and state equal protection guarantees.[103] Technically, the court reviewed MICRA using the traditional rational basis test;[104] however, the court conducted a "serious and genuine inquiry into the correspondence between the classification and the legislative goals."[105] This type of inquiry, based on the standard used in a previous California case, *Brown v. Merlo*,[106] did not involve judicial second guessing of the legislature, but rather, used a legitimate analysis which actually required the legislature to demonstrate the existence of a truly rational basis supporting limitations on individual rights.[107]

Part of the court's decision rested on the plaintiff's challenge to the legislature's premise that "the cost of medical care may be contained by a reduction of malpractice premiums paid by hospitals."[108] Relying on historical and statistical information provided by *amicus curiae*, the court decided that the legislature's rationale,

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100. *Id.* at 944, 424 A.2d at 838.

101. *Id.* at 945, 424 A.2d 839.

102. 33 Cal. 3d 674, 660 P.2d 829, 190 Cal. Rptr. 371 (1983), *reh'g granted, vacated*, 36 Cal. 3d 359, 683 P.2d 670, 204 Cal. Rptr. 671 (1984) [hereinafter *American Bank I*].

103. *Id.* at ___, 660 P.2d at 837, 190 Cal. Rptr. at 379.

104. The court indicated that two levels of scrutiny were available in California, and that strict scrutiny was implicated only in cases where a fundamental interest was at stake or where a suspect class was discriminated against. *Id.* at ___, 660 P.2d at 837, 190 Cal. Rptr. at 379 (citations omitted).

105. *Id.*

106. 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388.

107. *Id.* at 865, 506 P.2d at 219, 106 Cal. Rptr. at 395 n.7.

108. *American Bank I*, 33 Cal. 3d at ___, 660 P.2d at 840, 190 Cal. Rptr. at 382.

as expressed in the MICRA preamble, was erroneous.[109] Although the legislature purportedly made findings in support of its premise, the court nevertheless invalidated the legislation regarding periodic payments as unconstitutional.[110]

However, on rehearing, the court vacated *American Bank I*.[111] In *American Bank II*, a new majority took the court backward, away from an enlightened and progressive rational basis test to the use of a "rubber stamp" approach.[112] The application of traditional rational basis review in *American Bank II* became the standard through which the court ultimately approved MICRA in its entirety.[113]

In *Roa v. Lodi Medical Group, Inc.*,[114] and *Fein v. Permanente Medical Group*,[115] the majority of the California Supreme Court determined that neither a fundamental right nor a suspect class was implicated by MICRA. Therefore, strict scrutiny was inapplicable, and, the court applied a highly deferential rational basis standard of review.[116] The court took this approach even in light of the fact that the legislature's premises were shown to be false,[117] and even considering that at the time that MICRA was passed "the Legislature had before it *no* evidence that the immense sacrifices of victims would result in appreciable savings to the insurance companies."[118]

In a very strong dissent, Chief Justice Bird, who had been in the majority in *American Bank I*, criticized the majority in *Fein*, not only for destroying the integrity of the court's previous, enlightened standards of constitutional review, but also because:

> While the majority . . . considered the cumulative *financial* effect of these provisions *on insurers* to support their conclusion that MICRA might have some desirable impact on

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109. *Id.*

110. *Id.* at ___, 660 P.2d at 841, 190 Cal. Rptr. at 383.

111. *American Bank II*, 36 Cal. 3d 259, 683 P.2d 670, 204 Cal. Rptr. 671.

112. *Id.* at 398, 683 P.2d at 696, 204 Cal. Rptr. at 697 (Bird, C.J., dissenting).

113. *See, e.g., Fein*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368; *Roa*, 37 Cal. 3d 920, 695 P.2d 164, 211 Cal. Rptr. 77.

114. 37 Cal. 3d 920, 695 P.2d 164, 211 Cal. Rptr. 77.

115. 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368.

116. *Fein*, 38 Cal. 3d at 158, 166, 695 P.2d at 679, 686, 211 Cal. Rptr. at 382, 389; *Roa*, 37 Cal. 3d at 930-31, 695 P.2d at 170, 211 Cal. Rptr. at 83.

117. *See infra* note 203.

118. *Fein*, 38 Cal. 3d at 172, 695 P.2d at 690, 211 Cal. Rptr. at 393 (Bird, C.J., dissenting).

> insurance rates . . . they have insisted upon assessing the *human* impact of each provision *on injured victims* in isolation. However, it is no longer possible to ignore the overall pattern of the MICRA scheme. In order to provide special relief to negligent health care providers and their insurers, MICRA arbitrarily singles out a few injured patients to be stripped of important and well-established protections against negligently inflicted harm.[119]

Chief Justice Bird's legitimate concerns reflect the need for courts and legislatures to recognize the broad societal implications inherent in alterations of tort law. The California and New Hampshire experiences with medical malpractice legislation demonstrate the fact that legislation hastily enacted in response to complex problems very often inadequately addresses such problems.

B. Municipal Liability

In many respects, the crisis-legislation sequence emerging in municipal liability parallels the ongoing sequence in medical malpractice.[120] However, although there are many similarities between the two crises, one notable difference relates to the development of the right of action implicated in each. Unlike the right to recover for professional malpractice, which has been an enduring feature of the common law,[121] the right of action against municipal corporations is a relatively recent development.[122] The slow maturation of

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119. *Id.* at 168, 695 P.2d at 687, 211 Cal. Rptr. at 390 (Bird, C.J., dissenting).

120. *See supra* note 13 and accompanying text; Hunter & Borzilleri, *supra* note 11, at 43.

121. *See, e.g.*, Hawkins, *supra* note 3, at 33.

122. K. DAVIS, ADMINISTRATIVE LAW TEXT §§ 25.01-.02, at 466, 468 (1972); W. PROSSER & W. KEETON, *supra* note 4, § 131, at 1051-52; *see also* Lipman v. Brisbane Elementary School Dist., 55 Cal. 2d 224, 359 P.2d 465, 11 Cal. Rptr. 97 (1961) (governmental bodies may be held liable for the tortious conduct of officials engaged in discretionary activity); Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961) (governmental immunity from tort liability abolished); Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957) (right to recover for personal injury caused by the tortious conduct of municipal employees acting within scope of employment is recognized, governmental-proprietary distinction rejected); Reich v. State Highway Dep't, 386 Mich. 617, 194 N.W.2d 700 (1972) (governmental tortfeasors not entitled to notice not extended to private defendants); Turner v. Staggs, 89 Nev. 230, 510 P.2d 879 (1973), *cert. denied*, 414 U.S. 1079 (1973) (arbitrary distinction between victims of private negligence and governmental negligence violates equal protection); Merrill v. City of Manchester, 114 N.H. 722, 332 A.2d 378 (1974) (absolute municipal immunity for torts abrogated, but legislature may establish conditions for bringing suit); Briscoe v. Rutgers, 130 N.J. Super. 493, 327 A.2d 687 (1974) (contract case—provision of law affecting remedy against governmental unit is invalid when plaintiff's

this right has been primarily a function of the persistence of the doctrine of governmental immunity.[123]

Governmental immunity has been a part of American common law since at least as early as the 1812 case of *Mower v. Leicester*.[124] The Massachusetts Supreme Judicial court introduced the concept, relying on the famous English case of *Russell v. The Men of Devon*.[125] However, Professor Edwin M. Borchard described *Mower* as a "poorly reasoned decision, based upon a case which contradicts rather than sustains it."[126] Even though *Russell* provided an arguably weak basis on which to support immunity for municipal corporations, it was followed by many jurisdictions through most of the nineteenth and half of the twentieth century.[127] However, since the late 1950's there has been a strong push among state courts and legislatures to discard the concept of immunity as applied to municipal corporations.[128]

Even though the right of action against governmental entities

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underlying right to have damages measured is destroyed); Ayala v. Philadelphia Bd. of Pub. Educ., 453 Pa. 584, 305 A.2d 877 (1973) (governmental immunity abolished as contrary to common law right to recover in tort); Becker v. Beaudoin, 106 R.I. 562, 261 A.2d 896 (1970) (governmental immunity abolished, governmental-proprietary distinction discarded, but, legislature may set certain limits on right to recover against municipalities); Hunter v. North Mason High School, 85 Wash. 2d 810, 539 P.2d 845 (1975) (right to be compensated for tortiously inflicted harm recognized as an important right which may not be arbitrarily restricted in violation of equal protection).

123. *See, e.g.*, Borchard, *Government Liability in Tort*, 34 YALE L.J. 1 (1924); *see also supra* note 122 and accompanying text.

124. 9 Mass. 247 (1812).

125. *Id.* at 249, (citing Russell v. The Men of Devon, 100 Eng. Rep. 359 (1788)).

126. Borchard, *supra* note 123, at 42. Professor Borchard stressed that:

> [The] only similarity between the situation in New England and the *Russell* case lay in the fact that the defendants were counties. The New England county was incorporated, had a corporate fund and means of enlarging it by taxation . . . . Under the authority of *Russell v. Devon*, therefore, practically no reason for immunity can be found in these circumstances to exist, yet the Massachusetts court passed judgment for the defendant on the unconvincing ground that the county was a quasi corporation created by the legislature for the purpose of public policy and not voluntarily, like a city, and that as a state agency it was therefore immune.

Id.

A number of state supreme courts have criticized reliance on *Russell* as improper, because the facts and timing of that case preclude it from being even arguably persuasive on modern litigation between private citizens and municipalities. *See, e.g., Ayala*, 453 Pa. at 590-91, 305 A.2d at 880; *Hargrove*, 96 So.2d at 132.

127. *See* K. DAVIS, *supra* note 122, §§ 25.01-.02, at 466-69; W. PROSSER & W. KEETON, *supra* note 4, § 131, at 1051-52.

128. K. DAVIS, *supra* note 122, §§ 25.01-.02, at 466-69; W. PROSSER & W. KEETON, *supra* note 4 § 131 at 1051-52; *see also* cases cited *supra* note 122.

developed more recently than other rights under tort law, this does not diminish its vitality. To the contrary, the abrogation of governmental immunity strongly underscores the general importance of private tort remedies.[129] As such, a brief discussion of the development of the right of action against municipal corporations is helpful in gaining an overall appreciation of tort remedies as "important substantive right[s]."[130]

In 1957, the Florida Supreme Court took the lead in dismantling the common law immunity of municipal corporations. In *Hargrove v. Town of Cocoa Beach*,[131] the court held that a woman whose husband died while in the custody of local police could maintain a wrongful death action against the city.[132] In its decision, the court emphasized "the problem . . . arising out of an historical recognition of a division of municipal functions into two categories, to wit, a governmental and proprietary."[133] The distinction between governmental and proprietary functions essentially developed out of the notion that a municipality, unlike the state itself, operates in a corporate capacity for certain undertakings and in a governmental capacity for others.[134] The traditional application of this rationale held municipalities immune from liability for harm caused while acting in a governmental capacity, and only attached liability when the public entity was performing a corporate function.[135] The problem with such a distinction was aptly illustrated by Professor Borchard:

> The galloping fire-apparatus bound to a fire has been deemed "governmental"; the same apparatus returning has been classified as "corporate" in an effort to reconcile law with justice. As to navigators on the river, the maintenance of a bridge has been deemed corporate; so as to travellers on the bridge, it was governmental. Sprinkling the streets has been deemed governmental, but flushing them is corporate. . . .[136]

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129. *See, e.g., Hunter*, 85 Wash. 2d at ___, 539 P.2d at 848: "The right to be indemnified for personal injuries is a substantial property right, not only of monetary value but in many cases fundamental to the injured person's physical well being and ability to continue to live a decent life." *Id.*

130. *See Carson*, 120 N.H. at 931-32, 424 A.2d at 830 (citations omitted).

131. *Hargrove*, 96 So.2d 130.

132. *Id.*

133. *Id.* at 132.

134. *See* K. DAVIS, *supra* note 122, § 25.01 at 468.

135. *See* W. PROSSER & W. KEETON, *supra* note 4, § 131, at 1053.

136. Borchard, *State and Municipal Liability in Tort—Proposed Statutory Reform*, 20 A.B.A. J. 747, 749 (1934).

The *Hargrove* court indicated its dissatisfaction with the distinction between governmental and proprietary functions, and stressed that sovereign immunity regarding governmental functions was "anachronistic not only to our system of justice but to our traditional concepts of democratic government."[137] The court continued, stating that "[i]f there is anything more than a sham to our constitutional guarantee that the courts shall always be open to redress wrongs and to our sense of justice that there shall be a remedy for every wrong committed, then certainly this basis for the rule cannot be supported."[138] The court fortified its position by identifying the faulty authority attributed to *Russell*:

> The Men of Devon decision merely relieved the inhabitants of an unincorporated *county* from liability for damages resulting from a defective bridge. . . . [T]hat leading English precedent turned on the proposition that it was an action against *all of the people of an unincorporated community* having no corporate fund or legal means of obtaining one. The law would not impose the burden on each individual citizen.[139]

By contrast, the court noted that:

> The modern city is in substantial measure a large business institution. While it enjoys many of the basic powers of government, it nonetheless is an incorporated organization which exercises those powers primarily for the benefit of the people within the municipal limits who enjoy the services rendered pursuant to the powers. To continue to endow this type of organization with sovereign divinity appears to us to predicate the law of the Twentieth Century upon an Eighteenth Century anachronism.[140]

The *Hargrove* decision marks the beginning of a trend in which "chunks of [sovereign] immunity" were abolished by state supreme courts.[141]

The characterization of the right to recover for personal injuries as an "important substantive right"[142] is well supported in numerous decisions addressing the problems associated with govern-

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137. *Hargrove*, 96 So.2d at 132.
138. *Id.*
139. *Id.* at 132.
140. *Id.* at 133.
141. K. DAVIS, *supra* note 122, § 25.02, at 468.
142. *Carson*, 120 N.H. at 931-32, 424 A.2d at 830 (citations omitted).

mental immunity.[143] In *Ayala v. Philadelphia Bd. of Pub. Educ.*,[144] the Pennsylvania Supreme Court abolished the doctrine of governmental immunity, calling the concept "devoid of any valid justification."[145] The plaintiff in *Ayala* was a fifteen year old student who lost an arm as a result of an accident in an upholstery class.[146] The student and his father brought an action charging the school district with negligence through its employees. The district raised the defense of governmental immunity, and the trial court dismissed the action.[147] Reversing, the supreme court stressed that: "It is fundamental to our common law system that one may seek redress for every substantial wrong. 'The best statement of the rule is that a wrongdoer is responsible for the natural and proximate consequences of his misconduct.' "[148] Continuing, the court noted that "[i]t is the business of the law to remedy wrongs that deserve it . . . ."[149]

An even stronger characterization of the right to a remedy in tort was made by the Washington Supreme Court in *Hunter v. North Mason High School*:[150] "The right to be [compensated] for personal injuries is a substantial property right not only of monetary value but in many cases fundamental to the injured person's physical well-being and ability to continue to live a decent life."[151]

In *Becker v. Beaudoin*,[152] the Rhode Island Supreme Court confronted "the question of the validity of the whole concept of immunity from liability of municipalities for the tortious acts of their agents and servants in the performance of a governmental function."[153] *Becker* involved a wrongful death action brought by the family of a prisoner who committed suicide in police custody.[154] Like the Pennsylvania court in *Ayala*, the *Becker* court was uncomfortable with the distinction between governmental and

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143. *See* cases cited *supra* note 122.

144. 453 Pa. 584, 305 A.2d 877.

145. *Id.* at 587, 305 A.2d at 878.

146. *Id.*

147. *Id.* at 586, 305 A.2d at 878.

148. *Id.* at 594, 305 A.2d at 882 (quoting Battalla v. State, 10 N.Y.2d 237, 240, 176 N.E.2d 729, 730, 219 N.Y.S.2d 34, 36 (1961)).

149. *Id.* at 597, 305 A.2d at 882 (quoting Neiderman v. Brodsky, 436 Pa. 401, 412, 261 A.2d 84, 89 (1970)).

150. 85 Wash. 2d 810, 539 P.2d 845.

151. *Id.* at ___, 539 P.2d at 848.

152. 106 R.I. 562, 261 A.2d 896.

153. *Id.* at 565, 261 A.2d at 898.

154. *Id.* at 563, 261 A.2d at 897.

corporate functions, and, indeed, found the distinction to be without even a rational basis.[155] Additionally, the court stressed the characteristic unfairness of governmental immunity, particularly considering "that there is no doctrine more firmly embedded in the law than the principle that liability follows tortious wrongdoing . . . ."[156]

These cases bring into focus both the significance of a right to a remedy at tort law, and the associated responsibility which negligent actors must bear for the consequences of their actions.

Concurrent with judicial steps to eradicate governmental immunity, state legislatures began modifying or completely eliminating the concept.[157] Dean Prosser observed that between judicial and legislative action, "[b]y the 1970's about half the states had abolished . . . municipal immunities . . . ."[158] However, as Prosser notes, "where immunity [was] abolished by a general statute, a tort claims act [was] usually enacted [with] particular exceptions . . . created . . . ."[159] The existence of such tort claims acts has resulted in a substantial amount of case law interpreting their validity.[160]

In discussing the impropriety of limiting the substantive right to a tort remedy because of governmental immunity, the California Supreme Court remarked in *Muskopf v. Corning Hospital District*,[161] that:

> The rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia. . . . None of the reasons for its continuance can withstand analysis. No one defends total governmental immunity. In fact, it does not exist. It has become riddled with exceptions, both legislative and judicial, and the exceptions operate so illogically as to cause serious inequality.[162]

Likewise, in *Turner v. Staggs*,[163] the Nevada Supreme Court, discussing the constitutionality of that state's nonclaim statute, held that "[s]uch arbitrary treatment clearly violates the equal protec-

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155. *Id.* at 567, 261 A.2d at 899.
156. *Id.* at 568, 261 A.2d at 900.
157. *See, e.g.*, W. PROSSER & W. KEETON, *supra* note 4, § 131, at 1052.
158. *Id.*
159. *Id.*
160. *See, e.g., supra* note 122.
161. 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89.
162. *Id.* at 216, 359 P.2d at 460, 11 Cal. Rptr. at 92 (citations omitted).
163. 89 Nev. 230, 510 P.2d 879.

tion guarantees of the United States Constitution."[164]

Accepting that liability attaches at negligence and that subsequent to negligent behavior the victim has an important and well established right to a remedy, a problem arises in determining the scope and nature of that right. Part of this problem stems from apparent confusion over whether there is a right to a specific measure of damages, or, instead, a right to a remedy which is free from arbitrary restrictions that have no substantial or even rational relation to legitimate governmental goals.

While the case law supports the proposition that a plaintiff has no right to a particular measure of damages,[165] the right to a fair remedy without artificial or improvident restrictions is indicated in forceful judicial language.[166] In other words, while a plaintiff is not guaranteed an absolute right to a particular amount of damages, he or she is entitled to carry a legitimate claim to a reasonable resolution. Therefore, when access to remedies, or the remedies themselves, are restricted, the restrictions and the associated reasoning must be weighed against the inherent impact on a substantive right. Considering this, the New Jersey Supreme Court has held that limitations on the exercise of a substantive right are unconstitutional when they have the effect of destroying that right.[167]

On the whole, as Dean Prosser has observed, judicial and legislative action eliminating or restricting governmental immunity for municipal corporations has been so pervasive that the Restatement of Torts recognizes that there is no longer general governmental immunity.[168] However, the materials cited indicate a constant theme suggesting that certain limitations on the scope and contours of a plaintiff's recovery against a municipal corporation might be legitimate from both a constitutional and a public policy perspective.[169] Specifically, Kenneth O. Eikenberry, Attorney General for the State of Washington, has observed that:

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164. *Id.* at ___, 510 P.2d at 883. The statute required, as a condition precedent to bringing a tort action against a governmental entity, that a plaintiff give notice within six months of the injury. The court held that this special procedural requirement violated state and federal equal protection guarantees because it arbitrarily barred victims of a certain class of tortfeasor from bringing suit. *Id.*

165. *See* cases cited *supra* note 122.

166. *See, e.g., Turner*, 87 Nev. at ___, 510 P.2d at 882-83.

167. Dwyer v. Volmar Trucking, 105 N.J.L. 518, ___, 146 A. 685, 687 (1929).

168. W. PROSSER & W. KEETON, *supra* note 4, § 131, at 1052.

169. *See, e.g., Cargill*, 119 N.H. 661, 406 A.2d 704; Eikenberry, *supra* note 2.

> [T]here are many instances in which government should not be liable for indirect conduct or for merely governing. Many activities in which government engages have no counterpart by private individuals or organizations. In such areas governmental entities are fundamentally different and should be judged by different rules than those applied to private parties.[170]

It is important to recognize that the emphasis of the cases ab-

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170. Eikenberry, *supra* note 2, at 742. A primary focus of Eikenberry's article is on the distinct roles played by legislative and judicial bodies in the development of public policy and the allocation of scarce governmental resources. *Id.* Part of Eikenberry's analysis revolves around the balance of power between the various branches of government and the improper judicial use of "[t]ort liability . . . as [a] financial punishment" for the negligent or otherwise wrongful acts of other branches. *Id.* Specifically, Eikenberry suggests that:

> Tort liability, acting as financial punishment, has both direct and indirect impact on the operation and integrity of the legislative and executive branches, the programs they engage in, and ultimately our constitutional form of government and balance of power. The ability of elected officials to govern on the basis of decisions designed to benefit the public generally is directly impaired by court decisions that narrowly focus on fashioning financial relief for some individuals without appropriate consideration of the available resources for the government program or project at issue.
>
> Legislative bodies are best equipped to determine policy, and the executive branch is best equipped to carry it out. No one has the panacea to solve all social problems, and judges certainly are not possessed of greater ability to do so than legislators or executive officials. Courts functioning as they do on a case-by-case basis are not well-suited for developing a cohesive public policy. Courts respond to specific occurrences and generally do not consider the effects of a decision upon existing governmental programs. Those considerations are generally left to legislative bodies, which have the ability to conduct hearings and receive wide public response. The legislature has to make the tough decision of how to allocate finite resources to best serve the overall interests of the society. In doing so, they are also directly accountable to their constituents.

Id. at 742-43.

This perspective emphasizes the importance that the *political process* plays in governmental decision making. Essentially, the incentives and disincentives which dictate government activities are not as dependent on external *market forces* as are those which influence the conduct of non-governmental actors. As such the *signal* (that there has been a misallocation of resources—i.e. that a specific activity or manner of performing that activity should be deterred) provided by the tort system need not be as strong when it is directed at municipal corporations. (For a discussion of the *signal* provided by the tort system regarding the misallocation of resources, see Schwartz & Komesar, *supra* note 8, at 1283.) In the governmental context, the *signal* need only be strong enough to indicate that there is a misallocation of resources. Once a misallocation of resources is identified (i.e. through civil action), then the political and administrative processes are, at least theoretically, set in motion.

Eikenberry should not be mistakenly understood as making an argument favoring unrestricted sovereign immunity. To the contrary, he specifically acknowledges that "[t]he early historical rule of sovereign immunity is clearly outmoded[,] [and] [g]overnment should be liable for its direct tortious conduct." *Id.* at 742.

rogating governmental immunity was on the need to compensate victims.[171] As such, governmental immunity was invalidated primarily because it stood as an automatic, artificial barrier to fair compensation for negligently inflicted harm.[172] However, while general immunity may be improper, legitimate public policy based restrictions may pass realistic judicial scrutiny.[173]

C. Synthesis and Analysis

The principle that victims of wrongful or negligent acts should be compensated to the extent that they have been harmed, is a staple of American common law.[174] As indicated, the importance of the right to be compensated for personal injuries has been a driving force behind the erosion of municipal immunity.[175] As early as 1933, the New York Court of Appeals suggested that municipal liability reflected moral and equitable obligations on the part of local governments to compensate victims for their losses.[176] However, the courts have experienced difficulty in classifying the victim's right to compensation. This difficulty associated with categorizing tort remedies has been particularly problematic in terms of finding and applying a proper standard of review when challenges have been made to legislative modifications of tort law.

As previously indicated, the right to recover in tort is not a fundamental right, but it is an "important substantive right," which has a close nexus to rights which are fundamental.[177] Considering, also, that tort recovery is not fairly classified as merely an economic or commercial right, an appropriately stringent level of judicial review is necessary when statutory modifications are made in this area of the common law. Because of the importance of victim compensation, the New Hampshire Supreme Court has deemed that, while strict scrutiny is not implicated, a statute limit-

171. *See, e.g.*, cases cited *supra* note 122.

172. *See, e.g.*, cases cited *supra* note 122.

173. *See infra* note 204 and accompanying text.

174. *See, e.g.*, W. PROSSER & W. KEETON, *supra* note 4, § 4, at 20.

175. *See supra* note 122 and accompanying text.

176. Evans v. Berry, 262 N.Y. 61, 70; 186 N.E. 203, 206 (1933). This case involved New York City's statutory waiver of immunity for injuries to bystanders while policemen were making an arrest. *Id.* at 65, 186 N.E. at 204. Commenting on *Evans v. Berry*, Professor Borchard commended the court of appeals on its decision, and noted, as the court had concluded, that "there was a moral and equitable if not a stronger obligation to assume such liability . . . ." Borchard, *supra* note 136, at 750.

177. *See supra* notes 65-70 and accompanying text.

ing tort remedies must pass an intermediate level of review to be sustained.[178]

In *Carson v. Maurer*, the New Hampshire Supreme Court refused to apply a highly deferential rational basis standard of review to legislation limiting the rights of plaintiffs in medical malpractice actions. In so doing, the court arguably modified its decision in *Estate of Cargill v. City of Rochester*.[179] In *Cargill*, the court sustained statutory restrictions on the right to recover against municipal corporations because the restrictions were "rationally relat[ed] to a legitimate state interest."[180] The court's rationale in *Cargill* derived from its earlier decision of *Merrill v. City of Manchester*[181] where the court abrogated municipal immunity, but provided that "the legislature has authority to specify the terms and conditions of suit against cities and towns . . . ."[182] The *Cargill* court stressed that the right to recover for injuries is not a fundamental right.[183] And while the *Carson* court acknowledged this principle, it noted that tort recovery is "an important substantive right,"[184] and therefore held that:

> [While, in *Cargill*,] we applied the rational basis test in evaluating classifications which, . . . place[d] restrictions on an individual's right to recover in tort [,] [w]e now conclude . . . that the rights involved herein are sufficiently important to require that restrictions imposed on those rights be subjected to a more rigorous judicial scrutiny than allowed under the rational basis test.[185]

The middle-tier scrutiny used in *Carson* required a balancing

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178. *Carson*, 120 N.H. at 932, 424 A.2d at 830-31.

179. In *Carson*, the court stressed that statutory modifications of tort remedies commanded review under a middle tier scrutiny. *Id.* However, the court alluded to distinctions between municipal corporations and other defendants. *Id.* at 942, 424 A.2d at 837. While it could be suggested that the *Carson* court's language implies that a different standard of scrutiny might attach depending upon the type of defendant, this is neither a necessary nor a likely conclusion. The thrust of the court's decision indicates that even under a middle tier scrutiny, the fundamental differences between governmental entities and other defendants makes it more likely that restrictions on the right of action against municipalities could pass an intermediate level of scrutiny. As such, *Carson* does not overrule *Cargill*, even though *Cargill* was decided under a rational basis review.

180. *Cargill*, 119 N.H. at 667, 406 A.2d at 707.

181. 114 N.H. 722, 332 A.2d 378.

182. *Id.* at 730, 332 A.2d at 384.

183. *Cargill*, 119 N.H. at 666-67, 406 A.2d at 707.

184. *Carson*, 120 N.H. at 931-32, 424 A.2d at 830 (citations omitted).

185. *Id.* at 932, 424 A.2d at 830.

of individual and societal interests to determine whether "the statute [had] a fair and substantial relation to [a] legitimate legislative objective and whether it impose[d] unreasonable restrictions on private rights."[186] Applying this test, the court concluded that the statute was constitutionally defective.[187]

Chief Justice Bird of the California Supreme Court cited *Carson* in support of her dissenting opinions in *Roa v. Lodi Medical Group, Inc.*[188] and *Fein v. Permanente Medical Group.*[189] The majority, however, discounted *Carson* because "the *Carson* court . . . applied an 'intermediate scrutiny' standard of review that is inconsistent with the applicable standard in [California]."[190] The majority's determination regarding the inapplicability of a middle tier level of review was based essentially on the decision in *American Bank II.*[191] However, in *American Bank II* the majority of the California Supreme Court had essentially ignored the principle of *stare decisis* and used judicial slight of hand to reduce a previously viable standard of review to a mere "rubber stamp" for the legislature.[192]

While it is true that California does not utilize a middle tier standard of judicial review,[193] Chief Justice Bird's sharp criticism of the California Supreme Court's post-*American Bank II* rational basis approach is analytically and historically correct. In *Fein*, the chief justice noted that she had previously opposed the introduction of an intermediate level of judicial review in the state. However, she stressed that her opposition was "conditioned" upon the "meaningful level of scrutiny" previously embodied in the court's lower tier or rational basis review.[194]

The quality of California's pre-*American Bank II* rational basis review was well described by Justice Tobriner in *Brown v.*

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186. *Id.* at 932-33, 424 A.2d at 831.

187. *Id.* at 946, 424 A.2d at 839.

188. 37 Cal. 3d at 949, 695 P.2d at 184, 211 Cal. Rptr. at 97 (Bird, C.J., dissenting).

189. 38 Cal. 3d at 170, 695 P.2d at 688, 211 Cal. Rptr. at 691 (Bird, C.J., dissenting).

190. *Id.* at 161, 696 P.2d at 682, 211 Cal. Rptr. at 385 n.19; *see also Roa*, 37 Cal. 3d at 932, 695 P.2d at 171, 211 Cal. Rptr. at 84 n.9.

191. *See, e.g., Roa*, 37 Cal. 3d at 930, 695 P.2d at 170, 211 Cal. Rptr. at 83.

192. *American Bank II*, 36 Cal. 3d at 398, 683 P.2d at 696, 204 Cal. Rptr. at 697 (Bird, C.J., dissenting).

193. *See, e.g.*, Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388.

194. *Fein*, 38 Cal. 3d at 174, 695 P.2d at 691, 211 Cal. Rptr. at 394 (Bird, C.J., dissenting).

Merlo.[195] In *Brown*, the court held that California's automobile guest statute violated state and federal equal protection guarantees because the limitations on tort recovery imposed by the statute were not rationally related to a legitimate state interest.[196] Although this language is reminiscent of traditional rational basis, highly deferential review, Justice Tobriner stressed that the standard to be employed was a *realistic rational basis test*. As such, the court refused to hypothesize about the rationale which the legislature may have had for passing the act:

> Although by straining our imagination, we could possibly derive a theoretically "conceivable" but totally unrealistic, state purpose that might support this classification scheme, we do not believe our constitutional adjudicatory function should be governed by a highly fictional approach to statutory purpose. We recognize that in past years several federal equal protection cases have embraced such excessively artificial analysis in applying the traditional "rational basis" equal protection test. More recently, however, the United States Supreme Court has drawn back from such an absolutely deferential position and has again demanded that statutory classifications bear some substantial relationship to an actual, not "constructive," legislative purpose. . . .[W]e believe it would be inappropriate to rely on a totally unrealistic "conceivable" purpose to sustain the present statute in the face of our state constitutional guarantees.[197]

Beyond this strong statement by Justice Tobriner, *Brown* bears an interesting kinship to the current situations regarding modification of tort remedies for medical malpractice and municipal liability. As recognized by Chief Justice Bird, the statute invalidated in *Brown* was similar to California's MICRA in that it too was "panic legislation" enacted in the face of a "crisis."[198] It is worth noting that the statute implicated in *Brown* was enacted in 1929 but not invalidated until 1973. This fact raised a point of concern to Chief Justice Bird in *American Bank II*. After comparing *Brown* and *American Bank II*, the chief justice lamented that "with [the] majority opinion, it appears that once again years will

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195. 8 Cal. 3d at 861-62, 506 P.2d at 216-17, 106 Cal. Rptr. at 392-93.

196. *Id.* at 882, 506 P.2d at 231, 106 Cal. Rptr. at 407.

197. *Id.* at 865, 506 P.2d at 219, 106 Cal. Rptr. at 395 n.7 (citations omitted).

198. *American Bank II*, 36 Cal. 3d at 387, 683 P.2d at 688, 204 Cal. Rptr. at 689 (Bird, C.J., dissenting).

pass and many victims of negligence will undergo injury without adequate relief before their constitutional rights will be recognized and respected."[199]

American Bank II, Fein, and *Roa* can arguably be supported by the proposition that a legislature may act to remedy " 'defects in the common law.' "[200] However, as Justice Tobriner noted in *Brown,* "in undertaking any alteration or reform of such rules the Legislature may not irrationally single out one class of individuals for discriminatory treatment."[201] It is particularly relevant that in determining the rationality of such a statutory modification of the common law, courts may consider "post-enactment information" and developments in addition to what was before the legislature at the time of passage.[202] Post-MICRA developments strongly suggests that the Act was not well suited to, and in fact failed to approach, the goals that it was intended to reach.[203]

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199. *Id.*, 683 P.2d at 689, 204 Cal. Rptr. at 690 (Bird, C.J., dissenting).

200. *Brown*, 8 Cal. 3d at 882, 506 P.2d at 231, 106 Cal. Rptr. at 407 (quoting Munn v. Illinois, 94 U.S. 113, 134 (1877)).

201. *Id.*

202. *See, e.g., American Bank II*, 36 Cal. 3d at 384, 683 P.2d at 686, 204 Cal. Rptr. at 687 (Mosk, J., dissenting).

203. *See, e.g., id.* at 382-83, 683 P.2d at 685, 204 Cal. Rptr. at 686 (Mosk, J., dissenting). Justice Mosk referred to figures provided in an *amicus* brief by the California Hospital Association:

> [I]n a study of premiums paid by 420 of the state's 650 hospitals, the cost of malpractice insurance had risen dramatically before the enactment of MICRA, so that by October 1, 1976, the charge for $1 million in coverage for each occupied hospital bed was $124.31 a month, or roughly $4 a day. Premium charges were lower by 1981, amounting to only $93.46 a month for the same amount of coverage for each occupied bed, or approximately $3 a day.
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> In 1975, the year after MICRA was enacted, the average daily charge for hospitalization in a community hospital in California was $217 a day. By 1981, the average hospital charge had risen to $547 daily, an increase of more than 20 percent over the previous year. Another increase of more than 20 percent occurred between the first quarter of 1981 and the first quarter of 1982, so that in the latter period, the average daily hospitalization charge amounted to $620.
>
> In short, while malpractice premiums for most of the state's hospitals declined by 25 percent in the years following enactment of MICRA, the cost of hospitalization rose dramatically.

Id. (footnote and citations omitted).

An additional consideration in assessing the impact of MICRA relates to an external factor. Soon after the passage of the Act, Travelers Insurance Company settled a suit brought by a group of California doctors by agreeing to a refund settlement valued at between $50 million and $61 million. The settlement was related to premium overcharges. W. SHERNOFF, *supra* note 9, at 187. The question must be raised, whether the impact of the suit and the settlement had a greater effect on the reduction of premiums than did the Act.

The California Supreme Court has not fairly reviewed the limitations imposed by MICRA, and in the process has betrayed the logic of *Brown* and *Muskopf*. However, this does not diminish the true importance of the right to compensation, but rather highlights the unfortunate stance which the court adopted. Had the court been true to its previously proud legacy of realistic rational basis review, it is unlikely that MICRA could have been sustained as written. The California court's approach is representative of an improvident, though politically expedient, manner of a judiciary unburdening itself of crucial and weighty issues by accepting, and then exploiting, artifice over substance.

The case law and authorities cited thus far do not suggest that modification of tort law remedies is impermissible.[204] What is suggested is that the rights of victims under tort law are so important that limitation or restriction of those rights should be subject to a middle tier scrutiny or at least a legitimate and realistic rational basis review. To this extent, the approach of the New Hampshire Supreme Court is both viable and valuable, and should be regarded as a model for dealing with legislative responses to the current crises.

III. The Public Policy of Deterrence

Much of the discussion, thus far, has centered on the compensation aspect of tort law. As emphasized by the cases and comments cited, the balancing of interests during judicial review has essentially been a process of weighing the victim's right to compensation against public benefits expected to accrue from limitations on that right.[205] However, this approach is not reflective of the entire societal role of tort law. This is because the public policy ramifications of tort law extend to and are heavily influenced by the goal of deterrence.[206]

Judge Posner has stressed that:

> The association of negligence with purely compensatory damages has prompted the erroneous impression that liability for negligence is intended solely as a device for compensation.

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204. *See, e.g., Carson*, 120 N.H. 925, 424 A.2d 825; *Cargill*, 119 N.H. 661, 406 A.2d 704; Borchard, *supra* note 136.

205. *See supra* notes 122 and 204.

206. *See supra* notes 33-34 and accompanying text; *see also supra* note 170.

> Its economic function is different; it is to deter uneconomical accidents. As it happens, the right amount of deterrence is produced by compelling negligent injurers to make good the victim's losses. Were they forced to pay more (punitive damages), some economical accidents might also be deterred; were they permitted to pay less than compensation, some uneconomical accidents would not be deterred. It is thus essential that the defendant be made to pay damages and that they be equal to the plaintiff's loss. But that the damages are paid to the *plaintiff* is, from an economic standpoint, a detail.[207]

This perspective is helpful in recognizing the societal importance of the deterrent aspect of negligence law. Such recognition stems from a realization that the development of public policy without proper consideration of the deterrence factor is incomplete and improvident.[208]

This understanding creates an *equation* different from the one thus far enumerated in the court. In this balance, the public interest[209] in limiting victims' rights must be weighed against the individual interest in compensation as well as the benefits accruing to a safer society through the general deterrence of harmful or negligent conduct.[210] When the full scope of consideration is given, the legitimacy of various limitations on rights or remedies can more accurately be measured. As such, the likelihood of tort reforms passing a realistic judicial scrutiny, as well as conscientious legislative analysis, is dependent upon a broader mix of factors than heretofore recognized. These factors, in turn, are often influenced

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207. R. POSNER, *supra* note 33, § 6.12, at 143 (footnote omitted).

208. Professor Calabresi has suggested that "no system of accident law should be designed with only one goal in mind." G. CALABRESI, *supra* note 31, at 37. Concentration on one goal to the exclusion of the other can deleteriously affect a system of negligence law. *Id.*

This may very well be the ultimate result of the recent New Hampshire tort reform act. By narrowly focusing on the compensation side of tort law while apparently addressing constitutional concerns, the legislature has arguably neglected the value of deterrence in the tort system.

209. The public interest, in this sense, relates the societal benefits expected to accrue because of a reduction in tort litigation. Such benefits arguably include a reduction in the cost of liability insurance, greater availability of liability insurance, reduced costs for services in both the private and public sectors, and a greater availability of various services.

210. The purpose of this *equation* is to demonstrate the broader policy perspectives that must be considered by legislatures enacting reforms and by courts reviewing those reforms. Specifically, there is a public benefit trade-off between loss of deterrence on one hand and the gains achieved by reducing litigation and awards in crisis situations on the other.

by underlying societal or public policy norms and values.[211]

Underlying public policy goals or perceptions determine the balance between compensation and deterrence for any type of negligence liability. This balance is a variable which differs, depending on the particular activity or class of activity concerned. In regard to certain activities or certain actors the tort goal of deterrence is much more important than the goal of compensation;[212] for others the opposite is true.[213] This principle goes far in explaining why limiting a cause of action or the structure of remedies against one class of target defendants may be more legitimate or acceptable than limiting a cause of action or the structure of remedies against another. The viability of this principle may also promote an understanding of why various features of the common law, such as governmental immunity, have been so enduring.

For many years municipal immunity was viewed as an anachronism in the common law,[214] yet it persisted. Only after a protracted struggle was general municipal immunity finally eradicated.[215] This breakdown, and the concurrent creation of municipal liability, resulted principally from judicial, and eventually legislative, indignation over the fact that innocent victims of governmental negligence were left uncompensated.[216]

Many courts and commentators have puzzled over why such an anachronistic and unsupported concept as governmental immunity was so difficult to dissolve.[217] The answer (or part of the answer), perhaps lies in what seems to be an identifiable, public policy undercurrent which suggests that government entities are less in need of deterrent incentives than are other classes of tortfeasors.[218] This is because, while health care providers and

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211. *See, e.g.*, W. PROSSER & W. KEETON, *supra* note 4, § 3, at 15.

212. *See*, Schwartz & Komesar, *supra* note 6.

213. *Cf.* Eikenberry, *supra* note 2 ("Tort liability, acting as financial punishment" is inappropriate when applied to governmental entities. *Id.* at 742.).

214. *See supra* note 122.

215. *See supra* notes 122 & 123 and accompanying text.

216. *See, e.g., supra* notes 122 & 123 and accompanying text.

217. *See, e.g.*, cases cited *supra* note 122; Borchard, *supra* notes 123 & 136.

218. This is suggested by the fact that municipal corporations are not-for-profit corporations created to serve the public good. Therefore, the motives which drive municipalities are different than those which induce private individuals or organizations to act. This distinction does not support general governmental immunity, but rather suggests a possible underlying (unspoken) basis for different treatment by the tort system of private and public actors. This unspoken basis is supported by an historical undercurrent in public policy. The thrust of this public policy undercurrent is that, because of the operation of the political

other private sector actors operate in essentially an *economic marketplace*, governmental bodies operate in a *political marketplace*.[219] As such, adverse judgments through the tort process serve a more direct and important deterrent role in private sector decision-making than in the public sector. Specifically, Kenneth O. Eikenberry has suggested that "[s]omething is fundamentally wrong with the idea that a tort action for damages is an appropriate way of setting or establishing governmental policy."[220]

If it can be accepted that governmental immunity persisted because of a *no need to deter* policy, then it is easier to understand why the obligation to compensate, by itself, was so slow in causing a shift in the balance between societal and individual interests.[221] On the other hand, there has long been a recognized need for tort law deterrence among professionals generally, and among health care providers specifically.[222] William B. Schwartz and Neil K. Komesar identify the disproportion in the balance between deterrence and compensation, suggesting that:

> The [malpractice] system makes a great deal more sense if it is understood primarily as a means to deter careless behavior rather than to compensate its victims. By finding fault and assessing damages against the negligent provider, the system sends all providers a general signal that discourages future carelessness and reduces future damages.[223]

So important do Schwartz and Komesar consider the role of deterrence in medical malpractice law, that they suggest:

> The importance of compensation in this view of the system is that it provides the victim with an incentive to bring suit; only thus can the signal be initiated. Compensation in this

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process, governmental bodies are able (or, at least, are perceived as being able) to respond to a weaker signal from the tort system than are private (profit motivated) actors, who are less immediately responsive to the political process. Because municipalities should be responsive to weaker signals, there is no prevailing public policy to bring the full deterrent scope of tort law to bear on municipal corporations.

219. *See* Eikenberry, *supra* note 2.

220. *Id.* at 743.

221. This is because without a policy of creating deterrent incentives, the individual compensation factor is not a strong counter-balance to broad societal interests. *Cf. Fein*, 38 Cal. 3d at 168, 695 P.2d at 687, 211 Cal. Rptr. at 390 (Bird, C.J., dissenting) (criticizing majority for sustaining MICRA based on balancing of individual compensation against overall societal benefit). In this balance, broad societal interests are measured in terms of aggregate benefits. *See supra* note 209.

222. *See, e.g.*, Hawkins, *supra* note 3, at 1282.

223. Schwartz & Komesar, *supra* note 6, at 1282.

> sense, is an indispensable *ingredient* of the deterrence mechanisms, even though compensating the victim is not [the] main *purpose* [of litigation].[224]

The difference between the role of deterrence in influencing the behavior of medical defendants as opposed to municipalities derives principally from the way that each group makes resource allocation decisions. At least one commentator has suggested that the expected value[225] of malpractice claims made against a physician is "a component of the price he pays for the right of access to the income-earning opportunities of practicing medicine."[226] This component, thus, influences the physician's allocation of resources in the medical field.[227]

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224. *Id.* at 1283.

225. *Expected value* is an economic term describing "the magnitude of a potential loss or gain multiplied by the probability of the loss or gain occurring." A. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 27 (1983).

226. Rottenberg, *Introduction*, in THE ECONOMICS OF MEDICAL MALPRACTICE 5 (S. Rottenberg ed. 1978). Rottenberg has identified the risk of injury to a patient and the threat of a malpractice claim as a "tax" assessed to the health care provider. *Id.* at 8. Further, Rottenberg stresses that while there is a perception that increased medical malpractice rates raise the total cost to society of medical care, this is not the case. *Id.* at 14. Because "[t]he cost to society of medical care is the sum of the value of the foregone uses of real resources employed in health care delivery and the value of the damage to patients arising from the ministrations of health care practitioners," the cost of society is "unaffected by the magnitude of malpractice insurance premium charges." *Id.* Rather, the increased costs to physicians merely indicate that they are bearing a greater burden of the aggregate costs:

> If more and larger payouts are made in malpractice trial awards and settlements than previously, this means only that a larger fraction of the cost of repairing medical injury is being borne by physicians than previously and a smaller fraction of that cost is being borne by patients. The distribution of that cost is affected, but the magnitude of the cost is unchanged.

Id.

227. Rottenberg suggests that the allocation of resources within the medical profession is affected in the following ways:

> (1) the establishment and abandonment of practice, and thus the size of the industry . . . .;
> (2) the allocation of practitioners among specialties;
> (3) the spatial distribution of medical practice—urban versus rural, by city size, and by practice in home visits, outpatient clinics, and hospitals;
> (4) size of firm—solo versus group practice;
> (5) the allocation of those trained in medicine between medical research and medical practice;
> (6) the allocation of practitioners among cases differentiated by diagnostic and prescriptive difficulty and by the degree of risk aversion of patients;
> (7) the ratio of physicians to paramedical personnel in delivering medical care; and

Included among the choices influenced by the threat of medical malpractice claims are not only how a physician practices, but what he or she practices.[228] Significantly, the malpractice system has the effect of deterring certain doctors from practicing in areas where, from a societal perspective, they should not be practicing.[229] In other words, the malpractice system is geared toward an effective allocation of resources through the use of *market forces* which include the costs of malpractice insurance and litigation. Professor Calabresi has addressed this concept, in the abstract, suggesting that "[g]eneral deterrence attempts to force individuals to consider accident costs in choosing among activities."[230] "[T]he primary way in which a society may seek to reduce accident costs," stresses Calabresi, "is to discourage activities that are 'accident prone' and substitute safer activities as well as safer ways of engaging in the same activities."[231]

By stark contrast, while the deterrent aspect of tort law influences the scope and nature of medical practice, it does not exercise the same influence in terms of the resource allocation of municipalities. Municipalities are political systems and the resource allocation choices of municipalities result from the political process. The societal remedy for improper governmental decisions is *theoretically* in the voting booth (and subsequently the administrative process), not in the courtroom.[232] As such, there is no strong public policy supporting a significant tort law role in deterring municipalities from engaging in certain activities. Therefore, while the breakdown of municipal immunity reflects a recognition of the victim's right to be compensated, the tort system is not properly seen as a primary avenue for influencing the activities of local government. Comparatively, because the medical field is not controlled directly by the political process, the costs associated with the malpractice system are needed as influences on the behavior of health care providers for the benefit of society.

Considering that the balance between the tort law goals of deterrence and compensation is determinative of the legitimacy of

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(8) the choice of diagnostic procedures and the choice of therapies appropriate to diagnostic estimates.

Id. at 5-6.

228. *Id.* at 6.

229. *Id.*; Schwartz and Komesar, *supra* note 6, at 1287.

230. G. CALABRESI, *supra* note 31, at 69.

231. *Id.* at 68 (footnote omitted).

232. *See generally* Eikenberry, *supra* note 2.

limitations on rights and remedies, it is easy to see how a narrow *compensation only* approach improperly distorts the perspective of reform and review. Having identified underlying public policy preferences which suggest a high ratio of deterrence to compensation regarding medical malpractice, as opposed to a low ratio of deterrence to compensation regarding municipal liability, it seems that there is more legitimacy to limitations on rights and remedies in causes of action against municipal corporations.

Perhaps this distinction explains why some health care providers have resisted changes in tort law which benefit governmental entities to the exclusion of other target defendants.[233] In 1982, a bill in the California State Legislature eliminating joint and several liability as applied to municipal defendants was defeated when health care providers placed their support behind those opposing the bill.[234] Passage of the bill may have evinced legislative recognition of the difference in the compensation-deterrence balance between these groups. However, this is not a difference which non-government target defendants may be willing to recognize openly, because it effectively precludes their access to relief legislation which would otherwise be available to both private and public target defendants.

The forms of relief legitimately accessible to governmental entities may be varied and it is not the purpose of this note to identify and discuss every possible reform in this area. However, two exceptions to the standard operation of the tort system which seem particularly applicable to government are: (1) limitations on the collateral source rule, and (2) limitations on joint and several liability.

The collateral source rule allows a plaintiff to recover fully from a defendant even if the plaintiff has been otherwise compensated by another "source independent of the tortfeasor."[235] There are several arguments supporting the rule, including the rationale that "the plaintiff paid for the benefit he is now receiving and that the defendant ought not benefit from that payment."[236] This argument is particularly relevant when the collateral source is the plaintiff's own insurance. The California Supreme Court, in

233. *See, e.g.*, Granelli, *supra* note 22, at 63.
234. *Id.*
235. D. DOBBS, THE LAW OF REMEDIES, § 8.10, at 581 (1973).
236. *Id.* at § 8.10, at 584.

Helfend v. Southern California Rapid Transit District, stressed that "[t]he collateral source rule expresses a policy judgment in favor of encouraging citizens to purchase and maintain insurance for personal injuries and for other eventualities."[237] While this observation is true, it focuses too narrowly on the actions of the plaintiff. In fact, discussion regarding the collateral source rule is often limited to issues of compensation and questions of how to distribute a windfall as between the innocent, prudent plaintiff and the wrongdoer.[238]

The collateral source rule, however, better serves the deterrent goal of tort law than the compensation goal. As Judge Posner has observed, "[t]o permit the defendant to set up [the plaintiff's insurance] as a bar [to complete recovery] would result in underdeterrence."[239] As such, if the collateral source rule is directed primarily at the deterrence of negligent or otherwise wrongful conduct, the degree of deterrence needed (based on the type of actor involved), will determine the validity of the rule under various circumstances. Considering that governmental actors need less deterrent incentives and disincentives than private actors, it may be a wholly legitimate exercise of public policy to limit, or even eliminate, the collateral source rule in cases involving municipal defendants.

Joint and several liability is another aspect of tort law which serves both compensation and deterrent purposes. The basic concept guarantees the plaintiff's recovery when several tortfeasors have contributed to his or her injury, but one or more of the defendants are judgment proof.[240] However, while the primary focus of joint and several liability may be on compensation, there is a significant deterrent aspect to the rule. Specifically, when two or more persons are engaged in an activity (such as the provision of

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237. 2 Cal. 3d 1, 10, 465 P.2d 61, 66, 84 Cal. Rptr. 173, 178 (1970).
It should be noted that, in *Helfend* the California Supreme Court refused to accept the defendant's argument that the collateral source rule should not apply to governmental entities. *Id.* at 14, 465 P.2d at 69, 84 Cal. Rptr. at 181. This holding apparently resulted from a failure to consider that the collateral source rule is essentially a deterrent feature of tort law, and that governmental entities are less in need of strong tort law deterrents than are private actors. However, given the fundamental difference between governmental and private actors, the elimination of the collateral source rule as applied to the government would be acceptable from both constitutional and public policy perspectives.

238. *See, e.g.*, D. DOBBS, *supra* note 235, § 8.11, at 586.

239. R. POSNER, *supra* note 33, § 6.15, at 153.

240. *See, e.g.*, Granelli, *supra* note 22.

health care), the possibility of being held jointly and severally liable for any harm resulting from negligence will necessarily increase the vigilance and careful behavior of all actors. As such, while joint and several liability may be particularly appropriate in private sector settings, unlimited joint and several liability may be inappropriate in the public sector because governmental bodies are less in need of, and less responsive to, tort law deterrence.

A reasonable response to concerns about the validity of joint and several liability as applied to governmental bodies is provided in recent tort reform legislation passed in the State of New Hampshire.[241] The New Hampshire rule applies joint and several liability to government actors, engaged in specific activities, only when the governmental defendant is liable for fifty percent or more of the plaintiff's harm.[242] This application allows a reasonable compensatory use of joint and several liability without improvident and excessive deterrence of municipal activities.

CONCLUSION

In recent years there has been a growing number of *crisis-legislation sequences* in tort law. The thrust of these sequences is that target defendants and insurance carriers are attempting to fundamentally change the face of tort law remedies in order to alleviate liability insurance crises which are claimed to result from excesses of the tort system. However, it is strongly suggested that many of the proposed and enacted *solutions* do not adequately address the purported problem, and therefore serve only to harm victims without providing a corresponding societal benefit.

Additionally, legislative modifications of tort law and judicial review of those modifications have historically been framed in terms of individual compensation versus overall societal benefits. This approach ignores the fundamental principle that the negligence system serves not only to compensate victims, but also to deter wrongdoers. In fact, a paramount public policy consideration of tort law is that the balance between the goals of compensation and deterrence shifts in relation to various actors and different activities. This is because underlying societal preferences indicate that certain classes of potential defendants should be subject to

241. 1986 N.H. Laws 227:10.
242. *Id.*

more deterrent incentives than should others. Such preferences must be considered by state legislatures in creating limitations on plaintiffs' rights and remedies, and by the courts in reviewing such limitations.

When tort reforms are proposed or reviewed, the legislatures and the courts must take a broad perspective. There must be an awareness that the individual right involved is an important substantive right. Because the right to compensation is so important, tort reform measures should be subjected to a middle-tier judicial scrutiny, or at least a realistic rational basis review. Also, legislatures and reviewing courts must be cognizant of the balance between compensation and deterrence in relation to the particular target group seeking redress. It seems that limitations on causes of action against governmental entities are more justifiable than are limitations relating to claims against other target defendants such as health care providers.

The reason that limitations on recoveries against municipalities might pass a legitimate scrutiny is that governmental decisions result from political pressures and influences which are not necessarily dependent on economic market concerns. Moreover, because municipal corporations exist to serve a public function, there is not necessarily a need to deter local government from engaging in public activities. However, because there is no comparable political process control over health care providers, society is dependent on the market, which includes the tort system, to deter inefficient activities of unqualified providers.

Even though some level of reform may be acceptable regarding municipal corporations, the eradication of governmental immunity demonstrates that wholesale or arbitrary restrictions on tort remedies will not survive judicial scrutiny. Among the most legitimate reform measures are the limitation of joint and several liability and the elimination of the collateral source rule as applied to municipal corporations.

Because joint and several liability has the effect of increasing the vigilance of private actors as a means of avoiding disproportionate liability, joint and several liability provides a significant deterrent incentive. However, because government reacts primarily to political rather than market incentives, unrestricted joint and several liability serves only to open the public treasury without being able to effectively curtail improper allocation of resources or negli-

gent conduct.

The collateral source rule is even less legitimately applied to municipal corporations. The rule is particularly supportive of the deterrent goal of tort law. By precluding a tortfeasor from benefiting from a victim's recovery from a source wholly independent of the tortfeasor, the collateral source rule provides economic disincentives against negligent or otherwise wrongful conduct. However, such economic disincentives are not as appropriate, or as necessary, in the public sector as in the private. This is because governmental actors may be responsive to weaker economic *signals* than private actors. Government is more responsive to weaker economic signals because the political process is, at least *theoretically*, set into motion by the identification of the misallocation of resources. Comparatively, in an economic marketplace, health care providers and other private actors, require stronger economic signals to be driven to, or precluded from, various activities.

This note has discussed the nature of the right to tort law remedies, and has identified the fundamental difference between certain classes of target defendants. By according the right its proper respect and by not blurring the differences between municipal corporations and private actors, state legislatures and state courts can address the current crises through a principled approach to tort reform.

Tort law currently exists in a turbulent environment in which rational choices are difficult to identify and even more difficult to effect. However, both the legislatures and the courts must be cognizant of the significant constitutional and public policy issues which are woven into the very fabric of tort law. Both the legislatures and the courts must avoid the temptations provided by the "expediency of the passing hour,"[243] and must not sacrifice important rights and principles for false promises.

George A. Michak

243. B. CARDOZO, *supra* note 1, at 92.