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## *Bernier v. Burris*: The Constitutional Implications of Abolishing Punitive Damages in Medical Malpractice Actions

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# Bernier v. Burris: The Constitutional Implications of Abolishing Punitive Damages in Medical Malpractice Actions

## I. INTRODUCTION

The sudden rise in insurance premiums<sup>1</sup> and large verdicts<sup>2</sup> and settlements<sup>3</sup> in medical malpractice cases have provoked many states to enact laws that modify common law tort law principles.<sup>4</sup>

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1. As noted in Comment, *The Constitutionality of Medical Malpractice Legislative Reform: A National Survey*, 18 LOY. U. CHI. L.J. 1053, 1053 n.1 (1987), physicians and insurance providers perceived a malpractice crisis based on the increased medical malpractice claims and larger judgments. Insurance carriers became reluctant to risk coverage of physicians without dramatic increases in malpractice insurance premiums. Whether or not such a crisis in fact existed has been the subject of debate. *Id.* (citing, Neubauer & Hencke, *Medical Malpractice Legislation: Laws Based on a False Premise*, 21 TRIAL 64 (Jan. 1985)). The AMERICAN MEDICAL ASSOCIATION SPECIAL TASK FORCE ON PROFESSIONAL LIABILITY & INSURANCE, PROFESSIONAL LIABILITY IN THE '80s, REPORT 1 (Oct. 1984) reported that between 1975 and 1983, medical liability premiums increased by more than 80% in general. *Id.* at 8.

2. As noted in Smith, *Battling a Receding Tort Frontier: Constitutional Attacks on Medical Malpractice Laws*, 38 OKLA. L. REV. 195, 196 (1985), figures supplied by the AMA indicate that the percentage of physicians sued in malpractice suits nearly tripled in the period from 1978 to 1983. *Id.* at 196 n.2. Smith also noted, however, that contrary to the AMA claims, other statistics indicate that after 1976, the average claim frequency fell nationwide. *Id.*

3. In 1982, more than 250 medical malpractice settlements exceeded one million dollars. See Smith, *supra* note 2, at 196 n.3. Studies of settlements and verdicts in medical malpractice cases compiled by HEW (*Report of the Secretary's Commission on Medical Malpractice*, (1973)) and the National Association of Insurance Commissioners (*NAIC Malpractice Claims*, (May, 1977)) covering all payments made from July 1, 1975, to June 30, 1976 indicate that in those cases in which some payment was made, either by settlement or verdict, approximately 75% were disposed of for under \$10,000 in 1970 and 89% for less than \$20,000. Only 3% of the cases in which payment was made were disposed of for more than \$100,000. For a summary of these studies, see H. ALSOBROOK, *Medical Malpractice: Course Manual* 230 (1984).

4. Smith, *supra* note 2, at 196. Some of the more common changes of common law tort principles have involved the adoption of medical review panels. See, e.g., ARIZ. REV. STAT. ANN. § 12-567 (West 1986); MASS. GEN. LAWS ANN. ch. 231, § 60B (West 1986); N.Y. JUD. LAW ANN. § 148-A(2) (West 1987). Provisions that provide for payment of a judgment over time also have been employed. See, e.g., CAL. CIV. PROC. CODE § 667.7 (West 1987), FLA. STAT. ANN. § 768.78 (West 1987); ILL. REV. STAT. ch. 110, paras. 2-1705-19 (1985). Other provisions have modified the collateral source rule. See, e.g., ARIZ. REV. STAT. ANN. § 12-565 (1986); DEL. CODE ANN. tit. 18, § 6862 (Michie Supp. 1986); TENN. CODE ANN. § 29-26-119 (1980). Another approach has been the regulation of attorneys' fees in medical malpractice cases. See, e.g., ARIZ. REV. STAT. ANN. § 12-568 (1985); ILL. REV. STAT. ch. 110, para. 2-1114(d) (1985); UTAH CODE ANN. § 78-14 7.5 (Supp. 1985). Finally, some provisions impose some sort of ceiling of plaintiff's recoverable damages. See, e.g., IND. CODE ANN. § 16-9.5-2-2 (West 1984) and § 16-9.5-4-1

In response to this medical malpractice "crisis," Illinois passed legislation intended to limit the jury awards in medical malpractice cases.<sup>5</sup> Part of this legislation, section 2-1115 of the Illinois Code of Civil Procedure, also provided that "[i]n all cases, whether in tort, or otherwise, in which plaintiff seeks damages by reason of legal, medical, hospital or other healing art malpractice, no punitive, exemplary or vindictive damages shall be allowed."<sup>6</sup> Accordingly, the Medical Malpractice Act (the "Act")<sup>7</sup> completely abolished punitive damages in all medical malpractice cases.

Although punitive damages<sup>8</sup> have come under recent attack,<sup>9</sup> only six states completely disallow an award of punitive damages.<sup>10</sup>

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to 4-3 (West 1986); TEX. REV. CIV. STAT. ANN. ART. 4590i, § 11.02 (Vernon 1987), VA. CODE § 8.01-581.15 (1984).

5. The Medical Malpractice Act, ILL. REV. STAT. ch. 110, para. 2-109 (1985) (originally enacted as ILL. REV. STAT. ch. 110, para. 2-114 (1985)), made various changes in the Code of Civil Procedure, ILL. REV. STAT. ch. 110, paras. 1-101 to 19c-101 (1985). The primary parts of the legislation provided for the system of review panels, for periodic payment of future damages, the modification of the collateral source rule and the limitations on the amount of contingent fees. ILL. REV. STAT. ch. 110, paras. 1-101 to 19c-101 (1985). See Smith & Lane, *Torts, 1985-1986 Illinois Law Survey*, 18 LOY. U. CHI. L.J. 795, 819 (1986).

6. ILL. REV. STAT. ch. 110, para. 2-1115 (1987). The inclusion of the legal profession in the statute does not weaken the argument that this statute unfairly shields the medical profession. Indeed, the additional shielding of lawyers from punitive damages gives rise to an argument that the legislation in question violates the single subject clause of the Illinois Constitution. The Illinois Constitution provides that "[b]ills, except for appropriations and for codification, revision or rearrangement of laws, shall be confined to one subject." ILL. CONST. art. IV, § 8(d). The plaintiff in *Bernier v. Burris*, 113 Ill. 2d 219, 497 N.E.2d 763 (1986), argued that because the provision concerns actions for both healing art malpractice and legal malpractice, it pertained to more than one subject. *Id.* at 247, 497 N.E.2d at 777. This Note will not explore this portion of the *Bernier* opinion.

7. ILL. REV. STAT. ch. 110, para. 1115 (1987).

8. Punitive damages are those damages awarded to the plaintiff over and above what will compensate him for his property loss, when the wrong done to him was aggravated by circumstances of violence, oppression, malice, fraud, or wanton and wicked conduct on the part of the defendant. Punitive damages are intended to comfort the plaintiff for mental anguish, shame, degradation, or other aggravations of the original wrong, or else to punish the defendant for his evil behavior or to make an example of him. BLACK'S LAW DICTIONARY 467 (4th ed. 1951). Generally, punitive damages and exemplary damages are considered to be synonymous. Forde, *Punitive Damages in Mass Tort Cases: Recovery on Behalf of a Class*, 15 LOY. U. CHI. L.J. 397, 401 n.19 (1984). Traditionally, however, there has been a distinction between punitive damages, which are primarily meant to punish, and exemplary damages which are intended to comfort the defendant, but were not meant to punish the defendant. Weigel, *Punitive Damages in Medical Malpractice Litigation*, 28 S. TEX. L.J. 119, 124 (1987).

9. See DuBois, *Punitive Damages in Personal Injury, Products Liability and Professional Malpractice Cases: Bonanza or Disaster*, 43 INS. L.J. 344 (1976); Long, *Punitive Damages: An Unsettled Doctrine*, 25 DRAKE L. REV. 870 (1976); McKillip, *Punitive Damages in Illinois: Review and Reappraisal*, 27 DE PAUL L. REV. 571 (1978).

10. Louisiana, (*McCoy v. Arkansas Natural Gas Co.*, 175 La 487, 143 So. 383 (1982); *Killbrew v. Abbott Laboratories*, 359 So. 2d 1275 (La. 1978) (punitive damages not al-

Other states limit the amount of punitive damages that can be awarded in medical malpractice cases.<sup>11</sup> Illinois, however, is the only state that has specifically barred punitive damages in medical malpractice actions.<sup>12</sup>

In *Bernier v. Burris*,<sup>13</sup> the Illinois Supreme Court addressed the constitutionality of prohibiting punitive damages in medical malpractice actions.<sup>14</sup> The plaintiff challenged section 2-1115 of the Act on the grounds that the elimination of punitive damages solely in medical malpractice cases violated the due process and equal protection clauses of the state and federal constitutions, and constituted special legislation under the Illinois Constitution.<sup>15</sup> The Illinois Supreme Court held that section 2-115 was constitutional because the legislation was rationally related to a legitimate governmental interest.<sup>16</sup>

This Note will discuss briefly the history of punitive damages in medical malpractice actions.<sup>17</sup> It then will discuss the *Bernier* opinion.<sup>18</sup> Finally, this Note will critique the court's rationale for

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lowed as a common law concept)); Massachusetts, (*City of Lowell v. Massachusetts Bonding & Ins. Co.*, 313 Mass 257, 47 N.E.2d 265 (1943); *Caperci v. Huntoon*, 397 F.2d 799, 801 (1st Cir. 1968) (no punitive damages allowed in common law)); Nebraska, (*Miller v. Kingsley*, 194 Neb. 123, 230 N.W.2d 472, 474 (1975); *Abel v. Conover*, 170 Neb. 926, 104 N.W.2d 684, 688 (1960) (punitive damages not allowed)); Washington, (*Fisher Properties Inc. v. Arden-Mayfair, Inc.*, 106 Wash. 2d 826, 726 P.2d 8, 23 (1986); *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 25 P. 1072 (1891) (punitive damages not allowed unless expressly authorized by statute)); New Hampshire (N.H. REV. STAT. ANN. § 507:16 as added by Laws 1986, ch. 227:3, effective July 1, 1986 (no punitive damages unless expressly authorized by statute)); and Indiana (*Nicholson's Mobile Home Sales, Inc. v. Schramm*, 164 Ind. App. 598, 330 N.E.2d 785 (1st Dist. 1975) (recovery of punitive damages not permitted if defendant in civil action is also subject to criminal prosecution for the same act)).

11. See, e.g., ALASKA STAT. § 09.17.010(b) (1986) (\$500,000 limit on noneconomic damages); Calif. Civ. Code Ann. § 3333.2 (West 1987) (\$250,000 limit on noneconomic damages); FLA. STAT. ANN. § 768.80 (West 1987) (\$450,000 limit on noneconomic damages). See also M. PETERSON, S. SARMA & M. SHANLEY, PUNITIVE DAMAGES: EMPIRICAL FINDINGS 3 (1987) [hereinafter EMPIRICAL FINDINGS].

12. ILL. REV. STAT. ch. 110, para. 2-1115 (1985). See also J. GHIARDI & J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE § 18.5 (Supp. 1987).

13. 113 Ill. 2d 219, 497 N.E.2d 763 (1986).

14. *Id.*

15. *Id.* at 245, 497 N.E.2d at 776. This Note will specifically address the equal protection and special legislation arguments. The due process argument and the single subject clause arguments will not be addressed. See *supra* note 6. For a further analysis of the special legislation argument, see *infra* notes 34-35 and 133-45 and accompanying text.

16. 113 Ill. 2d at 245-46, 497 N.E.2d at 776. The *Bernier* court noted that the focus of an equal protection and due process challenge is whether or not the legislation in question is rationally related to a legitimate governmental goal. *Id.* at 228, 497 N.E. at 768.

17. See *infra* notes 20-30 and accompanying text.

18. See *infra* notes 31-74 and accompanying text.

concluding that punitive damages may be disallowed only in medical malpractice actions.<sup>19</sup>

## II. HISTORICAL PERSPECTIVE

### A. *Punitive Damages Generally*

Juries generally have the power to award more money than needed to compensate injured parties.<sup>20</sup> This power has its roots in English common law.<sup>21</sup> Early cases recognized that compensatory damages might be an insufficient response to certain willful, wanton, reckless, malicious, oppressive, or brutal acts.<sup>22</sup> Accordingly, punitive damages were designed not only as satisfaction to the injured person, but also as punishment for the guilty,<sup>23</sup> and a deterrent to both the individual and society from future misconduct.<sup>24</sup>

### B. *Punitive Damages in Medical Malpractice Actions*

Circumstances that warrant an award of punitive damages in medical malpractice actions vary among the states.<sup>25</sup> In Illinois, the standard that originally governed an award of punitive damages in medical malpractice actions was articulated in *Pratt v. Davis*.<sup>26</sup>

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19. See *infra* notes 75-145 and accompanying text.

20. EMPIRICAL FINDINGS, *supra* note 11, at 2. See also Belli, *Punitive Damages: Their History, Their Use and Their Worth in Present Day Society*, 49 UMKC L. REV. 1 (1980); Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S.C.L. REV. 12 (1982); Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173 (1931).

21. See Belli, *supra* note 20; Ellis, *supra* note 20; Morris, *supra* note 20.

22. The first case to award punitive damages was *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763). Early American cases that awarded a plaintiff punitive damages include: *Hanna v. Sweeney*, 78 Conn. 492, 62 A. 785 (1906) (punitive damages awarded as compensation for plaintiff's cost of bringing suit), *Coryell v. Colbaugh*, 1 N.J.L. 90 (1791) (punitive damages awarded for example's sake for breach of a promise to marry).

23. *Eshelman v. Rawalt*, 298 Ill. 192, 198, 131 N.E. 675, 679 (1921). In *Smith v. Hill*, 12 Ill. 2d 588, 595, 147 N.E.2d 321, 325 (1958), the court held that punitive damages are not designed to recompense the individual, but are allowed only in the interest of society.

24. *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763). Punishment and deterrence are the objectives of punitive damages in modern law as well. See, e.g., *Kimes v. Trapp*, 52 Ill. App. 2d 442, 202 N.E.2d 42 (3d Dist. 1964) (wanton acts and malice are basic elements for allowance of exemplary damages); *Mattyasovszky v. West Towns Bus Co.*, 61 Ill. 2d 31, 330 N.E.2d 509 (1975) (punitive damages are awarded primarily to punish the offender and to discourage other offenses). See also Chapman, *Punitive Damages in Illinois and Elsewhere*, 64 ILL. B.J. 636 (1976).

25. Annotation, *Allowance of Punitive Damages In Medical Malpractice Actions*, 27 A.L.R. 3d 1274 (1969); Long, *supra* note 9, at 876.

26. 118 Ill. App. 161 (1905), *aff'd* 224 Ill. 300, 79 N.E. 562 (1906). Illinois had awarded punitive damages prior to the award in *Pratt*. In 1845, the Illinois Supreme Court sustained an award of exemplary damages in order "not only to compensate the

In *Pratt*, a doctor removed a patient's uterus without her permission.<sup>27</sup> The court held that malice, oppression, or wanton recklessness may be the proper standards for an award of punitive damages. The court interpreted those words to mean a willful and deliberate intention to commit an act that the doctor was bound to recognize as illegal.<sup>28</sup> The *Pratt* standard is no longer the law governing punitive damages in medical malpractice cases in Illinois. The Medical Malpractice Act<sup>29</sup> has completely banned punitive damages in medical malpractice cases.<sup>30</sup>

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plaintiff but to punish the defendant." *McNamara v. King*, 7 Ill. 432, 2 Gilman 432 (1845). *Pratt* was the first case in Illinois involving medical malpractice in which an award for punitive damages was sustained.

27. 118 Ill. App. at 161.

28. *Id.* at 182. The defendant in *Pratt* urged that malice meant a morally evil intention on the part of the tortfeasor. *Id.* The court disagreed and held that the willful and deliberate intention to commit an act that the defendant was bound in the eye of the law to know was illegal constituted malice in the legal sense. *Id.* The court stated: "[t]o hold otherwise would be to throw around intentional and wilful indefensible acts protection, because of ignorance of the law, which every man is presumed to know, or because of a disposition to ignore and defy the law for ends deemed justifiable by the offender." *Id.* Generally, an actual or deliberate intention to harm is still the standard for awarding punitive damages. ILLINOIS SUPREME COURT, COMMITTEE ON JURY INSTRUCTIONS, ILLINOIS PATTERN JURY INSTRUCTIONS: CIVIL § 35.01 (2d ed. 1971). The courts, however, have defined the circumstances warranting an award of punitive damages in a variety of ways. See McKillip, *supra* note 9, at 573.

29. ILL. REV. STAT. ch. 110, para. 2-109 (1985) (originally enacted as ILL. REV. STAT. ch. 110, para. 2-114 (1985)).

30. Section 2-1115 of the Illinois Code of Civil Procedure, also provides: "[i]n all cases, whether in tort, or otherwise, in which plaintiff seeks damages by reason of legal, medical, hospital or other healing art malpractice, no punitive, exemplary or vindictive damages shall be allowed." ILL. REV. STAT. ch. 10, para. 2-1115 (1987). No state, other than Illinois, has ever held it to be constitutional to limit the award of punitive damages solely in malpractice actions. Other states have ruled on the constitutionality of various other medical malpractice reform measures. Smith, *supra* note 2, at 200. The constitutional objections to the reform measures, especially those which rest on state constitutional grounds, have been increasingly successful. Smith, *supra* note 2, at 209 n.83 (citing cases in which state courts have struck down malpractice remedial measures on the basis that the legislature's classification was irrational and bore no reasonable relationship to a legitimate governmental purpose). For example, the Illinois Supreme Court held in *Wright v. Central DuPage Hosp. Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976), that a \$500,000 limit on compensatory damages in a medical malpractice action violated equal protection and was, therefore, unconstitutional. For further discussion of *Wright*, see *infra* notes 93-95 and accompanying text. Although the tests used in evaluating a federal constitutional challenge, such as equal protection, are uniform among the states, the tests used in evaluating state constitutional challenges are not. Smith, *supra* note 2, at 204-12. As noted by Justice Stevens, a state constitution's equal protection clause may encompass more than the federal provision and state supreme courts should be able to vindicate individual rights by striking down laws on state constitutional grounds. *Michigan v. Long*, 463 U.S. 1032, 1039 (1983). State courts are therefore more flexible in the application of tests used in evaluating the constitutionality of a given law.

### III. DISCUSSION

The plaintiff in *Bernier v. Burris*<sup>31</sup> attempted to enjoin the disbursement and expenditure of public funds for carrying out various provisions of the Medical Malpractice Act,<sup>32</sup> including the provision of the Act that prohibits awards of punitive damages in actions for healing art or legal malpractice.<sup>33</sup> The plaintiff alleged that the prohibition violated federal and state guarantees of equal protection and due process. The plaintiff also asserted that the prohibition constituted special legislation.<sup>34</sup> The circuit court concluded that section 2-1115 violated the federal and state guarantees of due process and equal protection and that it constituted special legislation.<sup>35</sup> Accordingly, the court enjoined disbursement of funds under the Act.<sup>36</sup>

On appeal to the Illinois Supreme Court,<sup>37</sup> the plaintiff argued that the entire Medical Malpractice Act did not conform with the due process and equal protection provision of the federal constitution because there was no statistical proof that a medical malpractice crisis necessitated such a legislative measure.<sup>38</sup> The plaintiff also argued that the Act's exemption of the medical and legal professions from punitive damages violated equal protection, due process, and the Illinois Constitution's single subject and special

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31. 113 Ill. 2d 219, 497 N.E.2d 763 (1986). The plaintiff, Bernice Bernier, obtained standing to sue under ILL. REV. STAT. ch. 110, para. 11-301, which states that "An action to restrain and enjoin the disbursement of public funds by any officer or officers of the State government may be maintained either by the Attorney General or by any citizen and taxpayer of the State." *Id.* The plaintiff brought a taxpayer's suit directly against the state comptroller, Roland R. Burris, to challenge the Medical Malpractice Act's validity. *Bernier*, 113 Ill. 2d 219, 497 N.E.2d 763 (1986).

32. ILL. REV. STAT. ch. 110, para. 2-109 (1985) (originally enacted as ILL. REV. STAT. ch. 110, para. 2-114 (1985)).

33. *Bernier*, 113 Ill. 2d at 245, 497 N.E.2d at 776 (citing ILL. REV. STAT. ch. 110, para. 2-1115 (1985)). For a general description of *Bernier*, see Note, *Constitutional Law, The Illinois Medical Malpractice Act, Pre-Trial Review Panels*, 76 ILL. B.J. 870 (1987).

34. *Bernier*, 113 Ill. 2d at 245, 497 N.E.2d at 776. Special legislation is a special or local law. The Illinois Constitution provides that: "[t]he General Assembly shall pass no special or local law when a general law is or can be made applicable." ILL. CONST. art. IV, § 13. For a further discussion of special legislation, see *infra* notes 133-45 and accompanying text.

35. *Bernier*, 113 Ill. 2d at 245, 497 N.E.2d at 776. The lower court held that section 2-1115 violated the provision of the Illinois Constitution requiring bills to be confined to one subject. ILL. CONST. art. IV, § 8(d). See *supra* note 6 and accompanying text.

36. *Bernier*, 113 Ill. 2d at 245, 497 N.E.2d at 776.

37. Because the decision rested on constitutional grounds, the State appealed directly to the Illinois Supreme Court. See ILL. REV. STAT. ch. 110, para. 302 (1987).

38. Brief of Plaintiff-Appellee at 9, *Bernier v. Burris*, 113 Ill. 2d 219, 497 N.E.2d 763 (1986) (No. 62876).

legislation clauses.<sup>39</sup> Specifically, the plaintiff contended that liability for punitive damages was uninsurable in Illinois, and there was no evidence that punitive damages had ever been awarded against a physician in Illinois.<sup>40</sup> Eliminating punitive damages could not be reasonably related to the Act's objective of reducing frivolous suits or thwarting the insurance crisis.<sup>41</sup> The defendant replied that the plaintiff's statistical evidence was irrelevant because under various Supreme Court decisions, such as *Minnesota v. Clover Leaf Creamery Co.*,<sup>42</sup> a court may not invalidate a statute merely because evidence shows that the legislature was mistaken.<sup>43</sup>

The Illinois Supreme Court agreed with the State and held constitutional the statute prohibiting punitive damages in actions for medical or legal malpractice.<sup>44</sup> The court concluded that the elimination of punitive damages was rationally related to the goal of avoiding excessive liability in medical malpractice actions.<sup>45</sup> In its analysis, the court first noted that there was a strong presumption that legislative enactments are constitutional.<sup>46</sup> The court then set forth the standards to be used in determining the validity of the plaintiff's equal protection, due process, and special legislation attacks.<sup>47</sup> The court noted that the guarantee of equal protection and the prohibition against special legislation are not identical, yet it chose to judge the two by the same standard.<sup>48</sup> Citing a law review article,<sup>49</sup> the supreme court stated that the rational-basis test generally had been applied in testing the constitutionality of medical malpractice legislation under guarantees of due process and equal protection.<sup>50</sup> The court then noted two recent cases<sup>51</sup> that did not use the rational-basis test, but rather the substantial-

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39. *Id.* at 54-59.

40. *Id.* at 54.

41. *Id.* at 57.

42. 449 U.S. 456, 464 (1981). For a discussion of *Clover Leaf*, see *infra* notes 79-83 and accompanying text.

43. *Bernier*, 113 Ill. 2d at 229, 497 N.E.2d at 767 (citing *Clover Leaf Creamery Co.*, 449 U.S. at 464).

44. *Id.* at 246, 497 N.E.2d at 776.

45. *Id.*

46. *Id.* at 227, 497 N.E.2d at 766 (citing *People v. Greene*, 96 Ill. 2d 334, 338, 450 N.E.2d 329, 331 (1983); *Cronin v. Lindberg*, 66 Ill. 2d 47, 58, 360 N.E.2d 360, 365 (1976)).

47. *Id.*

48. *Id.* at 228, 497 N.E.2d at 767.

49. Smith, *supra* note 2.

50. For a discussion of the various standards used in an equal protection analysis see *infra* notes 54-58 and 76-79 and accompanying text. The rational basis standard requires only a loose fit between the legislative ends and the legislative means. See G. GUNTHER, CONSTITUTIONAL LAW 590-91 (11th ed. 1985).



relation test in assessing equal protection challenges of state constitutions.<sup>52</sup> The *Bernier* court, however, declined to follow the substantial-relation test used in these cases.<sup>53</sup> The court reasoned that because the medical malpractice legislation did not implicate a suspect classification,<sup>54</sup> quasi-suspect classification,<sup>55</sup> or a fundamental right,<sup>56</sup> the traditional mere rationality test applied.<sup>57</sup> The court stated that the same mere rationality test also applied to the special legislation challenge.<sup>58</sup>

In support of its decision, the court explained that the history of the legislation amply demonstrated that it was enacted in response to what was perceived to be a crisis in the area of medical malpractice.<sup>59</sup> Although the court deferred to the trial court's finding that there was no such "crisis,"<sup>60</sup> it nonetheless refused to strike down

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51. *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978).

52. *Bernier*, 113 Ill. 2d at 227-28, 497 N.E.2d at 766. Under the substantial relation test, a classification is valid if it is reasonable and premised on some ground of difference having a fair and substantial relationship to the object of the legislation, so that all persons similarly situated are treated alike. Note, *Refining the Methods of Middle Tier Scrutiny*, 61 TEX. L. REV. 1501, 1504-05 (1983). As noted in *Bernier*, the Supreme Court of New Hampshire held in *Carson*, that as a matter of state constitutional law, the appropriate standard in assessing the equal-protection challenges was whether the challenged classifications are reasonable and have a fair and substantial relation to the object of the legislation. *Bernier*, 113 Ill. 2d at 227, 497 N.E.2d at 766 (citing *Carson v. Maurer*, 120 N.H. 925, 932-33, 424 A.2d 825, 831 (1980)). The *Bernier* court also noted that the Supreme Court of North Dakota also used an intermediate standard of review — one that required "a close correspondence between statutory classification and legislative goals" in finding that various medical malpractice provisions violated state constitutional guarantees of equal protection and due process. *Bernier*, 113 Ill. 2d at 227-28, 497 N.E.2d at 766 (citing *Arneson v. Olson*, 270 N.W.2d 125, 133 (1978)).

53. *Bernier*, 113 Ill. 2d at 228, 497 N.E.2d at 767.

54. The Supreme Court has reserved strict scrutiny for classifications based upon race, religion, nationality, alienage, and upon categorizations involving fundamental rights. *Smith*, *supra* note 2, at 202.

55. Quasi-suspect classifications have been traditionally limited to those classifications based on gender or illegitimacy. Recently, the groups accorded quasi-suspect classification status have been subject to change. *Smith*, *supra* note 2, at 204.

56. Rights explicitly or implicitly guaranteed by the Constitution are fundamental. *Smith*, *supra* note 2, at 202.

57. *Bernier*, 113 Ill. 2d at 227-28, 497 N.E.2d at 766 (citing *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 809 (1969); *Illinois Housing Development Authority v. Van Meter*, 82 Ill. 2d 116, 119-20, 412 N.E.2d 151, 159 (1980)).

58. *Bernier*, 113 Ill. 2d at 228, 497 N.E.2d at 767 (citing *Jenkins v. Wu*, 102 Ill. 2d 468, 477-48, 468 N.E.2d 1162, 1167 (1984); *Anderson v. Wagner*, 79 Ill. 2d 295, 315, 402 N.E.2d 560, 568-69 (1979)).

59. *Id.* at 229, 497 N.E.2d at 767. For further discussion of the medical malpractice "crisis," see *infra* notes 113-16 and accompanying text.

60. *Id.* Whether a malpractice crisis existed at all was disputed by the plaintiff in the circuit court, and the trial judge expressly found that there was no such crisis. *Id.* As noted by the *Bernier* court, the plaintiffs sought to avail themselves of the argument pre-

the legislation on the grounds that the legislative judgment was incorrect.<sup>61</sup>

Having set the standards of review, the court proceeded to analyze whether section 2-115 of the Code of Civil Procedure violated the federal and state guarantees of due process and equal protection and whether it constituted special legislation.<sup>62</sup> The court began by noting that other statutes prohibiting the recovery of punitive damages in various types of actions previously had been upheld by the courts.<sup>63</sup> The court also cited *In re Air Crash Disaster*<sup>64</sup> in support of its decision to uphold the statute.<sup>65</sup> In that case, the United States Court of Appeals for the Seventh Circuit held that the elimination of punitive damages in wrongful death actions to avoid excessive liability was a legitimate legislative goal served by the chosen means.<sup>66</sup> In reaching that conclusion, the Seventh Circuit noted that more severe limitations had been upheld and that the purpose of barring punitive damages in a particular context — to avoid excessive liability — was a legitimate goal served by the chosen means.<sup>67</sup> The *Bernier* court noted that a similar re-

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viously employed in *Boucher v. Sayeed*, 459 A.2d 87 (R.I. 1983). In *Boucher*, the court held that absent a crisis to justify the enactment of malpractice legislation, there could be no satisfactory reason for the separate and unequal treatment that it imposes on medical malpractice litigants. *Id.* at 93. For further discussion of *Boucher*, see *infra* notes 114-16 and accompanying text.

61. *Bernier*, 113 Ill. 2d at 229, 497 N.E.2d at 767. The *Bernier* court cited *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981), for the proposition that states are not required to convince the courts of the correctness of their legislative judgments. According to *Clover Leaf Creamery Co.*, when evidence before the legislature reasonably supported the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken. *Id.* The *Bernier* court then noted that whether a malpractice crisis existed was a question "at least debatable." *Bernier*, 113 Ill. 2d at 230, 497 N.E.2d at 768.

62. *Bernier*, 113 Ill. 2d at 245, 497 N.E.2d at 775.

63. *Id.* (citing *Siegal v. Solomon*, 19 Ill. 2d 145, 166 N.E.2d 5 (1960) (actions for alienation of affections); *Smith v. Hill*, 12 Ill. 2d 588, 147 N.E.2d 321 (1958) (actions for breach of promise to marry)).

64. 644 F.2d 594 (7th Cir. 1981).

65. The plaintiffs in *In re Air Crash Disaster* argued that the denial of punitive damages in wrongful death actions was unconstitutional. *In re Air Crash Disaster*, 644 F.2d 594 (7th Cir. 1981). The Seventh Circuit held that the classification was rationally related to the legitimate state purpose of avoiding excessive liability. *Id.* at 610. As noted by one commentator, to disallow punitive damages due to the death of the victim, whether done so in the name of judicial restraint or in the name of stare decisis, is inequitable and illogical. "Indeed, it seems that people have trouble living with the adage, still true, that it is cheaper to kill rather than injure." Gleason, *Illinois Reaffirms the Principle that Punitive Damages Die with the Victim*, 72 ILL. B.J. 570 (1984).

66. *Bernier*, 113 Ill. 2d at 246, 497 N.E.2d at 776.

67. *Id.*

sult must obtain in the case at bar.<sup>68</sup> Although the *Bernier* court recognized that it previously had invalidated, as special legislation, limits on recovery of compensatory damages in medical malpractice actions,<sup>69</sup> it concluded that punitive damages need not be available in every case.<sup>70</sup>

The court also rejected the plaintiff's argument that because punitive damages are not insurable in Illinois, their prohibition is irrational.<sup>71</sup> It noted that the legislative purpose was broad enough to extend beyond problems peculiar to insurable damages, and that the Act generally served the legislative goal of reducing damages against the medical profession.<sup>72</sup> Because the court had established that the standards for analyzing equal protection, due process, and special legislation claims were the same, the failure of the equal protection argument precluded the success of the others.<sup>73</sup> The Illinois Supreme Court also rejected the plaintiff's assertion that a bill eliminating punitive damages for both legal and medical malpractice violated the single-subject requirement.<sup>74</sup>

#### IV. ANALYSIS

##### A. *Equal protection*

##### 1. Federal and State Standards

The *Bernier* court held that the same standards governed the equal protection challenge of both the state and federal constitutions.<sup>75</sup> The *Bernier* court followed the federal courts' formulation that, in cases not involving a suspect classification<sup>76</sup> or a fundamen-

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68. *Id.*

69. *Id.* (citing *Wright v. Central DuPage Hosp. Ass'n*, 63 Ill. 2d 313, 329, 347 N.E.2d 736, 744 (1976)).

70. *Id.* The court distinguished compensatory and punitive damages by noting that punitive damages were intended to punish rather than compensate. *Id.*

71. *Id.* The plaintiffs argued that the abolition of punitive damages in medical malpractice actions was not rationally related to the legislative goal of reducing the high cost of medical insurance because punitive damages are not an insurable item in Illinois. *Id.* See *infra* notes 110-12 and accompanying text.

72. *Id.*

73. *Id.*

74. *Id.* Art. IV § 8(d) of the Illinois Constitution states in part: "Bills . . . shall be confined to one subject." ILL. CONST. art. IV, § 8(d). The court held that both legal and medical malpractice cases were not sufficiently discordant, and because the Code of Civil Procedure could prohibit punitive damages in medical and legal malpractice actions separately, their inclusion together in one provision did not offend the single-subject requirement. *Bernier*, 113 Ill. 2d at 247, 497 N.E.2d at 776. See also *infra* note 6 and accompanying text.

75. *Bernier*, 113 Ill. 2d at 227, 497 N.E.2d at 767.

76. Suspect classifications normally involve racial, ethnic, or national origin classi-

tal right,<sup>77</sup> minimal scrutiny should be used.<sup>78</sup> In support of this proposition, *Bernier* cited *Minnesota v. Clover Leaf Creamery Co.*<sup>79</sup>

In *Clover Leaf*, the United States Supreme Court considered the constitutionality of a state law that banned the retail sale of milk in plastic nonreturnable containers, but permitted retail sales in other nonreturnable containers, such as paper milk cartons.<sup>80</sup> In upholding the law, the Supreme Court held that whether the statute actually aided the legislative objective was irrelevant.<sup>81</sup> According to

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cations. *See, e.g.,* *Strauder v. W. Va.*, 100 U.S. 303, 306 (1880) (Blacks may not be excluded from jury solely because of race); *Loving v. Va.*, 388 U.S. 1, 3 (1967) (racial classifications, especially in criminal statutes, are subject to the most rigid scrutiny).

77. A fundamental right is explicitly or implicitly guaranteed by some provision of the Constitution. *See, e.g.,* *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973) (education is not a fundamental right); *Kramer v. Union Free School Dist.*, 395 U.S. 621, 625 (1969) (voting is a fundamental right); *Griffin v. Ill.*, 351 U.S. 12, 15 (1956); *Douglas v. Cal.*, 372 U.S. 353, 355 (1963) (access to courts is a fundamental right); *Roe v. Wade*, 410 U.S. 113, 117 (1973) (privacy is a fundamental right).

78. The meaning of minimal scrutiny has changed over time. As noted by Gerald Gunther, traditionally, equal protection supported only minimal judicial intervention. G. GUNTHER, *CONSTITUTIONAL LAW* 590-91 (11th ed. 1985). Courts did not demand a tight fit between the legislative classification and the legislative purpose. *Id.* During the Warren Court era, however, the Court developed a two-tier scrutiny of equal protection, reserving the traditional deferential stance for cases involving social or economic legislation, but at the same time applying strict scrutiny to legislation that embraced a suspect classification or that had an impact on fundamental rights or interests. *Id.* at 590. Under the strict scrutiny tier, the legislation has to be a necessary means to achieve a compelling state interest. Under the minimal scrutiny tier, the legislation only has to be a rationally related means of achieving a legitimate state end. *Id.* This rigid two tiered analysis is no longer rigorously applied. *Id.* Justice Stevens has been the most vehement advocate of a single standard of equal protection. *Id.* at 590. *See, e.g.,* *Craig v. Boren*, 429 U.S. 190, 195 (1976) (Stevens, J., concurring) (classifications based on gender must serve important governmental objectives and must be substantially related to achieve those objectives). Justice Marshall has also advocated a sliding scale approach to the equal protection clause. *See, e.g.,* *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 5 (1973) (Marshall, J., dissenting). In his dissent, Justice Marshall noted that the majority appears to find only two standards of equal protection review — strict scrutiny, or mere rationality. In reality, there is a wide spectrum of review depending on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the classification. The amount of review accorded to nonconstitutional rights or interests varies according to the nexus between those rights and specific constitutional guarantees. Gunther notes that the Burger Court Justices have suggested that the classification, even under the mere rationality standard must substantially further some legitimate, articulated state purpose, rather than a conceivable one. G. GUNTHER, *CONSTITUTIONAL LAW* 590-91 (11th ed. 1985). Moreover, the mere rationality/strict scrutiny dichotomy has also been eroded by recent Supreme Court development of an intermediate level of scrutiny. Under this test, the legislative means must be substantially related to an important governmental goal. *See* Smith, *supra* note 2, at 204.

79. 449 U.S. 456 (1981).

80. *Id.* For a full discussion of the *Clover Leaf* case, see Smith *supra* note 2, at 202-04.

81. *Clover Leaf*, 449 U.S. at 446.

the Court, the equal protection clause would be satisfied if the Minnesota legislature could rationally have decided that its ban might foster greater use of environmentally desirable alternatives.<sup>82</sup> Justice Stevens dissented on the ground that state courts, unlike federal courts, were free under the Constitution to substitute their own evaluation of the means and purpose of a law for that of the state legislature, and hence have more power to vindicate individual rights by striking down laws on constitutional grounds.<sup>83</sup>

Some courts have followed the course suggested by Justice Stevens in *Clover Leaf*.<sup>84</sup> For example, a few courts have held that the right to recover damages in a personal injury tort action is a fundamental right similar to the right of privacy or the right to vote.<sup>85</sup> Other courts, such as those in New Hampshire and North Dakota, have afforded medical malpractice legislation an intermediate standard of review.<sup>86</sup> In *Carson v. Maurer*,<sup>87</sup> the Supreme Court of New Hampshire noted that, although the right to recover was not a fundamental right, it was nevertheless sufficiently important to require that restrictions imposed on that right be subjected to a more rigorous judicial scrutiny than that applied under the rational basis test.<sup>88</sup> The *Carson* court held that the classifications created by malpractice remedial statutes must be reasonable, not arbitrary, and supported by a good reason to treat the delineated class differently.<sup>89</sup> Courts in Indiana, Idaho, and North Dakota also have required equal protection challenges to medical malpractice legislation to pass the substantial relation test.<sup>90</sup>

*Bernier* rejected the substantial relation test, and applied the

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82. *Id.*

83. *Id.* at 478-82 (Stevens, J., dissenting).

84. *White v. State*, 203 Mont. 363, 661 P.2d 1272 (1983); *Kenyon v. Hammer*, 142 Ariz. 124, 688 P.2d 961 (1984) (right to recover for bodily injury is a fundamental right).

85. *Smith*, *supra* note 2, at 204-05, (citing *Kenyon v. Hammer*, 142 Ariz. 124, 688 P.2d 961 (1984); *White v. State*, 203 Mont. 363, 661 P.2d 1272 (1983)).

86. *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978).

87. 120 N.H. 925, 424 A.2d 825 (1980).

88. *Id.* at 928, 424 A.2d at 830.

89. *Id.* at 928, 424 A.2d at 831.

90. *Jones v. State Bd. of Medicine*, 97 Idaho 859, 555 P.2d 399, 411 (1976), *cert. denied*, 431 U.S. 914 (1977) (damages and liability limits controlled by substantial relationship test). On remand, the court held unconstitutional the provisions under this same standard. *See also Jones v. State Bd. of Medicine*, Nos. 55527 and 55586 (4th Dist. Idaho, Nov. 3, 1980); *Johnson v. Saint Vincent Hosp., Inc.*, 273 Ind. 374, 404 N.E.2d 585 (1980) (substantial relationship applied; Indiana Medical Malpractice Act held constitutional); *Arneson v. Olson*, 270 N.W.2d 125, 133 (N.D. 1978). *See Smith*, *supra* note 2, at 207.

traditional mere rationality test.<sup>91</sup> In its application of this test, the court did not undertake a meaningful analysis as to whether the legislature's classification was irrational or whether it bore any reasonable relationship to a legitimate governmental purpose.<sup>92</sup> Additionally, the court chose not to follow *Wright v. Central Du Page Hospital Association*<sup>93</sup> which held unconstitutional legislation limiting the amount of compensatory damages that could be awarded. *Wright* concluded that such a limitation was irrational and bore no reasonable relationship to a legitimate governmental purpose.<sup>94</sup> The *Bernier* court not only failed to follow the *Wright* analysis, but also failed to distinguish the *Wright* holding. The court's examination of the legislation with such deferential scrutiny lacked any meaningful review. The *Bernier* court should have looked to the purpose of the legislation and asked whether the legislative means were rationally related to its purpose.<sup>95</sup>

## 2. Purpose and Means

The threshold inquiry of purpose has always posed problems for the courts.<sup>96</sup> The Illinois Senate debates regarding section 2-1115

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91. *Bernier*, 113 Ill. 2d at 227-28, 497 N.E.2d at 766.

92. *Id.*

93. 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

94. *Id.*

95. *People ex. rel. Tucker v. Kotsos*, 68 Ill. 2d 88, 96, 368 N.E.2d 903, 910 (1977); *Bridgewater v. Hotz*, 51 Ill. 2d 103, 111, 281 N.E.2d 317, 324 (1972).

96. Gunther, *The Supreme Court, 1971 Term — Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). In some cases, the Court, when faced with an unclear or unexpressed declaration of purpose, has substituted a conceivable one. See *McGowan v. Maryland*, 366 U.S. 420 (1961) (state Sunday closing law survives an equal protection challenge on the grounds that the legislature is presumed to have acted within its constitutional power despite the law's unequal results); *McDonald v. Board of Election*, 394 U.S. 802 (1969) (state may deny imprisoned voters awaiting trial absentee ballots without violating equal protection because legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining legislative motives are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) (a statute that barred opticians from placing old lenses in new frames without written authority from those with greater professional training upheld because the legislature might have concluded that prescriptions were necessary with sufficient frequency to require the regulation). In other cases, the Court has inquired into the true motivations of the legislature rather than conceivable ones. See *Smith v. Cahoon*, 283 U.S. 553 (1931) (decision invalidates a Florida law which required commercial motor vehicles to post liability bonds or furnish insurance policies for the protection of those injured through the carrier's negligence. The law explicitly exempted transporters of agricultural, horticultural, and dairy products. The Court held that the exemption violated equal protection because the general purpose of the law was traffic safety the exemption must be justified in terms of traffic safety).

of the Illinois Code of Civil Procedure<sup>97</sup> provide some indication of the legislative purpose behind abolishing punitive damages in medical malpractice actions.<sup>98</sup> According to the legislative history, the legislature intended to reduce the high cost of medical malpractice insurance,<sup>99</sup> the number of medical malpractice lawsuits,<sup>100</sup> and the number of frivolous lawsuits.<sup>101</sup>

The Illinois Supreme Court in *Bernier* noted generally that the overall purpose of the bill was to reduce the liability of the medical profession. The court, however, failed to consider carefully the articulated legislative purposes of the statute.<sup>102</sup> Although under a traditional equal protection analysis, any conceivable purpose could sustain legislation,<sup>103</sup> the modern trend suggests that courts should ask whether the challenged distinction rationally furthers some legitimate, articulated state purpose rather than a conceivable one.<sup>104</sup> The *Bernier* court chose to consider merely the conceivable purpose.<sup>105</sup>

The next step in the equal protection analysis is determining whether the means used are rationally related to the purpose.<sup>106</sup> A court should consider first whether the abolition of punitive damages is rationally related to the legislative goal of reducing the high

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97. ILL. REV. STAT. ch. 110, para. 2-1115 (1985).

98. For the legislative history of 2-115, see Senate Debates, 84th General Assembly, May 24th, card 0043, row 5, column 9 (1985).

99. Senate Debates, 84th General Assembly, May 24th, card 0043, row 5, column 9 (1985).

100. *Id.*

101. Illinois General Assembly, House Debate, June 18, 1985, at 36-37. Representative Daniels stated: "Many of these lawsuits are non-meritorious. A number of them are surely frivolous. These lawsuits, together with the ever increasing verdicts and settlements in other lawsuits, have caused a crisis of affordability in malpractice insurance and it is to these [problems] to which the legislation is addressed." *Id.*

102. *Bernier*, 113 Ill. 2d at 246, 497 N.E.2d at 776. According to the historical and practice notes regarding the Medical Malpractice Act, the legislation represents a third attempt by the Illinois General Assembly to regulate comprehensively medical malpractice litigation, with a view toward reducing the number of lawsuits and the size of the awards which are given. ILL. REV. STAT. ch. 110, para. 2-109 (1987).

103. See *supra* notes 96-97 and accompanying text.

104. Gunther, *supra* note 96. As noted by Gunther, requiring the courts to consider the articulated state purpose would encourage state legislatures to explain the benefits sought by the legislation. *Id.* at 46. The acceptability of the legislative objective, therefore, would be exposed at once to critical public debate which would ultimately pierce any fragile facade obscuring real objectives. *Id.* Even in the face of legislative silence, the Court could always remand to a legislature for a more adequate record regarding purpose. *Id.* According to Gunther, either method would be healthier for the political process than looking for a conceivable purpose which would justify the legislation. *Id.*

105. *Bernier*, 113 Ill. 2d at 246, 497 N.E.2d at 776.

106. See *supra* notes 96-105 and accompanying text.

cost of medical insurance.<sup>107</sup> Second, the court must ask whether the abolition of punitive damages in medical malpractice actions serves the legislative purpose of reducing the number of lawsuits.<sup>108</sup> Finally, the court should determine whether the abolition of punitive damages in medical malpractice actions reduces medical malpractice liability in general. The supreme court in *Bernier* never carefully considered these questions. The court instead summarily concluded that a conceivable means-ends relationship existed that could sustain the legislation, not only against an equal protection challenge, but also against a due process and special legislation challenge.<sup>109</sup>

Initially, the *Bernier* court should have analyzed whether the abolition of punitive damages in medical malpractice actions was rationally related to the legislative goal of reducing the high cost of medical insurance.<sup>110</sup> This question assumes that punitive damages are an insurable item.<sup>111</sup> Since 1981, Illinois courts have held that

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107. *Bernier*, 113 Ill. 2d at 246, 497 N.E.2d at 776.

108. *Id.*

109. *Id.*

110. The *Bernier* court did ask itself this question. *Id.* at 246, 497 N.E.2d at 776. However, it responded: "[The fact that] in Illinois one may not insure against awards of punitive damages does not render the provision irrational in the context in which it was enacted. The purpose of the legislation here was broad enough, we believe, to extend beyond the problems that must be peculiar to insurable damages." *Id.* (citations omitted).

111. Jurisdictions differ as to whether or not punitive damages are insurable. Coverage allowed: *Pennsylvania Threshermen and Farmers Mut. Cas. Ins. Co. v. Thornton*, 244 F.2d 823 (4th Cir. 1957); *Concord Gen. Mut. Ins. Co. v. Hills*, 345 F. Supp. 1090 (S.D. Me. 1972); *Am. Fidelity & Casualty Co. v. Werfel*, 230 Ala. 552, 162 So. 103 (1935); *Price v. Hartford Accident and Indem., Co.*, 108 Ariz. 485, 502 P.2d 522 (1972); *Southern Farm Bureau Casualty Ins. Co.*, 246 Ark. 849, 440 S.W.2d 582 (1969); *Greenwood Cemetery, Inc. v. The Travelers Indem. Co.*, 238 Ga. 313, 232 S.E.2d 910 (1977); *Abbie Uriguen Oldsmobile Buick Inc. v. United States Fire Ins. Co.*, 95 Idaho 501, 511 P.2d 783 (1973); *Carroway v. Johnson*, 245 S.C. 200, 139 S.E.2d 908 (1965); *Lazenby v. Universal Underwriters Ins. Corp.*, 214 Tenn. 639, 383 S.W.2d 1 (1964); *Dairyland County Mut. Ins. Co. v. Wallgren*, 477 S.W.2d 341 (Tex. Civ. App. Fort-Worth 1972); *State v. Glen Ins. Co.*, 147 Vt. 313, 404 A.2d 101 (1979). Coverage prohibited: *Northwestern Nat'l Casualty Co. v. McNulty*, 307 F.2d 432 (5th Cir. 1962); *American Sur. Co. of New York v. Gold*, 375 F.2d 523 (10th Cir. 1966); *City Prods. Corp. v. Globe Indem. Co.*, 88 Cal. App. 3d 31, 151 Cal. Rptr. 494 (1st Dist. 1979); *Universal Indem. Insur. Co. v. Trenery*, 96 Colo. 10, 39 P.2d 776 (1934); *Caspersen v. Webber*, 298 Minn. 93, 213 N.W.2d 327 (1973); *Crull v. Gleb*, 382 S.W.2d 17 (Mo. Ct. App. 1964); *Variety Farms Inc. v. New Jersey Mfrs. Ins. Co.*, 172 N.J. Super. 10, 410 A.2d 696 (1980); *Hartford Accident & Indem. Co. v. Village of Hempstead*, 48 N.Y.2d 218, 397 N.E.2d 737, 422 N.Y.S.2d 47 (1979); *Isenhardt v. Gen. Casualty Co. of Am.*, 233 Or. 49, 377 P.2d 26 (1962). See generally *Burrell & Young, Insurability of Punitive Damages*, 62 MARQ. L. REV. 1 (1978); *Haskell, Punitive Damages: The Public Policy and Insurance Policy*, 58 ILL. B.J. 780 (1970); *Zugar, Insurance Coverage of Punitive Damages*, 53 NOTRE DAME L. REV. 239 (1977); Note, *Insurance Coverage of Punitive Damages: A Reevaluation*, 28



public policy prohibits insurance against liability for punitive damages arising out of one's own misconduct.<sup>112</sup> Because punitive damages are not insurable in Illinois, the elimination of punitive damages in medical malpractice actions does not bear a rational relationship to the legislative goal of reducing the high cost of medical insurance.

Further, the *Bernier* court did not consider whether the abolition of punitive damages in medical malpractice actions was a rationally related means of reducing the number of medical malpractice suits. The *Bernier* court made two assumptions in its opinion. First, the court assumed that the increase in malpractice suits has contributed to the medical malpractice crisis. Second, the court assumed that the practical solution for this problem was the elimination of punitive damages. Both assumptions are flawed.

Empirical studies do not indicate that escalating punitive damage awards contributed to the medical malpractice crisis.<sup>113</sup> The

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HASTINGS L.J. 431 (1976); Note, *An Overview of the Insurability of Punitive Damages Under General Liability Policies*, 33 BAYLOR L. REV. 203 (1981).

112. *Beaver v. Country Mut. Ins. Co.*, 95 Ill. App. 3d 1122, 420 N.E.2d 1058 (5th Dist. 1981). In *Beaver*, the court cited *Northwestern Nat'l Casualty Co. v. McNulty*, 307 F.2d 432, 440-41 (5th Cir. 1962), for the proposition that insurance against punitive damages would contravene public policy because no one should be permitted to take advantage of his own wrong. *Id.* The *Beaver* court noted, however, that its holding did not affect the rule that an employer may insure himself against vicarious liability for punitive damages assessed against him in consequence of the wrongful conduct of his employee. *Beaver*, 95 Ill. App. 3d at 1125, 420 N.E.2d at 1060-61.

113. According to several RAND studies, the medical malpractice crisis has its roots in increasing insurance costs, not the increasing number of medical malpractice cases. M. PETERSON & M. SHANLEY, *COMPARATIVE JUSTICE: CIVIL JURY VERDICTS IN SAN FRANCISCO AND COOK COUNTIES, 1959-1980*, at 50-53 (1983); M. PETERSON & G. PRIEST, *THE CIVIL JURY: TRENDS IN TRIALS AND VERDICTS, COOK COUNTY, ILLINOIS, 1960-1979*, at 24-25 (1982). The purported medical malpractice crisis came into being when, at some point in the 1970's, juries began to award verdicts so large that they could not be anticipated by the insurance companies. Consequently, medical insurers suffered huge losses on malpractice policies. M. PETERSON & M. SHANLEY, *supra* at 50-53 (1983). Some have noted that if jury trials for medical malpractice cases produced a crisis in the 1970's, then other areas of litigation seem also to have undergone a similar crisis. *Id.* There is no evidence that the number of cases, or the plaintiff's chance of winning also rose during this time. M. PETERSON & G. PRIEST, *supra* at 24-25 (1982). Other observers have also noted that the increases in punitive damages are illusory, stating, by way of example, "the statistic which places the average product-liability award in 1985 at more than \$1.8 million does not include subsequent award reductions, decision reversals, or defense victories. It's like measuring an elephant and claiming to know the average size of all the animals on earth." Kovach, *Insurance "Crisis" on Trial; Proposed Federal Legislation Spurs Retort*, INDUS. WK., Apr. 14, 1986, at 21. Moreover, the plaintiff's chances of winning were and remain to be significantly lower (1 out of 3) in a medical malpractice case than any other personal injury suit (2 out of 3). A. CHIN & M. PETERSON, *DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS?* 49 (1985). Thus, medical malpractice plaintiffs only have a 33% chance of win-

court in *Bernier*, therefore, upheld legislation that purports to solve a nonexistent problem. The *Bernier* case is no different from *Boucher v. Sayeed*,<sup>114</sup> in which the court held that "absent a crisis to justify the enactment of such legislation, we can ascertain no satisfactory reason for the separate and unequal treatment that it imposes on medical malpractice litigants."<sup>115</sup> The legislation in *Bernier*, which is similar to the legislation in *Boucher*, attempts to solve a nonexistent problem.<sup>116</sup>

The court in *Bernier* nonetheless concluded that the means were rationally related to the purpose of reducing damages against the medical profession in general.<sup>117</sup> Once again, statistics do not demonstrate any such rational relationship. Although medical malpractice liability has risen, the incidence of punitive damages in malpractice actions has not.<sup>118</sup> Secondly, statistics do not support the proposition that juries award disproportionately large punitive

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ning their suit. *Id.* at 50. Statistics from the late 1970's and early 1980's also show that only 1.4% of all claims (including those in which no money was ever paid) or 4% of all claims in which some money was paid went to verdict. H. ALSOBROOK, *MEDICAL MALPRACTICE: COURSE MANUAL* 230 (1984). Thus, the perception that there was a medical malpractice "crisis" is not evidenced by statistics.

114. 459 A.2d 87 (R.I. 1983).

115. *Id.* at 93.

116. REPORT OF THE SPECIAL COMMITTEE ON PUNITIVE DAMAGES SECTION OF LITIGATION, *Punitive Damages: A Constructive Examination*, (AMERICAN BAR ASSOCIATION) 17-18 (1986). The American Bar Association's Special Committee on Punitive Damages Section of Litigation also concluded that, contrary to the common perception, punitive awards are neither routine nor routinely large, especially in malpractice and product liability cases. *Id.* The Committee notes that the notion of a punitive damages crisis is exaggerated overall. *Id.* Thus, the problem in medical malpractice cases is not the rise of punitive damages, but the escalation of compensatory awards. *Id.* Mark Peterson argues that the problem seems to be a two tier structure of justice in tort law. M. PETERSON, *COMPENSATION OF INJURIES: CIVIL JURY VERDICTS IN COOK COUNTY* 56 (1984). For example, his statistical studies show that plaintiffs in car accidents, intentional torts, common carrier, injury on property, and dram shop cases receive modest compensatory awards whereas plaintiffs in work injury, malpractice, products liability, and street hazard receive a great deal more. *Id.* Even in terms of compensatory damages, however, the medical profession does not pay the highest awards. Defendants in work injury and product liability cases earn this dubious distinction. A. CHIN & M. PETERSON, *DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS* 54 (1985).

117. *Bernier*, 113 Ill. 2d at 246, 497 N.E.2d at 776.

118. EMPIRICAL FINDINGS, *supra* note 11, at iv-v. In the 1980's, for example, the number of punitive damage awards in Cook County for personal injury cases (including malpractice) barely increased. *Id.* The study notes that there were no punitive damage awards in the malpractice area in Cook County from 1960 to 1979 and only three punitive damage awards between 1980 and 1984. *Id.* at 13. The study concludes that punitive damages are an issue primarily in intentional tort and business/contract cases, because these actions account for 81% of all punitive damage awards in Cook County. *Id.*

damage awards in medical malpractice actions.<sup>119</sup> Punitive damage awards in actions against health care defendants are rare because physicians infrequently are found to be guilty of grossly negligent or reckless treatment.<sup>120</sup> Although it is true that it is not the function of the courts to pass on the prudence of legislation, the courts should examine whether the legislation bears a rational relation to the purposes it purports to serve. Due to its arbitrary classification, the legislation involved in *Bernier* does not pass the rationality test.

In support of its decision, the court in *Bernier* noted that other statutes prohibiting the recovery of punitive damages in various types of actions had been upheld by the courts.<sup>121</sup> The court in *Bernier* relied primarily on a recent Seventh Circuit case<sup>122</sup> which held that the denial of punitive damages in wrongful death actions did not violate equal protection.<sup>123</sup> *Bernier* noted that the purpose of barring punitive damages in a particular context to avoid excessive liability was recognized by the Seventh Circuit as a legitimate

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119. EMPIRICAL FINDINGS, *supra* note 11, at 59, 61. Most punitive damage awards were less than half of the compensatory damages in personal injury cases (including malpractice); whereas many business/contract cases produced punitive damages that were more than ten times the compensatory awards. *Id.* This is not to say that large punitive damage awards have never been awarded in malpractice cases. See EMPIRICAL FINDINGS, *supra* note 11, at 22. These instances, however, are certainly the exception and not the rule. As noted by the study, most punitive damage awards in personal injury cases continue to be modest. *Id.*

120. Smith, *supra* note 2, at 228. Smith also notes that punitive damages have not been considered a problem even by the medical profession, which in its first two task force reports did not even mention the issue of curtailing punitive damages and did so only briefly in its third report. *Id.*

121. *Bernier*, 113 Ill. 2d at 245, 497 N.E.2d at 776. Some courts have held that a claim for punitive damages survives the death of the tortfeasor. *Ellis v. Zuck*, 546 F.2d 643 (5th Cir. 1977); *Paul v. Milburn*, 275 F. Supp. 105 (W.D. Tenn. 1967). The general rule, however, is that the death of the wrongdoer extinguishes the claim. *Holm Timber Indus. v. Plywood Corp. of America*, 242 Cal. App. 2d 492, 51 Cal. Rptr. 597 (1966); *Mattyasovszky v. West Towns Bus Co.*, 61 Ill. 2d 31, 33, 330 N.E.2d 509, 510 (1975); *Mervis v. Wolverton*, 211 So. 2d 847 (Miss. 1968); *State ex rel Mercantile Nat'l Bank v. Rooney*, 402 S.W.2d 354 (Mo. 1966); *Hayes v. Gill*, 216 Tenn. 39, 390 S.W.2d 213 (1965). Some jurisdictions also disallow punitive damages when the plaintiff dies. See, e.g., *In Re Air Crash Disaster Near Chicago Ill.*, 644 F.2d 594 (1981); *In Re Paris Air Crash*, 622 F.2d 1315 (9th Cir. 1980); *Jackson v. K.L.M.*, 459 F. Supp. 953 (S.D.N.Y. 1978); *Vander Lind v. Superior Court of Orange County*, 146 Cal. App. 3d 358, 194 Cal. Rptr 209 (1983); *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W.2d 437 (1980). Several courts have allowed punitive damages. See e.g., *Koppinger v. Cullen-Schlitz and Assocs.* 513 F.2d 901 (8th Cir. 1975) (applying Iowa law); *Estes Health Care Centers, Inc. v. Bannerman*, 411 So.2d 109 (Ala. 1982); *Martin v. United States Security Services Inc.*, 314 So.2d 765 (Fla. 1975); *Bond v. City of Huntington*, 166 W.Va. 581, 276 S.E.2d 539 (W. Va. 1981).

122. *In re Air Crash Disaster*, 644 F.2d 594 (7th Cir. 1981).

123. *Bernier*, 113 Ill. 2d at 246, 497 N.E.2d at 776.

legislative goal served by the chosen means.<sup>124</sup> Yet the *Bernier* court overlooked the fundamental difference between a medical malpractice action and a wrongful death or survival action; a medical malpractice claim has its roots in common law,<sup>125</sup> a wrongful death or survival claim does not.<sup>126</sup> Because statutory claims have generally been considered as derivations from the common law, they have been construed more strictly.<sup>127</sup> Without clear legislative intent to authorize punitive damages in statutorily created causes of action, such as a wrongful death or survival claim, punitive damages generally have remained outside the scope of the plaintiff's lawsuit.<sup>128</sup>

In contrast, the role of punitive damages at common law as a deterrent has been established firmly.<sup>129</sup> This deterrent role is crucial in medical malpractice actions in modern times. Critics of punitive damages argue that compensatory damages serve as an effective deterrent, thereby eliminating the need for punitive damages.<sup>130</sup> Unlike other tort actions, however, reform measures have otherwise limited plaintiff's access to full compensation in medical malpractice cases.<sup>131</sup> It is only through punitive damages, therefore, that deterrence can be maintained.<sup>132</sup>

### B. Special Legislation

Currently in Illinois, if the legislature restricts access to compensatory damages in an arbitrary manner, it is held not only to violate equal protection, but also the provision of the Illinois

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124. *Id.*

125. See *Pratt v. Davis*, 118 Ill. App. 161 (1st Dist. 1905). In *Pratt*, the court noted that medical malpractice is a form of common law trespass. *Id.* at 182.

126. At common law there was no cause of action if the injured party died. *McKillip*, *supra* note 9, at 575. See also *Mattyasovszky v. West Towns Bus Co.*, 61 Ill. 2d 31, 34, 330 N.E.2d 509, 510 (1975) (court refused to recognize a common law action for wrongful death that includes the element of punitive damages).

127. *McKillip*, *supra* note 9, at 574.

128. *Id.*

129. See *supra* notes 21-24 and accompanying text.

130. See, e.g., Sales, *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1158-64 (1984).

131. See generally *Smith*, *supra* note 2 at 201. *Smith* describes in detail the numerous provisions in state constitutions that modify tort law principles governing medical malpractice cases. Some of the more common modifications include limiting the amount of compensatory damages plaintiffs may recover, abolishing the collateral source rule in medical malpractice actions, permitting periodic payment of damage judgments in medical malpractice actions, shortening the statute of limitations for actions against health-care providers, and placing limits on the amount of attorneys' fees recoverable in medical malpractice lawsuits. *Id.*

132. *Id.* at 228.

Constitution prohibiting special legislation.<sup>133</sup> The plaintiffs in *Bernier* asserted that the denial of punitive damages solely in medical malpractice actions violated the special legislation clause of the Illinois Constitution.<sup>134</sup> The plaintiffs claimed that the legislature could not unreasonably impose a particular burden or confer a special right, privilege, or immunity upon a portion of the people, when a general law would apply.<sup>135</sup> Plaintiffs further argued that whether a general law is appropriate is a matter for the courts, not the legislature to decide.<sup>136</sup> Because there was no indication that a general law could not have been made applicable, the plaintiffs argued that the legislature violated the constitutional provision.<sup>137</sup> The plaintiffs maintained that by conferring upon the medical professions absolute, unqualified immunity from punitive damages, the legislature violated the special legislation prohibition.<sup>138</sup>

The *Bernier* court disagreed with the plaintiff's assertion, but did not elaborate on its holding.<sup>139</sup> In effect, the court equated the special legislation challenge with an equal protection challenge.<sup>140</sup>

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133. ILL. CONST. art. IV., § 13 provides that: "[t]he General Assembly shall pass no special or local law when a general law is or can be made applicable."

134. *Bernier*, 113 Ill. 2d at 247, 497 N.E.2d at 776.

135. *Id.* A similar argument was made in *Bridgewater v. Hotz*, 51 Ill. 2d 103, 109-11, 281 N.E.2d 317, 321-22 (1972) (statutes creating different period of voter registration in different counties violates the special legislation provision upheld); and *Kittay v. Allstate Ins. Co.*, 78 Ill. App. 3d 335, 338, 397 N.E.2d 200, 202 (1st Dist. 1979) (statute which allowed only insurance companies to represent the interest of third persons violated the prohibition against special legislation. The court dismissed the argument noting that the statute operated uniformly and on all persons similarly situated, and, thus its operation was not limited to insurance companies).

136. *Id.* (citing *Bridgewater*, 51 Ill. 2d at 110, 281 N.E.2d at 321-22 (1972)).

137. *Bernier*, 113 Ill. 2d at 247, 497 N.E.2d at 776.

138. Amicus Curiae Brief by the Illinois State Council of Senior Citizens In Support of The Plaintiff-Appellee at 6, *Bernier v. Burris*, 113 Ill. 2d 219, 497 N.E.2d 763 (1986) (No. 62876).

139. *Bernier*, 113 Ill. 2d at 219, 497 N.E.2d at 763. By contrast, the court in *Wright v. Central Du Page Hosp. Ass'n*, 63 Ill. 2d 313, 330, 347 N.E.2d 736, 734 (1976), held that a limited recovery of compensatory damages solely in medical malpractice actions constituted a special law in violation of § 13 of article IV of the Illinois Constitution. *Wright*, 63 Ill. 2d at 330, 347 N.E.2d at 734. The *Bernier* court attempted to distinguish *Wright* on the grounds that an elimination of punitive damages is a privilege rather than a right. *Bernier*, 113 Ill. 2d at 219, 497 N.E.2d at 763. The *Bernier* court alluded to the fact that compensatory damages play an integral function in the law of torts, unlike punitive damages. *Id.* Rather, punitive damages are an anomaly in the law. *Id.* Once the true purpose and history of tort law is explored, however, there is no difference between the two. See Note, *In Defense of Punitive Damages*, 55 N.Y.U. L. REV. 303, 309-24 (1980). If one accepts the premise that both compensatory and punitive damages serve different, yet equally important roles in tort law, then any arbitrary, selective legislative restriction on either should be viewed with careful scrutiny. *Id.*

140. *Id.* Other courts have also held that in deciding whether something is special legislation invokes the same principles utilized in an equal protection analysis. Anderson

As noted by the dissent in *Illinois Housing Development Authority v. Van Meter*,<sup>141</sup> whether a general law is or can be made applicable shall be a matter for judicial determination.<sup>142</sup>

The court in *Grace v. Howlett*<sup>143</sup> specifically noted that the legislative experimentation with special legislation is limited, and that the courts may not rule that the legislature is free to enact special legislation under the guise of effectuating reform one step at a time.<sup>144</sup> Accordingly, even if eliminating punitive damages in medical malpractice actions bears a rational relationship to legislative goals under the equal protection challenge, unless the court determined that a general law was not applicable, the particular legislation cannot survive the special legislation challenge.<sup>145</sup>

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v. Wagner, 79 Ill. 2d 295, 315, 402 N.E.2d 560, 576 (1979) (whether a statute limiting the amount of medical malpractice damages violates the special legislation clause invokes the same standards of analysis as an equal protection issue); Ill. Hous. Dev. Auth. v. Van Meter, 82 Ill. 2d 116, 124, 412 N.E.2d 151, 159 (1980) (whether a statute permitting a housing development authority to issue bonds to raise money for low-interest loans to first time home buyers is in violation of the provision prohibiting special legislation invokes the same principle utilized in equal protection analysis). Accordingly, an unsuccessful equal protection challenge, would in effect, foreclose a special legislation challenge.

141. 82 Ill. 2d 116, 124, 412 N.E.2d 151, 159 (1980).

142. *Id.*

143. 51 Ill. 2d 478, 283 N.E.2d 474 (1972).

144. *Id.* at 487, 283 N.E.2d at 479. Shortly after the enactment of the provision in 1970, the *Grace* court, 51 Ill. 2d 478, 283 N.E.2d 474 (1972), and the *Bridgewater* court, 51 Ill. 2d 103, 281 N.E.2d 317 (1972), concluded that the test was simply whether or not a general law could apply in a given context. The modern trend, however, as noted in the Ill. Hous. Dev. Auth. v. Van Meter dissent, 82 Ill. 2d at 127, 412 N.E.2d at 269 (1980) has moved away from this clearly articulated standard of review in favor of adopting the same reasonable basis test used to evaluate equal protection challenges. See, e.g., *Anderson v. Wagner*, 61 Ill. App. 3d 822, 378 N.E.2d 805 (1978). Other recent cases have struck down medical malpractice remedial legislation on the grounds that it violates special legislation as interpreted by *Grace*. See, e.g., *Wright v. Central Du Page Hosp. Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

145. Section 2-115 was also challenged on the grounds that it violated the single subject clause of the Illinois Constitution. Art. IV § 8(d) of the Illinois Constitution provides that: "[b]ills, except for appropriations and for the codification, revision or rearrangement of laws, shall be confined to one subject." The plaintiff's argued that because § 2-115 bars awards of punitive damages not only in medical malpractice, but also in legal malpractice actions, the clause encompasses more than one subject. *Bernier*, 113 Ill. 2d at 247, 497 N.E.2d at 776. The *Bernier* court rejected the challenge, reasoning that because the Code of Civil Procedure could contain separate prohibitions of awards of punitive damages in medical malpractice actions and legal malpractice actions, their inclusion together in one provision does not offend the single subject requirement. *Id.* at 248, 497 N.E.2d at 776. The plaintiffs maintained that the disunity of subject matter evidenced in the statute is precisely what the single subject clause meant to prevent. Brief of Plaintiff-Appellee at 58, *Bernier v. Burris*, 113 Ill. 2d 219, 497 N.E.2d 763 (1986) (No. 62876).

## IV. CONCLUSION

In *Bernier*, the Illinois Supreme Court considered whether the prohibition of punitive damages in malpractice actions violated the federal and state constitutions. The legislation is the only one of its kind in the United States, and illustrates the severe reform measures that have been enacted in response to the medical malpractice "crisis" of the 70's and 80's.<sup>146</sup> Although some tort reform measures may be appropriate to help cope with the escalating costs of medical malpractice insurance, the elimination of punitive damages does not qualify as an appropriate solution.<sup>147</sup> The *Bernier* court stressed in its analysis of the legislation that it is not the place of the courts to question whether the legislature has chosen the best available means to deal with a problem.<sup>148</sup> This is true. It is the role of the courts, however, when faced with an equal protection or a special legislation challenge, to question at least minimally whether the law at issue is arbitrary. Section 2-1115 of the Code of Civil Procedure is an arbitrary law. It arbitrarily protects the medical and legal professions from punitive damages when there is no evidence to suggest that punitive damages have contributed to the escalating costs of professional malpractice suits.<sup>149</sup>

Moreover, the *Bernier* court failed to use the proper standard of review in judging the plaintiff's special legislation challenge.<sup>150</sup> The court failed to abide by the clear mandate of this provision, which directs the judiciary to ask whether or not a general law could be made applicable in place of the specific law in question. In doing so, the *Bernier* court has failed to recognize that section 2-1115 of the Code of Civil Procedure simply grants a special privilege to a special interest group. The *Bernier* decision signals the new era of special interest group legislation in Illinois, and harkens the end of a uniform body of laws.

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146. See *supra* notes 113-16 and accompanying text.

147. See *supra* notes 110-32 and accompanying text.

148. See *supra* notes 96-112 and accompanying text.

149. See *supra* notes 113-20 and accompanying text.

150. See *supra* notes 133-45 and accompanying text.