

1994

Defining "Professional Negligence" After Central Pathology Service Medical Clinic v. Superior Court: Should California's Medical Injury Compensation Reform Act Cover Intentional Torts?

Paul F. Arentz

Follow this and additional works at: <https://scholarlycommons.law.cwsl.edu/cwlr>

Recommended Citation

Arentz, Paul F. (1994) "Defining "Professional Negligence" After Central Pathology Service Medical Clinic v. Superior Court: Should California's Medical Injury Compensation Reform Act Cover Intentional Torts?," *California Western Law Review*: Vol. 30 : No. 2 , Article 3.

Available at: <https://scholarlycommons.law.cwsl.edu/cwlr/vol30/iss2/3>

This Article is brought to you for free and open access by CWSL Scholarly Commons. It has been accepted for inclusion in California Western Law Review by an authorized editor of CWSL Scholarly Commons. For more information, please contact alm@cwsl.edu.

DEFINING "PROFESSIONAL NEGLIGENCE" AFTER *CENTRAL PATHOLOGY SERVICE MEDICAL CLINIC V. SUPERIOR COURT*: SHOULD CALIFORNIA'S MEDICAL INJURY COMPENSATION REFORM ACT COVER INTENTIONAL TORTS?

PAUL F. ARENTZ*

INTRODUCTION

In 1975 the California State Legislature enacted the Medical Injury Compensation Reform Act (MICRA)¹ in response to what was commonly referred to at the time as the "medical malpractice crisis."² MICRA's provisions changed considerably the law governing actions for medical malpractice.³ MICRA shortened the applicable statute of limitations during

* B.A., University of Arizona, 1990; J.D., *cum laude*, California Western School of Law, 1993. The author is an associate with Bonne, Bridges, Mueller, O'Keefe & Nichols, in Los Angeles, California.

1. Stats. 1975, Second Ex. Sess. 1975-1976, chs. 1, 2, pp. 3949-40007.

2. The legislature convened in an extraordinary session to consider measures aimed at remedying the rapid increase in medical malpractice premiums. As then Governor Edmund G. Brown, Jr. stated in his address to the legislature:

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

Governor's Proclamation to Leg. (May 16, 1975) Stats. 1975 (Second Ex. Sess. 1975-1976) p. 3947.

The "medical malpractice crisis" was characterized by a 40% increase in claims filed against physicians from 1965 to 1975. Between 1968 and 1970, the malpractice group insurance rates for physicians rose 400%. PRELIMINARY REPORT, CALIFORNIA ASSEMBLY SELECT COMMITTEE ON MEDICAL MALPRACTICE 3 (1974). The reason for the increase in malpractice claims was felt to be attributable to the depersonalization of the doctor-patient relationship, the increasing expectations of patients regarding the infallibility of modern medicine, and doctrinal changes in the law applicable to medical malpractice claims. *Id.* at 4. There is some evidence the "crisis" began as early as 1961. See Benjamin J. Naitove, *Medicolegal Education and the Crisis in Interprofessional Relations*, 8 AM. J. L. & MED. 293, 295 (1982).

3. Despite the significant changes MICRA wrought on medical malpractice claims, its provisions were uniformly upheld against a series of constitutional challenges based on the Equal Protection Clause. *American Bank & Trust Co. v. Community Hospital*, 683 P.2d 670 (Cal. 1984)(periodic payment of future damages); *Barme v. Wood*, 689 P.2d 446 (Cal. 1984) (abrogation of collateral source rule); *Roa v. Lodi Medical Group*, 695 P.2d 164 (Cal. 1985) (limitation on contingency fees); *Fein v. Permanente Medical Group*, 695 P.2d 665 (Cal. 1985) (cap on noneconomic damages). For a contemporary overview of MICRA see *Selected 1975 California Legislation: Torts; Medical Malpractice*, 7 PAC. L. J. 544 (1975) [hereinafter *Selected 1975 California Legislation*].

which a medical malpractice claim could be brought,⁴ abolished the collateral source rule,⁵ allowed periodic payment of future damages,⁶ regulated contingency fee arrangements,⁷ authorized arbitration clauses in medical services contracts,⁸ and perhaps most significantly, placed a \$250,000 cap on noneconomic losses.⁹

One unresolved issue concerning MICRA has been its application to actions other than those for "professional negligence."¹⁰ Initially, MICRA appeared to apply only to specified health care providers¹¹ and only to actions for "professional negligence."¹² However, in *Central Pathology Service Medical Clinic v. Superior Court*,¹³ the California Supreme Court, interpreting an analogous provision of the Code of Civil Procedure, held that an injured party seeking punitive damages from a health care provider for an

4. CAL. CODE CIV. PROC. § 340.5. See *infra* notes 39-47 and accompanying text.

5. CAL. CIV. CODE § 3333.1. See *infra* notes 33-35 and accompanying text. Under the collateral source rule, evidence of insurance or other benefits paid to the injured party are inadmissible for the purpose of diminishing the amount of recovery. *Helfend v. Southern California Rapid Transit Dist.*, 465 P.2d 61 (Cal. 1970).

6. CAL. CODE CIV. PROC. § 667.7. See *infra* notes 29-32 and accompanying text.

7. CAL. BUS. & PROF. CODE § 6146. See *infra* notes 36-38 and accompanying text.

8. CAL. CODE CIV. PROC. § 1295. See *infra* notes 48-51 and accompanying text.

9. CAL. CIV. CODE § 3333.2. See *infra* notes 24-28 and accompanying text.

10. MICRA contains six sections defining "professional negligence" as "a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital." CAL. CODE CIV. PROC. §§ 364(f)(2), 667(e)(4), 1295(g)(2); CAL. BUS. & PROF. CODE § 6146(c)(3); CAL. CIV. CODE §§ 3333.1(c)(2), 3333.2(c)(2).

The term "professional negligence" has been broadly construed. Most of the cases interpreting the phrase "professional negligence" have been concerned with distinguishing professional from ordinary negligence. *Atienza v. Taub*, 239 Cal. Rptr. 454 (Ct. App. 2d Dist. 1987) (inducing a patient to enter sexual relationship on pretext it is necessary part of treatment constitutes "professional negligence"); *Bell v. Sharp Cabrillo Hospital*, 260 Cal. Rptr. 886 (Ct. App. 4th Dist. 1989) ("professional negligence" includes a hospital's failure to fulfill its duty to screen the competency of its medical staff); *Hedlund v. Superior Court*, 669 P.2d 41 (Cal. 1983) (failure to warn constitutes "professional negligence"); *Murillo v. Good Samaritan Hospital*, 160 Cal. Rptr. 33 (Cal. App. 4th Dist. 1979) and *Taylor v. United States*, 821 F.2d 1428 (9th Cir. 1987) (MICRA applies to "garden variety" negligence in an action against a health care provider irrespective of the level of skill required in the situation resulting in injury). *But see* *Andrea N. v. Laurelwood Convalescent Hospital*, 16 Cal. Rptr. 2d 894, 904 (Ct. App. 2d Dist. 1993) (failure to provide security not "professional negligence"); *Flores v. Natividad Medical Center*, 238 Cal. Rptr. 24 (Ct. App. 1st Dist. 1987) (failure to summon medical help for prisoner not "professional negligence"); *Nelson v. Gaunt*, 178 Cal. Rptr. 167, 173-174 (Ct. App. 1st Dist. 1981) (statute of limitations for professional negligence does not apply to cause of action against physician for fraud).

11. CAL. BUS. & PROF. CODE § 6146 defines a "health care provider" as "any person licensed or certified pursuant to Division 2 (commencing with § 500) of the Business and Professions Code, or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with § 1440) of Division 2 of the Health and Safety Code." "Health care provider" includes the legal representatives of a health care provider. *Id.*

12. See generally *Selected 1975 California Legislation*, *supra* note 3, at 544.

13. 832 P.2d 924 (Cal. 1992).

injury "directly related" to the performance of professional services must comply with Code of Civil Procedure section 425.13, which bars a claim for punitive damages unless the court has determined at the pleading stage there is a "substantial probability" the plaintiff will prevail on the claim.¹⁴ More important, the Court held, identifying a cause of action as an intentional tort rather than negligence does not remove such a claim from the requirements of the statute.¹⁵ This decision reversed the Fifth District Court of Appeal decision in *Bommareddy v. Superior Court*,¹⁶ which had held section 425.13(a) inapplicable to a cause of action for battery.¹⁷

Although section 425.13 is not a part of the statutory scheme created by MICRA,¹⁸ *Central Pathology* does raise questions about which claims in an action for medical malpractice should be covered by MICRA. Specifically, the decision raises the issue of whether MICRA provisions such as the cap on noneconomic damages, or the limitation on contingency fees should be applied to actions for battery, fraud, or intentional infliction of emotional distress; actions which comprise a small but significant portion of malpractice suits.¹⁹

This article addresses the issue of MICRA's applicability to causes of action for intentional torts. Part I provides an overview of MICRA and explains the Act's effect on medical malpractice actions. Part II discusses the *Central Pathology* decision and explains the Court's approach to statutory interpretation and how this interpretation should apply to MICRA as well. Part III examines prior interpretations of MICRA with respect to coverage of intentional torts. Finally, part IV proposes that the MICRA provisions should apply to all torts, regardless of intent, which occur during the course of performing professional services. However, MICRA should exclude those acts which are committed with a purely personal or non-therapeutic purpose.

14. 832 P.2d at 931. In order to show a "substantial probability" of prevailing on a claim for punitive damages, a plaintiff who seeks to amend his complaint to assert punitive damages must demonstrate the existence of a prima facie case entitling the plaintiff to punitive damages. *College Hospital v. Superior Court*, 16 Cal. Rptr. 2d 833, 836 (Ct. App. 4th Dist. 1993); *accord*, *Looney v. Superior Court*, 20 Cal. Rptr. 2d 182, 191 (Ct. App. 2d Dist. 1993). Because the plaintiff must prove entitlement to punitive damages by clear and convincing evidence at trial, the court in ruling on such a motion must evaluate the evidence presented in light of that standard. *Looney*, 20 Cal. Rptr. 2d at 193.

15. 832 P.2d at 931.

16. 272 Cal. Rptr. 246 (1990), *rev'd*, *Central Pathology Serv. Medical Clinic Inc. v. Superior Court*, 832 P.2d at 927.

17. *Bommareddy*, 272 Cal. Rptr. at 250.

18. *See infra* note 83 and accompanying text.

19. Actions for medical malpractice may be based on claims for battery, intentional infliction of emotional distress, breach of contract, fraud and negligence.

I. AN OVERVIEW OF MICRA

The primary purpose behind MICRA is to ensure the availability of health care by making medical malpractice insurance coverage affordable.²⁰ At the time MICRA was enacted, malpractice rates were spiraling out of control and in response many physicians went on strike, threatened to stop providing care in high-risk specialties, or simply left practice all together.²¹ Still others began to practice "bare."²² Accordingly, MICRA was enacted to lessen the costs on health care insurers of paying out malpractice judgments.²³

20. The spirit in which MICRA was enacted is evident from the preamble to MICRA which provides *inter alia*:

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

1975 Cal. Stat. c. 1, § 1, at 4007. *See also* Samuel Shore, *Civil Liability Expands in State But Insurance Costs Keep Up Pace*, L.A. DAILY J., September 11, 1978, at 9 (indicating problems of health care availability and insurance coverage cost and availability).

21. *When Doctors Went Out On Strike*, U.S. NEWS & WORLD REP., May 26, 1975, at 4 (strike by San Francisco Anesthesiologists angered at rising malpractice insurance costs); *see also*, *When Doctors Rebel Against Higher Insurance Costs*, U.S. NEWS & WORLD REP., Jan. 19, 1976, at 36 (work slowdown by Los Angeles County doctors angered at proposed insurance rate increase of 486 percent).

22. Practicing "bare" means to practice without malpractice insurance coverage. *Barme v. Wood*, 689 P.2d 446, 448-449 (Cal. 1984).

However, the so-called liability crisis has all but vanished and insurance premiums have remained stable for several years. Also, the flight of doctors from high-risk specialties such as obstetrics due to increases in insurance premiums seems to have come to an end as well. Kenneth Jost, *Still Warring Over Medical Malpractice: Time for Something Better*, A.B.A. J., May, 1993, at 68.

23. In *American Bank & Trust Co. v. Community Hospital*, 683 P.2d 670, 672 (Cal. 1984) the Supreme Court stated MICRA (1) attempted to reduce the incidence and severity of medical malpractice injuries by strengthening governmental oversight of physician education, (2) sought to curtail unwarranted insurance premium increases by authorizing alternative insurance coverage programs and by establishing new procedures to review substantial rate increases, and (3) attempted to reduce the cost and increase the efficiency of medical malpractice litigation by revising a number of legal rules applicable to such litigation. . . . The goal of the Legislature was to reduce the number of medical malpractice actions filed, with the hope of a corresponding reduction in malpractice insurance rates." *Noble v. Superior Court*, 237 Cal. Rptr. 38, 40 (Ct. App. 2d Dist. 1987).

But see Anthony Aarons, *Insurance Bad Faith, Business Litigation Dominate in Top 10 Verdicts*, L.A. DAILY J., March 22, 1993, at 1. "In light of all the attention given medical malpractice in tort and health care reform debates, it is interesting that none of the 10 largest verdicts in 1992 came in medical malpractice cases." Furthermore, new studies by legal, medical and public health experts show that juries rarely make awards to malpractice plaintiffs and that unjustified awards are even rarer. Jost, *supra* note 22, at 68. Also, in terms of ensuring the affordability of health care, the malpractice system accounts for only one percent of the nation's health care bill, in direct costs, and no more than five percent in total costs, including so-called "defensive medicine." *Id.*

A. *Cap on Recovery of Noneconomic Damages*

Perhaps the most controversial limitation imposed by MICRA is the limitation imposed on noneconomic damages.²⁴ This section is at the forefront of MICRA's effort to reduce insurance costs.²⁵ Under MICRA an injured plaintiff is limited to \$250,000 in noneconomic losses.²⁶ The cap does not apply to economic damages²⁷ which include medical expenses, loss of earnings, and loss of employment resulting from the injury.²⁸

B. *Periodic Payment of Future Damages*

At the request of either the plaintiff or the defendant, the court in a malpractice case must enter judgment ordering that future damages be paid

24. MICRA has been disfavored by attorneys who represent plaintiffs in malpractice cases and its enactment was a major political defeat for the California Trial Lawyers Association. During the last days of the 1987 legislative session, lobbyists met with Assembly Speaker Willie Brown in Frank Fat's restaurant near the Capitol and signed an agreement on a napkin providing for a five year truce during which the trial lawyers would refrain from attempting to overturn MICRA. With that agreement expiring in 1992, the MICRA issue is expected to soon become an issue again; especially the cap on noneconomic damages. Dan Walters, *Looming War Over MICRA: Doctor Malpractice is Back on Agenda in Sacramento*, L.A. DAILY J., Feb. 26, 1993, at 6.

Plaintiffs' lawyers and consumer groups say their biggest gripe is with the medical malpractice law's \$250,000 ceiling on 'noneconomic damages.' . . . They argue that the limitation—which has not changed despite 17 years of inflation—hurts the elderly, the poor and others who cannot show much 'economic' damage from the loss of jobs or future earnings.

. . . .
The limits make it tough for such people to get representation, since the costs of the case can exceed the amount of damages. . . .

Reynolds Holding, *Truce Expires Between Lawyers, Doctors: Malpractice Battle to Erupt Anew*, S.F. CHRON., Feb. 8, 1993, at A1.

25. "Section 3333.2 . . . is, of course, one of the provisions which made changes in existing tort rules in an attempt to reduce the cost of medical malpractice litigation, and thereby restrain the increase in medical malpractice insurance premiums. It appears obvious that this section—by placing a ceiling of \$250,000 on the recovery of noneconomic damages—is rationally related to the objective of reducing the costs of malpractice defendants and their insurers." *Fein v. Permanente Medical Group*, 695 P.2d 665, 672 (Cal. 1985).

26. CAL. CIV. CODE § 3333.2 provides:

(a) In *any action* for injury against a health care provider *based on professional negligence*, the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage.

(b) In *no action* shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars (\$250,000).

Id. (emphasis added).

27. *Fein*, 695 P.2d at 680.

28. BAJI 14.00

in whole or in part by periodic payments rather than by lump sum,²⁹ if the award equals or exceeds \$50,000 in future damages.³⁰ Money damages awarded for the compensation of lost future wages may not be reduced or terminated by the death of the injured plaintiff.³¹ The future earnings award must be paid to dependents of the plaintiff.³²

C. Abrogation of the Collateral Source Rule

Traditionally, the collateral source rule bars a defendant from introducing evidence of other sources of compensation for a plaintiff's injury.³³ However, under MICRA a defendant may elect to introduce evidence of benefits payable to the plaintiff as a result of the injury and this amount is reduced from the total amount awarded to the plaintiff.³⁴ The payor of the

29. CAL. CODE CIV. PROC. § 667.7. The authorization of periodic payments is conditioned on the judgment debtor's ability to post adequate security. *Id.* Failure to make periodic payments renders the judgment debtor in contempt of court and liable for damages resulting from nonpayment. *Id.* In *American Bank & Trust Co. v. Community Hospital*, the Supreme Court explained:

The adoption of a periodic payment procedure permits insurers to retain fewer liquid reserves and to increase investments, thereby reducing the costs to insurers and, in turn, to insureds. In addition, the portion of section 667.7 which provides for the termination of a significant portion of the remaining future damage payments in the event of the plaintiff's death is obviously related to the goal of reducing insurance costs.

683 P.2d 670, 678-79 (Cal. 1984).

"Apparently, this provision of the MICRA was included because payments of large sums of money could place some insurance carriers in a precarious financial position which could only be alleviated by drastic increase in the premium rate. Evidently, periodic payments may not only obviate the 'windfall' effect that a lump sum judgment may have under certain circumstances, but may also tend to permit a more manageable and predictable insurance environment." *Selected 1975 California Legislation, supra* note 3, at 549.

30. "Future damages" are damages for future medical treatment, care or custody or the injured party, loss of future earnings, loss of bodily function, or future pain and suffering. *Id.* § 667.7(e)(1).

31. *Id.* § 667.7(c).

32. *Id.*

33. As the California Supreme Court explained in *Helfend v. Southern California Rapid Transportation District*, 465 P.2d 61, 63 (Cal. 1970), California courts have long adhered to the collateral source rule which provides that "if an injured party receives some compensation for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor." The collateral source rule remains generally accepted in the United States despite the fact that many other jurisdictions have restricted or repealed it. *Id.*

34. CAL. CIV. CODE § 3333.1 provides *inter alia* that:

(a) In the event the defendant so elects, in an action for personal injury based upon professional negligence, he may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the personal injury pursuant to the United States Social Security Act,[] any state or federal income disability or worker's compensation act, any health, sickness or income-disability insurance, accident insurance that provides health benefits or income-disability coverage, and any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the cost of medical, hospital, dental, or other health care services. Where

collateral benefits may not seek indemnity from either the plaintiff or defendant, nor is the payor subrogated to the rights of the plaintiff against the defendant.³⁵

D. Limitation on Contingency Fee Agreements

Another controversial MICRA provision is the limitation placed on contingency fees in medical malpractice cases.³⁶ MICRA prescribes a "sliding scale" contingency fee system providing for a percentage fee inversely related to the amount of the recovery.³⁷ This limitation changes

the defendant elects to introduce such evidence, the plaintiff may introduce evidence of any amount which the plaintiff has paid or contributed to secure his right to any insurance benefits concerning which the defendant has introduced evidence.

Id. (emphasis added).

In *Barne v. Wood*, the Supreme Court ruled that Civil Code section 3333.1(b) "is rationally related to the objective of reducing the cost of medical malpractice insurance. By prohibiting 'collateral sources' from obtaining reimbursement from medical malpractice defendants or their insurers, the section obviously reduces the potential liability of such defendants." 689 P.2d 446, 450 (Cal. 1984).

35. CAL. CIV. CODE § 3333.1(b).

36. The purpose behind the enactment of this section was to discourage excessive fees and allow a plaintiff to retain a greater percentage of the overall award. According to the Supreme Court in *Roa v. Lodi Medical Group*, this is true because "a plaintiff will be more likely to agree to a lower settlement since he will obtain the same net recovery" and such a rule will "have the effect of deterring attorneys from either instituting frivolous suits or encouraging their clients to hold out for unrealistically high settlements." 695 P.2d 164, 170-71 (Cal. 1985). The court agreed with the Legislature's conclusion that "unregulated contingency fee contracts . . . play at least some part in leading so many plaintiffs to pursue malpractice claims." *Id.* at 171.

Apparently the Legislature concluded that large fees from large judgments have detrimental social effects. *Selected 1975 California Legislation, supra* note 3, at 549. There is some uncertainty as to the effect contingency fees have upon the amount or cost of medical malpractice claims. *Id.* (citing REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE, DEPT. OF HEALTH, EDUCATION AND WELFARE, Washington, D.C., DHEW Publication No. (OS) 73-88, Jan. 16, 1973, app., *The Medical Malpractice Legal System*, at 113-120).

37. CAL. BUS. & PROF. CODE § 6146 provides *inter alia* that:

(a) An attorney shall not contract for or collect a contingency fee for representing any person seeking damages in *connection with an action* for injury or damage against a health care provider *based upon* such person's alleged professional negligence in excess of the following limits:

- (1) Forty percent of the first fifty thousand dollars (\$50,000) recovered.
- (2) Thirty-three and one-third percent of the next fifty thousand dollars (\$50,000) recovered.
- (3) Twenty-five percent of the next five hundred thousand dollars (\$500,000) recovered.
- (4) Fifteen percent of any amount on which the recovery exceeds six hundred thousand dollars (\$600,000).

The limitations shall apply regardless of whether the recovery is by settlement, arbitration, or judgment, or whether the person for whom the recovery is made is a responsible adult, can infant, or a person of unsound mind.

A "recovery" is the net amount of the judgment *after* deduction of legal expenses incurred in settlement or prosecution of the claim. CAL. BUS. & PROF. CODE PROC. § (c)(1). In a

dramatically the fee a plaintiff's attorney can collect in a medical malpractice case as compared to other types of personal injury cases.³⁸

E. Special Statute of Limitations for Medical Malpractice Actions

In order to expedite medical malpractice claims the Code of Civil Procedure was amended to shorten the statute of limitations.³⁹ An action for malpractice brought by an adult must be commenced within three years of the date of the injury or one year after the date the injury was or should have been discovered, whichever occurs first.⁴⁰ The statute is tolled *only* upon proof of fraud, intentional concealment, or by the presence of a non-therapeutic foreign body in the plaintiff.⁴¹

The statute changed significantly the limitations period applicable to minors.⁴² An action on behalf of a minor must be brought within three

malpractice case such costs may be substantial. Medical expenses incurred by the plaintiff and the attorney's office overhead costs or charges are *not* deductible. *Id.*

38. The disparity is best illustrated by example. Attorney represents two plaintiffs on a contingency fee basis. A was injured in an automobile accident and after trial is awarded a judgment of \$2,000,000. B was the victim of medical malpractice and is awarded an equal amount (after deducting payment from collateral sources and limiting noneconomic losses to \$250,000). Attorney's standard fee for personal injury cases which proceed to trial is 30% of the total recovery. A's recovery will yield a fee of \$600,000, but B's case will pay Attorney only \$371,665.

39. Former § 340.5 provided for a four-year statute of limitations, which was tolled only upon proof the defendant failed to disclose any act, error, or omission of which he or she knew or should have known. Former § 340.5 applied to actions based on lack of informed consent. *See e.g.*, *Cobbs v. Grant*, 502 P.2d 1 (Cal. 1972). Curiously, this provision is absent from the present section 340.5. Arguably, § 340.5 should cover intentional torts. *Cf. Selected 1975 California Legislation, supra* note 3, at 547.

40. CAL. CODE CIV. PROC. § 340.5. This section applies to "an action for injury or death based upon . . . professional negligence." *Id.*

Rose v. Fife, 255 Cal. Rptr. 440 (Ct. App. 2d Dist. 1989) explains the interrelationship between the one and three-year periods: "The three year period begins to run when the plaintiff discovers the harmful effect, i.e., the physical manifestation of the wrongful act. The negligent cause of that effect is not a concern for the three-year period." *Id.* at 444-445. "The one-year period commences when the plaintiff is aware of both the physical manifestation of the injury and *its negligent cause.*" *Id.* (emphasis in original). The plaintiff need not be aware of "facts which establish the wrongdoing of a particular defendant or defendants before the one-year period begins to run." *Id.* at 447.

41. CAL. CODE CIV. PROC. § 340.5. The "foreign body" exception tolls the three-year outside limitation period and not the one-year "discovery" period. *Ashworth v. Memorial Hospital*, 254 Cal. Rptr. 104, 110-11 (Ct. App. 2d Dist. 1988). However, once the plaintiff discovers or reasonably should have discovered the "foreign body" and its role in her injury she has one year within which to file. *Id.* at 111.

42. Generally the statute of limitations for a minor in other tort actions is tolled for the *entire* period of the plaintiff's minority. CAL. CODE CIV. PROC. § 352.

The change in the statute applicable to minors is significant since many malpractice actions involve injuries occurring at or near the time of birth. These "bad baby" complaints often allege that the infant has suffered a brain injury resulting in cerebral palsy, epilepsy, or mental retardation. Such injuries often result in permanent mental and physical disability and typically involve high damage awards due to the protracted medical care required by the child after the injury. *See generally* William P. Franklin, Jr. & Wendy Woods Williamson, "Bad Baby" *Lawsuits: Defending Brain-Damaged-Infant Claims*, THE BRIEF, Winter 1993, at 55.

years of the injury unless the child is under six years of age, in which case the action must be commenced within three years or by the time the child reaches eight years of age; whichever is the *longer* period of time.⁴³ The statute may be tolled in the case of fraud or collusion by the child's parent and the defendant or the defendant's insurer, or by any of the tolling provisions applicable to adults.⁴⁴ However, the delayed discovery rule does not apply to minors.⁴⁵

Additionally, a plaintiff is required to give the named potential defendants a 90-day notice that he or she intends to file an action for malpractice.⁴⁶ The notice must state the legal basis of the claim and describe the alleged injury. If the notice of intent is served within 90 days of the end of the applicable limitations period, the 90-day period is "tacked on" to the one-year limitations period.⁴⁷

F. Authorization of Agreement to Submit Claims to Arbitration

In an attempt to encourage arbitration of malpractice claims,⁴⁸ the Legislature enacted Code of Civil Procedure section 1295 to allow arbitration clauses in medical services contracts so long as its prescriptions are complied with.⁴⁹ Such a contract will also regulate fee disputes.⁵⁰ The statute

43. CAL. CODE CIV. PROC. § 340.5.

44. *Id.*; Young v. Haines, 718 P.2d 909, 911 (Cal. 1986).

45. *Id.*

46. CAL. CODE CIV. PROC. § 364. The purpose of requiring advance notice of the plaintiff's intent to sue is to afford an opportunity for early resolution of the claim without resort to judicial intervention. The penalty for not providing notice of intent to file suit is a possible report to the State Bar. However, failure to give notice does not hurt the plaintiff unless the statute of limitations expires.

47. Hilburger v. Madsen, 222 Cal. Rptr. 713, 718 (Ct. App. 2d Dist. 1986); Braham v. Sorenson, 174 Cal. Rptr. 39, 42 (Ct. App. 2d Dist. 1981). Note that the outside three-year period *cannot* be tolled for any reason other than those specified in § 340.5.

This extension of the limitations period was likely the result of a compromise between the medical community and their counsel, and the plaintiff's bar. Noble v. Superior Court, 237 Cal. Rptr. 38, 40 (Ct. App. 2d Dist. 1987).

48. See *Selected 1975 California Legislation*, *supra* note 3, at 544-55, 550-51. "[A]rbitration has become a proper and usual means of resolving civil disputes, including disputes relating to medical malpractice." Madden v. Kaiser Foundation Hospitals, 552 P.2d 1178, 1188 (Cal. 1976). Furthermore, it is the "public policy of this state to favor arbitration over litigation as a means of settling disputes because it is expeditious, avoids the delays of litigations, and relieves court congestion." Wheeler v. St. Joseph Hospital, 133 Cal. Rptr. 775, 782 (Ct. App. 4th Dist. 1976).

49. CAL. CODE CIV. PROC. § 1295 provides *inter alia* that:

(a) Any contract for medical services which contains a provision for arbitration of any dispute as to professional negligence of a health care provider shall have such provision as the first article of the contract and shall be expressed in the following language: "It is understood that any dispute as to medical malpractice, that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently or incompetently rendered, will be determined by submission to arbitration as provided by California law, and not by a lawsuit or resort to court process except as California law provides for judicial review

specifically provides if all the provisions are complied with, such a contract is *not* a contract of adhesion nor unconscionable.⁵¹

II. CENTRAL PATHOLOGY SIGNALS A NEW APPROACH TO STATUTORY INTERPRETATION

Prior to the *Central Pathology* decision, there seemed to be little doubt that the MICRA provisions applied only to actions for professional negligence.⁵² Two courts of appeal held that Code of Civil Procedure section 1295 applied to intentional torts.⁵³ However, the California Supreme Court and one court of appeal had declined to extend other MICRA provisions to cover intentional torts.⁵⁴ Most notably, the Fifth District Court of Appeal

of arbitration proceedings. Both parties to this contract, by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration."

(b) Immediately before the signature line provided for the individual contracting for the medical services must appear the following in at least 10-point bold red type.

"NOTICE: BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOU RIGHT TO A JURY OR COURT TRIAL. SEE ARTICLE 1 OF THIS CONTRACT."

50. CAL. CODE CIV. PROC. § 1295(c).

51. CAL. CODE CIV. PROC. § 1295(e). *See also*, Stanley D. Henderson, *Contractual Problems in the Enforcement of Agreements to Arbitrate Medical Malpractice*, 58 VA. L. REV. 947 (1972).

52. *See* note 10 *supra* defining "professional negligence" as a "negligent act or omission . . . in the rendering of professional services."

Apparently, because of the scope of this definition an action brought under a legal theory *other* than negligence will *not* be regulated by this part of the MICRA--for instance, an action for battery on the grounds of a lack of "informed consent." Furthermore, if the injury occurs while the health care provider is acting *outside* of the scope of a license or hospital regulation, legal redress of such an injury may apparently be pursued without regard to the restrictions of this part of MICRA. Consequently, it would seem that in such a case general tort law should be followed.

Selected 1975 California Legislation, *supra* note 3, at 544 (emphasis in original). However, this author mistakenly concluded that an action for lack of informed consent is a battery. An action for lack of informed consent would undoubtedly be covered by MICRA since such a claim is properly plead as negligence and not battery. *Cobbs v. Grant*, 502 P.2d 1, 8 (Cal. 1972). *See* a discussion of *Cobbs* at *infra* notes 267-269 and accompanying text.

53. *Herrera v. Superior Court*, 204 Cal. Rptr. 553 (Ct. App. 2d Dist. 1984) (holding that plaintiff's entire claim alleging different theories arising from the same basic facts subject to arbitration pursuant to statute providing for such arbitration although complaint alleged intentional torts as well as negligent acts); *accord*, *Baker v. Sadick*, 208 Cal. Rptr. 676 (Ct. App. 4th Dist. 1984).

54. *Waters v. Bourhis*, 709 P.2d 469, 478 (Cal. 1985) (refusing to apply section regulating contingency fees to an action against an attorney alleging that he charged an excessive fee in a "hybrid" action alleging professional negligence and intentional tortious conduct against a psychiatrist); *Noble v. Superior Court*, 237 Cal. Rptr. 38 (Ct. App. 2d Dist. 1987) (statute of limitations tolling provisions applicable only to negligence causes of action and not to those based upon intentional torts or other theories as to which the limitations period has run).

in *Bommareddy*,⁵⁵ had held section 425.13(a) inapplicable to an action for battery,⁵⁶ and the Fourth District in *Szkorla v. Vecchione*,⁵⁷ an opinion later ordered depublished by the Supreme Court,⁵⁸ held the cap on non-economic damages did not apply to an action for battery.⁵⁹ By reversing *Bommareddy* and depublishing *Szkorla*, the Supreme Court has reopened the debate over MICRA's coverage of intentional torts.⁶⁰

A. *Bommareddy v. Superior Court*

In concluding section 425.13(a) was inapplicable to an action for battery,⁶¹ the *Bommareddy* court's analysis centered on the exclusivity of the term "professional negligence." The court concluded: "Professional negligence" as used in Code of Civil Procedure section 425.13 is a term of art that does not include intentional torts, such as battery, even when occurring during the provision of medical services."⁶²

In so ruling, the court rejected Dr. *Bommareddy*'s argument that the words "arising out of" were included by the Legislature in order to give that section a broad application which would include a cause of action for battery

55. 272 Cal. Rptr. 246, 250 (Ct. App. 5th Dist. 1990), *rev'd*, *Central Pathology*, 832 P.2d at 927.

56. *Bommareddy*, 272 Cal. Rptr. at 250.

57. 283 Cal. Rptr. 219 (1991), *review granted*, 286 Cal. Rptr. 779, 818 P.2d 62 (Cal. 1991), *reprinted for tracking pending review*, 2 Cal. App. 4th 1208 (4th Dist. 1991). Review was later denied on the grounds that it was improvidently granted. Review was granted in *Szkorla* at about the same time as *Central Pathology*. Mike McKee, *MedMal Limits Face Challenge in Supreme Court; Attack is on Damage Limits for Intentional Torts*, THE RECORDER, May 13, 1992, at 1. See a discussion of the analysis in *Szkorla* at *infra* notes 182-203 and accompanying text.

58. CAL. RULE OF COURT § 979(e) provides a depublishment order "shall not be deemed an expression of opinion of the Supreme Court of the correctness of the result reached by the decision or of any of the law set forth in the opinion." However, the Court arguably intended to impliedly reverse *Szkorla*. "[T]o insist that those depublishment orders are without significance would be to perpetuate a myth." *People v. Dee*, 272 Cal. Rptr. 208, 211 (Ct. App. 1st Dist. 1990). Opinions are depublished "because a majority of the justices . . . consider the opinion to be wrong in some significant way." Joseph R. Grodin, *The Depublishment Practice of the California Supreme Court*, 72 CAL. L. REV. 514, 514-15 (1984).

59. *Szkorla*, 283 Cal. Rptr. at 228.

60. Alexander Peters, *Supreme Court Reinstates MedMal Limits*, THE RECORDER, Aug. 3, 1992, at 1. According to Kent Richland who represented the Central Pathology clinic before the Supreme Court, under the Court's reasoning, MICRA's \$250,000 cap on noneconomic damages will now apply to most cases alleging intentional torts. *Id.* At least one other author concurs in this regard, Russell A. Gold, *Central Pathology Service Medical Clinic, Inc. v. Superior Court: Statute Limiting Punitive Damages For the Professional Negligence of Health Care Providers Includes Intentional Torts*, 30 SAN DIEGO L. REV. 621 (1993).

61. The plaintiff in *Bommareddy* alleged the defendant performed a cataract extraction with an intraocular lens implant on her right eye without her consent since she had allegedly consented only to tear duct surgery on her left eye. *Bommareddy*, 272 Cal. Rptr. at 246. Plaintiff further alleged that the defendant's actions were "willful, wanton malicious and done with a conscious disregard for her rights," thereby entitling her to request punitive damages. *Id.* at 247. Plaintiff's second cause of action was for negligence and did not request punitive damages. *Id.*

62. *Id.* at 250.

which “[did] not substantively exist apart from the negligence theory of recovery.”⁶³ Since the plaintiff pleaded her injuries resulted from a “substantially different surgery than that to which she consented,” the court ruled the plaintiff should not be precluded from claiming punitive damages since battery is a theory different from negligence and is applicable to only a limited category of medical malpractice cases.⁶⁴ The court further rejected Dr. Bommareddy’s argument that, since punitive damages are rarely available in a negligence cause of action, limiting application of section 425.13(a) to causes of action for negligence would make little sense.⁶⁵ Finally, the court rejected Dr. Bommareddy’s argument that the legislative history and public policy behind the statute supported including intentional torts within the scope of section 425.13.⁶⁶ Professional negligence, the court concluded, is a “term of art . . . [that] has a specific meaning which does not include unconsented-to battery upon a patient.”⁶⁷

B. Central Pathology v. Superior Court

In *Central Pathology*, plaintiffs Constance and Michael Hull filed a medical malpractice action against several defendants, including Central

63. *Id.* at 247.

64. *Id.* at 247 (citing *Cobbs v. Grant*, 502 P.2d 1 (Cal. 1972)).

65. *Bommareddy*, 272 Cal. Rptr. at 247-248. The court explained there was no “bright line delineating the general availability of punitive damages” based on whether the action sounds in intentional tort versus negligence. “[C]ourts have not limited the availability of punitive damages to cases in which [an intent actual intent to harm the plaintiff] has been shown. . . . [I]n order to justify the imposition of punitive damages, the defendant ‘must act with the intent to vex, injure, or annoy, or with a conscious disregard of the plaintiff’s rights.’” *Id.* at 248 (quoting *Taylor v. Superior Court*, 598 P.2d 854 (Cal. 1979) (emphasis in original). *Cf.* *Bell v. Sharp Cabrillo Hospital*, 260 Cal. Rptr. 886 (1989) (upholding trial court’s refusal to instruct jury on punitive damages for lack of evidence defendant had consciously disregarded the safety of others). The court also noted that “the same statute which added Code of Civil Procedure section 425.13 also expanded the definition of malice found in Civil Code section 3294 to include ‘despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.’” *Bommareddy*, 272 Cal. Rptr. at 248 (quoting *Stats.* 1987, ch. 1498).

66. *Bommareddy*, 272 Cal. Rptr. at 248.

From the outset, it seems notable that the legislature chose to specifically regulate only those actions brought upon a theory of ‘professional negligence,’ as defined as a negligent act or omission by a health care provider in the rendering of professional services which cause personal injuries or wrongful death. Hence a ‘malpractice’ action brought on a theory of an unconsented-to-battery upon the patient, breach of warranty, or other non-negligence theory would apparently be without the ambit of this legislation.

Id. (citing *Selected 1975 California Legislation*, *supra* note 3, at 544, 562).

67. *Bommareddy*, 272 Cal. Rptr. at 249. The court also cited with approval *Noble v. Superior Court*, 237 Cal. Rptr. 38 (Ct. App. 2d Dist. 1987) which, in construing Code of Civil Procedure section 364, held that professional negligence does not include a cause of action for battery. *See* discussion of the *Noble* decision at *infra* notes 153-173 and accompanying text. The Fifth District Court of Appeal, however, declined to follow *Bommareddy* in *Feister v. Superior Court*, 1 Cal. Rptr. 2d 150 (1990).

Pathology Service Medical Clinic.⁶⁸ The complaint pleaded causes of action for medical negligence and loss of consortium based on the failure of the defendants to timely diagnose and treat cancer in Constance Hull.⁶⁹ Subsequent to filing the complaint, the Hulls moved for leave to file an amended complaint alleging causes of action for fraud and intentional infliction of emotional distress.⁷⁰ The Hulls' amended complaint sought punitive damages.⁷¹

Central Pathology opposed the Hulls' motion to amend the complaint on the grounds that the amended complaint failed to meet the requirements of section 425.13(a);⁷² specifically, the Hulls would be unable to show a "substantial probability" of prevailing on the punitive damages claim.⁷³ The Hulls contended that section 425.13(a) did not apply to the proposed amendments since those causes of action were not for "professional negligence."⁷⁴ Relying on *Bommareddy*, the trial court granted the motion to amend, holding section 425.13(a) did not bar punitive damages allegations against a health care provider on causes of action unrelated to professional negligence.⁷⁵ The Supreme Court granted review and reversed.⁷⁶

68. 832 P.2d at 926.

69. *Id.* at 926.

70. *Id.* These new causes of action were based on the fact that defendant Elizabeth Irwin, M.D., allegedly performed a pap smear on Hull which was sent to Central Pathology for analysis. Hull alleged that, despite the presence of abnormal cells, Irwin and Central Pathology failed to notify Hull that she was developing cancer. Hull further alleged that Central Pathology, after being ordered to retest all persons tested in the past five years, intentionally failed to notify Hull that she should be retested; and that Irwin denied using Central Pathology in an effort to cover up her negligence, thus giving rise to a cause of action for fraud. Hull also alleged that Central Pathology and Irwin acted in an outrageous manner with the intent to cause severe emotional distress, thus giving rise to a cause of action for intentional infliction of emotional distress. *Id.*

71. *Id.*

72. CAL. CODE CIV. PROC. § 425.13(a) prescribes a procedure for claiming punitive damages in a malpractice action. That section provides *inter alia* that:

In any action for damages arising out of the professional negligence of a health care provider, no claim for punitive damages shall be included in a complaint or other pleading unless the court enters an order allowing an amended pleading that includes a claim for punitive damages to be filed. The court may allow the filing of an amended pleading claiming punitive damages on a motion by the party seeking the amended pleading and on the basis of the supporting and opposing affidavits presented that the plaintiff has established that there is a substantial probability that the plaintiff will prevail on the claim pursuant to Section 3294 of the Civil Code. . . .

Id. Such an amended pleading must be filed within two years after the complaint is filed or nine months before the first trial date, whichever is earlier. *Id.* The rationale behind section 425.13(a) is that, since most malpractice policies do not cover punitive damages, a request for punitive damages creates a conflict of interest between the insurer and the insured. Accordingly, before such a claim will be allowed the court will make an initial determination that the claim has merit.

73. *Central Pathology*, 832 P.2d at 926.

74. *Id.* at 926-927.

75. *Id.* at 927 (citing the trial court's opinion).

1. Interpretation of Section 425.13(a)

The *Central Pathology* Court began its analysis by looking at the plain language of section 425.13 which provides:

*In any action for damages arising out of the professional negligence of a health care provider, no claim for punitive damages shall be included in a complaint or other pleading unless the court enters an order allowing an amended pleading that includes a claim for punitive damages to be filed. . . .*⁷⁷

The Court explained that, since the phrase "arising out of" is "equated with origination, growth or flow from the event,"⁷⁸ an intentional tort cause of action can "arise out of" an action for professional negligence.⁷⁹ With respect to the term "professional negligence," the Court turned to the various MICRA provision which define the term.⁸⁰ Since the legislature was familiar with that definition, it was assumed to apply to section 425.13 as well.⁸¹ Next, the Court turned to the legislative history of section 425.13(a) to determine whether, in the malpractice context, an intentional tort cause of action could "originate, grow, or flow from an action for 'professional negligence.'"⁸²

Section 425.13 was added to the Code of Civil Procedure by a section of the Brown-Lockyear Civil Liabilities Reform Act.⁸³ In its original form, section 425.13 was not limited to actions for medical malpractice.⁸⁴ Later, it was amended to apply to "any action . . . arising out of the professional negligence of a health care provider."⁸⁵ The Legislature was concerned with the overbreadth of the original version of section 425.13 in that it could

76. *Id.* at 931. The Supreme Court granted review after defendant's petition for a writ of mandate was summarily denied by the Court of Appeal.

77. CAL. CODE CIV. PROC. § 425.13(a)(emphasis added).

78. *Central Pathology*, 832 P.2d at 931 (citing *Hartford Accident & Indem. Co. v. Civil Service Employees Ins. Co.*, 108 Cal. Rptr. 737, 741 (Ct. App. 3d Dist. 1973) and *Palmer v. Agee*, 150 Cal. Rptr. 841, 847 (Ct. App. 4th Dist. 1978) ("arise" means to originate from a specified source or to come into being)).

79. *Id.* The Court analogized prior decisions holding that intentional tort causes of action can "arise out of" contractual relationships. *Id.* (citing *Stout v. Turney*, 586 P.2d 1228 (Cal. 1978) and *Smith, Valentino & Smith, Inc. v. Superior Court*, 551 P.2d 1206 (Cal. 1976)).

80. 832 P.2d at 928. See *supra* note 10 for those sections defining "professional negligence."

81. *Id.*

82. *Id.* at 928.

83. Stats. 1987, ch. 1498, §§ 1-7, pp. 5777-5782. The Act provided in part for an increased evidentiary threshold in order to recover punitive damages ("clear and convincing evidence of oppression, fraud, or malice"). *Central Pathology*, 832 P.2d at 929.

84. *Id.* The statute provided *inter alia*, "[n]o claim for punitive damages against a health care provider shall be included in a complaint or other pleading unless the court enters an order allowing an amended pleading that includes a claim for punitive damages to be filed." *Id.* (quoting Stats. 1987, ch. 1498, § 7, p. 5782).

85. *Id.* (quoting Stats. 1988, ch. 1205, § 1, p. 4028).

apply to any lawsuit against a health care provider unrelated to providing professional services, whereas the intent behind the statute was to "provide protection to health practitioners *in their capacity as practitioners*."⁸⁶

The Court concluded section 425.13 was therefore intended to apply only to lawsuits related to a practitioner's conduct in providing health care related services.⁸⁷ Although the Assembly Subcommittee expressed the view that claims for fraud and intentional torts would be claims unrelated to the practitioner's practice, the Court concluded section 425.13 was nevertheless intended to cover any lawsuit brought against health practitioners "in their capacity as practitioners."⁸⁸

In reversing *Bommareddy*, the Court explained the Court of Appeal had mistakenly focused on the issue of whether "professional negligence" as defined under MICRA included intentional torts.⁸⁹ "Whether professional negligence, as defined in MICRA statutes, *includes* intentional torts is not the question. Rather, the trial court must determine whether a plaintiff's action for damages is one 'arising out of the professional negligence of a health care provider.'⁹⁰ More important, under the *Bommareddy* court's interpretation of section 425.13(a), a plaintiff would be able to circumvent the protection afforded by the statute by artfully pleading a claim for an intentional tort along with the negligence cause of action and asserting a claim for punitive damages based only on the intentional tort.⁹¹

2. Section 425.13 Applies to Causes of Action "Directly Related" to the Performance of Professional Services

For purposes of section 425.13, an intentional tort "arises out of" a claim for negligence when the nature and cause of the injury is "directly related to the manner in which professional services were provided."⁹² As the Court explained:

[Hull's] cause of action for fraud in this case is directly related to the manner in which defendant's provided professional services. The claim emanates from the manner in which defendants performed and communicated the results of medical tests, a matter that is an ordinary and usual part of medical professional services. . . . [Hull's] cause of action for intentional infliction of emotional distress is predicated on the same alleged facts as the fraud claim. Therefore, it too is directly related to defendants'

86. *Id.* at 930 (quoting Assem. Subcom. on the Administration of Justice Rep. in Sen. Bill No. 1420, p.1 (1987-1988 Reg. Sess.) (emphasis in original)).

87. *Id.*

88. *Id.*

89. *Id.* at 930.

90. *Id.* (quoting §425.13(a) emphasis in original).

91. *Id.*

92. *Id.* at 931.

performance of professional services and is governed by section 425.13(a).⁹³

Moreover, the Court held section 425.13 applies whether the complaint alleges a single cause of action for an intentional tort or states a cause of action for professional negligence.⁹⁴

C. Should MICRA Apply to All Torts Which Are "Based On" Claims for Professional Negligence?

Central Pathology raises several questions regarding MICRA's interpretation. The first is whether MICRA's provisions should be given a similar interpretation. Does the language used by the Legislature in drafting MICRA suggest an intent to cover all torts, intentional or unintentional, that are committed while performing professional services? If the language used in those sections would allow such an interpretation, would the policies behind the statute be furthered by the inclusion of intentional torts? Finally, if intentional torts are to be covered by MICRA, which types should receive protection?

The various MICRA provisions all apply to actions "based on" professional negligence.⁹⁵ Arguably, the same reasoning applied by the Court in *Central Pathology* could be applied to the MICRA provisions which pertain to claims "based on" professional negligence.⁹⁶ In its *amicus curiae* brief before the *Central Pathology* Court, the California Medical Association (CMA) contended that the Legislature intended section 425.13 to cover the same types of actions as MICRA.⁹⁷ The legislative history of section 425.13 shows the Legislature looked to the MICRA statutes as precedent in drafting section 425.13.⁹⁸ Section 425.13 applies "[i]n any action for

93. *Id.*

94. *Id.*

95. *See, e.g.*, CAL. CIV. CODE §§ 3333.1 & 3333.2, and CAL. CODE CIV. PROC. § 364.

96. This same argument was raised by the California Medical Association (CMA) in an *amicus curiae* brief filed in *Szkorla v. Vecchione*. *See* AMICUS CURIAE BRIEF ON BEHALF OF CALIFORNIA MEDICAL ASSOCIATION, CALIFORNIA DENTAL ASSOCIATION, AND CALIFORNIA ASSOCIATION OF HOSPITALS AND HEALTH SYSTEMS IN SUPPORT OF APPELLANT at 8. (on file with California Western Law Review) [hereinafter CMA BRIEF SZKORLA]. The CMA and the California Association of Hospitals and Health Systems were instrumental in defending MICRA's constitutionality. *Id.* at A.

97. AMICUS CURIAE BRIEF OF CALIFORNIA MEDICAL ASSOCIATION, CALIFORNIA ASSOCIATION OF HOSPITALS AND HEALTH SYSTEMS, AND CALIFORNIA DENTAL ASSOCIATION IN SUPPORT OF PETITIONERS, at 3. (on file at California Western Law Review) [hereinafter CMA BRIEF (*Central Pathology*)].

98. The comments to the bill state, "[t]here is substantial precedent for SB 1420. The provisions of the Medical Injury Compensation Reform Act of 1975 (MICRA) all pertain to claims of 'professional negligence.' (See Civil Code Section 3333.1, relating to the collateral source rule, Civil Code Section 3333.2 relating to limitations on noneconomic losses, Code of Civil Procedure Section 411.30, relating to Certificates of Merit, and Code of Civil Procedure Section 667.7, relating to periodic payments of judgments.)" ASSEMB. SUBCOMM. ON THE ADMIN. OF JUSTICE, S.B. 1420, at 1-2.

damages *arising out of* the professional negligence of a health care provider.” In comparison, the MICRA statutes apply to actions “*based upon* professional negligence.”⁹⁹ As the CMA stated in its brief, “[w]hether or not there is any meaningful linguistic difference between ‘based upon’ and ‘arising out of’ . . . the Legislature surely did not intend to make a distinction. . . . To the contrary, the Legislature’s view of the MICRA language as ‘precedent’ demonstrates no distinction was intended.”

The *Central Pathology* Court conceded this point, explaining:

We agree with amici curiae California Medical Association et al. that committee reports before the Legislature at the time it was considering amending section 425.13 indicate the Legislature did not intend to distinguish the terms “based upon” and “arising out of.”¹⁰⁰

As the Court explained, “[w]e recognize that in the medical malpractice context, there may be considerable overlap of intentional and negligent causes of action.”¹⁰¹ If the language “arising out of” can link an intentional tort cause of action to a negligence claim, it would seem that an intentional tort could also be “based on” professional negligence.¹⁰²

The CMA further contended that the difference in the language used in the various MICRA statutes was the result of “drafting imperfections.”¹⁰³ As a result “it would be misleading to read too much into the Legislature’s use of the term ‘professional negligence’ in the other MICRA statutes. When read in the context of MICRA’s purpose, it is apparent the Legislature would have expressed its intent more accurately if it had used the term ‘professional

99. CAL. CIV. CODE § 3333.1 (emphasis added). *See also, e.g.*, CAL. CIV. CODE § 3333.2; CAL. BUS. & PROF. CODE § 6146; CAL. CODE CIV. PROC. §§ 340.5, 364.

100. *Central Pathology*, 832 P.2d at 928 n.3 (citing Assem. Subcom. on the Administration of Justice, Analysis of Sen. Bill No. 1420 (1987-1988 Reg. Sess.); Sen. Office of Research, 3d reading analysis of Sen. Bill No. 1420 (1987-1988 Reg. Sess.) as amended Apr. 14, 1988; Assem. Office of Research, Sen.3d reading analysis of Sen. Bill No. 1420 (1987-1988 Reg. Sess.) as amended Aug. 30, 1988).

101. 832 P.2d at 931.

102. *Id.*

103. CMA BRIEF (*Central Pathology*), *supra* note 97, at 6. As the brief points out:

No two MICRA provisions use exactly the same language to describe the cases to which they apply. For example, while Civil Code section 3333.2 (limiting noneconomic damages to \$250,000 applies “[i]n any action for *injury* against a health care provider based on professional negligence” (emphasis added), Civil Code section 3333.1 (changing the collateral source rule) applies “in an action for *personal injury* against a health care provider based upon professional negligence” (emphasis added), and Code of Civil Procedure section 340.5 (the statute of limitations) applies “[i]n an action for *injury or death* against a health care provider based upon such person’s alleged professional negligence” (emphasis added). Code of Civil Procedure section 1295 governs contract provisions concerning the arbitration “of any *dispute as to* professional negligence of a health care provider” (emphasis added). Despite these differences, it would be casuistry to argue each provision has a different scope.

Id.

services' or 'medical malpractice.'"¹⁰⁴ In fact, the language used in Code of Civil Procedure section 1295 indicates the Legislature viewed the terms "professional negligence" and "medical malpractice" as synonymous.¹⁰⁵ That section provides for "arbitration of any dispute as to *professional negligence*"¹⁰⁶ and requires the contract to include warnings about the arbitrability of "any dispute as to *medical malpractice*"¹⁰⁷ and "any issue of *medical malpractice*."¹⁰⁸ Furthermore, Code of Civil Procedure section 667.7 authorizes periodic payment "of judgments in *malpractice actions* against health care providers."¹⁰⁹ Code of Civil Procedure section 340.5 provides for tolling of the statute of limitations "upon proof of *fraud*,"¹¹⁰ which is an intentional tort with its own three year statute of limitations.¹¹¹ Although each of the MICRA provisions provide their own definition "professional negligence" as a "negligent act or omission,"¹¹² the language used in the rest of the MICRA statutes shows no clear intent to limit MICRA to causes of action for negligence.¹¹³ These "drafting imperfections" should not detract from MICRA's overriding purpose to ensure the availability of health care by making malpractice insurance affordable.¹¹⁴

III. PRIOR STATUTORY INTERPRETATION

The question of whether MICRA should cover intentional torts has remained for the most part undecided.¹¹⁵ All the MICRA provisions uniformly apply to actions "based on" or "based upon" professional negligence.¹¹⁶ Yet, the few decisions which have addressed MICRA's coverage of intentional torts have not focused on those words as having any significance with respect to statutory interpretation. Following *Central Pathology*, it would seem that the phrase "based on professional negligence"

104. CMA BRIEF (*Central Pathology*), *supra* note 97, at 7.

105. *Id.*

106. § 1295(a).

107. *Id.*

108. § 1295(b).

109. § 667.7(f) (emphasis added).

110. CAL. CODE CIV. PROC. § 340.5 (emphasis added).

111. CAL. CODE CIV. PROC. § 338. Nevertheless, *Nelson v. Gaunt*, 178 Cal. Rptr. 167, 171 (Ct. App. 1st Dist 1981) held that a cause of action for fraud is governed by the three year statute.

112. *See supra* note 10.

113. CMA BRIEF, (*Central Pathology*), *supra* note 97, at 6. The distinction between "malpractice" and "negligence" is not an insignificant one. Many other malpractice reform statutes in other states apply to actions for "malpractice" and not just those for "negligence." *See infra* note 245 and accompanying text.

114. *Id.* at 7.

115. As yet, only CAL. CODE CIV. PROC. §§ 340.5 and 1295 have been examined by the courts with respect to coverage of intentional torts.

116. *See supra* notes 26, 34, 37 and 40. CAL. CODE CIV. P. § 1295 contains much broader language.

should be broadly construed as a whole to include all malpractice torts regardless of the level of intent involved and thus better effect MICRA's statutory purpose of lowering health care costs.¹¹⁷ As the *Central Pathology* Court explained:

To ensure that the legislative intent underlying MICRA is implemented, we have recognized that the scope of conduct afforded protection under MICRA provisions (actions "based on professional negligence") must be determined after consideration of the purpose underlying each of the individual statutes. . . . Absent any indication that the Legislature intended otherwise in using the term "arising out of professional negligence" in section 425.13, we must do the same here.¹¹⁸

Curiously the Court cites *Waters v. Bourhis*¹¹⁹ and *Hedlund v. Superior Court*¹²⁰ for the proposition that the phrase "based on" was given an interpretation consistent with its statutory purpose in those cases and a similar interpretation should be applied to the words "arising out of" in order to conclude that intentional torts should be covered by section 425.13.¹²¹ However, while the Court in *Hedlund* broadly construed the phrase professional negligence to encompass a claim for failure to warn, *Waters* introduced a certain amount of confusion to the issue of which torts are covered by MICRA and which are not.

A. *Waters v. Bourhis* and "Hybrid" Recoveries

In *Waters v. Bourhis*,¹²² the California Supreme Court held that the limitation on contingency fees¹²³ does not apply where a plaintiff proceeds both on claims of professional negligence and intentionally tortious conduct, and obtains a recovery that might be based on either claim.¹²⁴ However,

117. *Central Pathology*, 832 P.2d at 931.

118. *Id.* (citations omitted).

119. 709 P.2d 469 (Cal. 1985) (refusing to apply contingency fee limitation to "hybrid" action alleging professional negligence and intentional tortious conduct).

120. 669 P.2d 41 (Cal. 1983) (including allegations of negligent failure to warn within the definition of "professional negligence" for purposes of the statute of limitations).

121. *Central Pathology*, 832 P.2d at 931. At least one court of appeal has declined to apply such a broad interpretation. In *Western Steamship Lines v. San Pedro Peninsula Hospital*, the court held that an employer's claim for implied equitable indemnity was not a legal theory "arising out of" or "based on" the professional negligence of a health care provider. 19 Cal. Rptr. 2d 611, 616 (Ct. App. 2d Dist. 1993).

122. 709 P.2d 469. Justice Kaus delivered the majority opinion in which Justices Broussard, Reynoso, Grodin, and Lucas concurred. Justice Mosk wrote a dissenting opinion in which Chief Justice Bird concurred. Justice Kaus, a retired associate justice was sitting under assignment by the Chairperson of the Judicial Council.

123. CAL. BUS. & PROF. CODE § 6146.

124. 709 P.2d at 475-77.

a close reading of the *Waters* decision supports the conclusion that MICRA should cover intentional torts.¹²⁵

Waters brought an action against her attorney who had represented her in an earlier suit against a psychiatrist who had allegedly seduced Waters while she was his patient contending her attorney had collected a contingency fee which exceeded the maximum permitted by section 6146.¹²⁶ Waters' complaint in the earlier action alleged her psychiatrist induced her to engage in sexual conduct suggesting it was part of therapy designed to alleviate her sexual inhibitions.¹²⁷ After terminating her therapy and assisting in criminal prosecution of her psychiatrist, Waters consulted an attorney to file a civil action seeking recovery on several legal theories.¹²⁸ Water's complaint alleged (1) negligence, (2) breach of duty of good faith, and (3) intentional infliction of emotional distress.¹²⁹ The suit was eventually settled for policy limits from which Waters' attorney collected his fee.¹³⁰ Waters then sued alleging her attorney had obtained a fee greater than he was entitled to under section 6146.¹³¹

The Court began its analysis by noting that "section 6146's limitations . . . do not apply to all types of actions against doctors or other 'health care providers' but—like other provisions of MICRA[]—only to actions which are 'based upon [the provider's] alleged professional negligence.'" ¹³² However, "MICRA's reference to actions based on 'professional negligence' is not strictly limited to classic sponge-in-the-patient medical malpractice actions."¹³³ Next, the Court explained that Waters' suit against the psychiatrist was not limited to an intentional tort theory but could also contain allegations of professional malpractice as well.¹³⁴ Accordingly, Waters'

125. So argued in CMA BRIEF (*Szkorla*), *supra* note 96, at 9.

126. 709 P.2d at 471.

127. *Id.*

128. *Id.* at 472. The defendant offered to represent Waters' case on either an hourly rate of \$50 or \$65 per hour or on a contingency fee basis "which provided for fees of (1) 33½ percent if recovery was obtained before the filing of a lawsuit, and (2) 40 percent after such a suit was filed." Plaintiff told him that she wanted to be represented on a contingency basis and signed the contingency fee agreement that defendant had prepared. *Id.*

129. *Id.* The third count alleged the psychiatrist's actions "'constitute[d] outrageous, unlawful, harmful and offensive conduct' and that they were undertaken with the 'intention of causing or recklessly disregarding the possibility of causing emotional distress to the plaintiff.'" *Id.* at 472 n.4.

130. *Id.* at 473.

131. *Id.*

132. *Id.* at 473-74. The Court ruled that Waters' allegations of sexual conduct gave rise to a cause of action for "professional negligence" as well as intentional tortious conduct citing numerous out-of-state decisions finding liability on such a basis. *Id.* at 475. For the full text defining "professional negligence" see *supra* note 10.

133. *Id.* at 475 (citing *Hedlund v. Superior Court*, 669 P.2d 41 (1983)).

134. *Id.* at 476. Where a psychiatrist intentionally abuses the therapist-patient relationship, the psychiatrist has breached both the duty imposed on everyone to refrain from intentionally injuring another and the special duty that a psychiatrist owes to his patient to use due care for the patient's health in the conduct of the therapist-patient relationship." *Id.*

recovery was based at least in part on a theory of professional negligence.¹³⁵

However, because the underlying suit had been settled, no determination had been made with regard to the theory on which the recovery was based.¹³⁶ The Court therefore concluded that, "when a plaintiff pursues and recovers on a non-MICRA cause of action, it is reasonable to conclude that section 6146's attorney fee limits should not apply, even if the plaintiff at the same time also succeeds on a separate MICRA cause of action."¹³⁷ The case was therefore reversed to resolve the factual question over "whether plaintiff knowingly consented to the pursuit and settlement of a cause of action that would not be subject to the limitations of section 6146."¹³⁸

The Court therefore treated Waters' earlier lawsuit as a "hybrid" claim "based on *both* non-MICRA and MICRA causes of action."¹³⁹ Implicit in the reversal was the acknowledgement that the recovery rested at least in part on a "non-MICRA" theory. This analysis is problematic since the Court, while implying that such a "non-MICRA" theory exists, does not define what type of theory would fall *outside* MICRA. On the surface it appears that the Court considered the allegation of intentional infliction of emotional distress (an intentional tort) to be a "non-MICRA" claim and the allegation of professional negligence to naturally be a MICRA claim. However, the Court's separation of Water's lawsuit into MICRA and non-MICRA theories is less than clear.¹⁴⁰

More significantly, the Court sidestepped the question of whether certain intentional torts are covered by MICRA. As the Court explained:

135. *Id.* at 476.

136. *Id.* at 477.

137. *Id.* at 478.

138. *Id.* at 479.

139. *Id.* at 477 (emphasis in original).

140. Traditionally, there can be only one recovery for a single injury no matter how many theories a plaintiff may prevail upon to recover against the defendant. Accordingly, it would be improper to apportion a different amount of damages to each cause of action.

Separation of the plaintiff's lawsuit into MICRA and non-MICRA causes of action creates further problems. As one author points out,

The court's holding could result in many personal injury attorneys asserting both MICRA and non-MICRA actions in order to avoid the limitations of section 6146. If the case goes to trial, the cause of action that succeeds will determine whether section 6146 applies. However, in the case of a settlement, the limits of section 6146 could be avoided because settlements do not establish on which theory the recovery is based. This could be an area for potential abuse of the limitations imposed by MICRA in malpractice actions. The provision that the plaintiff must knowingly consent to proceed on both theories will hopefully provide a check for potential abuse by attorneys.

Marie P. Henwood, *California Supreme Court Survey: The Contingency Fee Limitations of MICRA Does [sic] Not Apply Where a Plaintiff Knowingly Chooses to Proceed on Both Non-MICRA and MICRA Theories in the Same Suit, and Subsequently Obtains a Recovery on the Non-MICRA Theory*, 13 PEPP. L. REV. 1106, 1110 (1986).

Amicus California Hospital Association argues that "professional negligence" in section 6146 and other MICRA provisions should be construed to encompass not only "negligent" acts of a health care provider but also those "intentional" acts of such a provider which are insurable under Insurance Code section 533. . . .

We have no occasion in this case to decide whether amicus' proposed construction is an appropriate interpretation of the statutory language. Because the initial lawsuit against the psychiatrist was settled, the record does not establish whether the psychiatrist's conduct falls into the "uninsurable" as opposed to the insurable category, any more than it establishes whether his conduct was "intentional" rather than "negligent." Thus, even if amicus' suggested reading of the statute were proper, it would not affect the result in this case.¹⁴¹

Therefore, assuming such a distinction exists, is a "non-MICRA" tort one that is "uninsurable" or one that is "intentional"? It would make sense for one defining criterion to be insurability; since the primary purpose of MICRA is to protect malpractice insurers from paying out large awards.¹⁴² This must be considered the proper holding of *Waters*. If intent alone were the sole criteria, the Court could have resolved the issue by simply holding that intentional torts are not covered under MICRA. Instead, the Court in the foregoing paragraph expressly declined to address the issue leaving its resolution for another day.

If insurability is one criteria for MICRA coverage that is to be gleaned from the *Waters* opinion, the second criteria must be the existence of a therapeutic motive on the part of the health care provider.¹⁴³ The *Waters* Court confined its analysis to the particular facts before it; where "the plaintiff's recovery in the earlier suit was based on *intentional misconduct* in which the psychiatrist engaged for *personal, as opposed to professional, motives.*"¹⁴⁴ Thus, a nontherapeutic motive appears to be the second defining criteria in determining whether a cause of action is governed by MICRA.¹⁴⁵

As *Waters* again shows, an analysis focusing solely on the term "professional negligence" is misplaced. Since such torts are insurable,¹⁴⁶

141. *Id.* at 476-77 n.11 (citations omitted). Some intentional torts are insurable under CAL. INS. CODE § 533. *Clemmer v. Hartford Ins. Co.*, 587 P.2d 1098, 1110 (Cal. 1978) (" . . . an act which is 'intentional' or 'wilful' within the meaning of traditional tort principles will not exonerate the insurer from liability . . . unless it is done with a 'preconceived design to inflict injury.'") See discussion at *infra* notes 229-230 and accompanying text.

142. See *supra* note 71.

143. The proposition that a malpractice reform statute should cover all torts which are related to the performance of the health care provider's professional duties has been the basis for several out of state opinions. See *infra* section IV.B.

144. *Waters*, 709 P.2d at 475 (first emphasis in original, second added); CMA BRIEF (*Szkorla*), *supra* note 96, at 10-11.

145. CMA BRIEF (*Szkorla*), *supra* note 96, at 11.

146. CAL. INS. CODE § 533. Cf. *Overton*, 160 Cal. App. 3d at 848-50 (criminal conviction for battery does not in and of itself preclude insurance coverage).

coverage under MICRA would help further the policy of ensuring affordable health care.¹⁴⁷

Many medical malpractice cases include legal theories other than negligence, such as technical battery. Those non-negligence theories, however, are inextricably related to the rendering of professional services and are covered by medical malpractice insurance. An interpretation of MICRA that narrowly limits its application to a legal theory of negligence ascribes to the Legislature the intent to subject health care providers and their insurers to increased liability in a significant category of medical malpractice cases. This would add to the costs of medical malpractice insurers and undercut MICRA's crucial purpose of ensuring the availability of health care and the enforceability of judgments against health care providers by making medical malpractice insurance affordable. Such a narrow construction of the phrase "based upon professional negligence" is inconsistent with the overriding legislative intent.¹⁴⁸

Under *Waters*, a theory is non-MICRA only if the practitioner is engaged in conduct for personal as opposed to professional motives.¹⁴⁹ The distinction between whether a tort is MICRA or non-MICRA should not be based on whether a tort is "intentional."¹⁵⁰ After all, "intent" for purposes of the commission of an intentional tort does not require an intent to do harm, only an intent to do the act which results in harm.¹⁵¹

Therefore, the distinction between negligence and intentional tort is insufficient to distinguish a MICRA from a non-MICRA tort. Rather, MICRA should exclude only intentional torts committed with a nontherapeutic motive.¹⁵² The test to determine MICRA's applicability should be similar to the test used to determine whether certain conduct is covered by the health care provider's malpractice insurance.

147. As the CMA argued in its brief before the Fourth District in *Szkorla*:

In our view, in the context of health care, the 'preconceived design to inflict injury' test [the test for noninsurability under section 533] is not significantly different from the 'nontherapeutic motive' test. If a health care provider's motive is nontherapeutic, a preconceived design to inflict injury generally should be inferable as a matter of law.

CMA BRIEF (*Szkorla*), *supra* note 96, at 11 n.10.

148. CMA BRIEF (*Central Pathology*) *supra* note 97, at 10.

149. *See supra* notes 122-145 and accompanying text.

150. CMA BRIEF (*Szkorla*), *supra* note 96, at 119. "'Motive' is different from 'intent.' 'Intent' is the word commonly used to describe the purpose to bring about stated physical consequences; the more remote objective which inspires the act and the intent is called 'motive.' . . . [M]otive . . . [is concerned with] reasons for desiring certain consequences." *Id.* (quoting PROSSER & KEETON, TORTS § 8, p. 35 (5th ed. 1984) (emphasis added).

151. "The intent with which tort liability [for intentional torts] is concerned is not necessarily a hostile intent, or a desire to do any harm. Rather it is an intent to bring about a result which will invade the interests of another in a way that the law forbids." PROSSER & KEETON, *supra* note 150, at 36.

152. CMA BRIEF (*Szkorla*), *supra* note 96, at 13.

However, the lower courts of appeal have not given MICRA such a broad interpretation. As noted above, the *Bommareddy* court focused very exclusively on the term "professional negligence" as a term of art which does not include intentional torts. *Noble v. Superior Court*,¹⁵³ followed a very similar reasoning. There, the Second District Court of Appeal held the tolling provisions of Code of Civil Procedure section 364¹⁵⁴ applied only to negligence causes of action and not to those based on intentional torts as to which the limitations period has run.¹⁵⁵

In *Noble*, the plaintiff¹⁵⁶ filed a "Notice of Intention to Commence Action," prior to the expiration of the one-year statute of limitations¹⁵⁷ which advised the defendant of her intention to commence an action against him.¹⁵⁸ On May 9, 1986, Noble filed a complaint which included a cause of action for battery.¹⁵⁹ Subsequently, Noble filed a First Amended Complaint on August 29, 1986, seeking damages based upon several negligence theories¹⁶⁰ as well as battery.¹⁶¹ The defendant demurred to the cause of action for battery on the grounds it was barred by the statute of limitations.¹⁶²

On appeal, Noble contended her cause of action for battery was based upon the same facts as the negligence cause of action and therefore the tolling provisions of section 364(d)¹⁶³ should also extend the one-year period for battery¹⁶⁴ which otherwise would expire on April 22, 1986.¹⁶⁵ The court of appeal, however, ruled the 90-day tolling provisions of section

153. *Noble v. Superior Court*, 237 Cal. Rptr. 38 (1987).

154. CAL. CODE CIV. PROC. § 364 provides for a 90 day notice to commence a malpractice action against a health care provider.

155. *Noble*, 237 Cal. Rptr. at 38.

156. CAL. CIV. CODE § 340.5. See discussion at *supra* notes 87-94 and accompanying text.

157. As required per CAL. CODE CIV. PROC. § 364(a). See *supra* note 130.

158. *Noble*, 237 Cal. Rptr. at 39.

159. *Id.* This cause of action was undoubtedly based on the allegation that Dr. Katz had exceeded the scope of the surgery to which Noble had consented.

160. Those theories were: medical malpractice, lack of informed consent, negligence, and negligent infliction of emotional distress. See *Cobbs v. Grant*, 502 P.2d 1 (Cal. 1972).

161. *Id.*

162. *Id.* The statute of limitations is one year under section 340.5 with respect to the causes of action for professional negligence. The battery cause of action would be governed by Code of Civil Procedure section 340(3).

As the court explained the running of the statute with respect to each of Noble's claims: "Because Noble filed her notice of intent within 90 days of the end of the one-year period (which ordinarily would have run on April 22, 1986), the limitations period was extended for 90 days, until July 21, 1986. Her complaint filed on May 9, 1986, was therefore timely filed as to the causes of action sounding in negligence." *Id.*

163. Subsection (d) provides that a "Notice of Intention to Commence Action" filed within 90 days of the end of the limitations period, tolls the statute for 90 days. See *supra* note 93 and accompanying text.

164. CAL. CODE CIV. PROC. § 340(3).

165. *Noble*, 237 Cal. Rptr. at 39.

364 apply only to negligence causes of action.¹⁶⁶ The court further rejected Noble's argument that her cause of action for battery was "merely an alternative theory based upon the same set of facts as her negligence causes of action."¹⁶⁷ The court concluded "the words 'negligent' and 'negligence' were carefully chosen to apply to only causes of action based upon negligence."¹⁶⁸ The court reasoned this interpretation would be consistent with the policies underlying MICRA since an opposite construction would have the effect of lengthening the statute with respect to a cause of action for battery.¹⁶⁹

However, the *Central Pathology* court accepted the argument the court of appeal rejected in *Noble*; that a cause of action for battery is merely an alternative theory based on the same facts as the negligence cause of action.¹⁷⁰ Arguably, the analysis in the *Noble* decision is faulty since the

166. *Id.* In *Brown v. Bleiberg*, the Supreme Court held (without much analysis) that the statute of limitations for professional negligence did not apply to the plaintiff's causes of action for battery and breach of warranty. 651 P.2d 815, 820 (Cal. 1982). The court held that the plaintiff's claims for battery and breach of warranty were not barred by the one year statute of limitations set forth in CAL. CODE CIV. PROC. § 340 (3), because there was a question of fact as to when the plaintiff should have discovered that the defendants had performed unauthorized surgery on her foot. *Id.* at 822. The court held that the plaintiff's claim for professional negligence was not tolled by the outside three year statute of limitations in CAL. CODE CIV. PROC. § 340.5 because of the physician's affirmative misrepresentations regarding the nature of the surgery. *Id.* at 821.

167. *Id.* (citing *Cobbs v. Grant*, 502 P.2d 1, for the proposition that there are significant differences between the theories of battery and negligence). *Cf.* *Herrera v. Superior Court*, 204 Cal. Rptr. 553 (Ct. App. 2d Dist. 1984) (citing *Cobbs* for the proposition that the legislature in drafting statute providing for arbitration agreements in malpractice cases, recognized a malpractice action can include theories other than negligence, such as a battery).

168. *Noble*, 237 Cal. Rptr. at 40.

The distinction between negligence and battery was not lost on our Supreme Court [in *Cobbs v. Grant*], and we do not believe it was lost on the Legislature when it enacted section 364 as a *limited* exception to the statute of limitations for "professional negligence." Had the legislature intended section 364, subdivision (d), to extend to causes of action based upon other theories which the plaintiff might wish to include in the complaint, it could have used language which reflected that intent. It did not.

Id. at 41 (emphasis in original).

169. *Id.* "[T]he provisions of MICRA relating to the statute of limitations . . . use the more limiting terms 'professional negligence' and 'negligent act or omission to act.' We view this as a deliberate choice, consistent with MICRA's goal of reducing the number of medical malpractice actions filed. The legislature specifically reduced the limitations period for such actions from four to three years. Noble's contention that section 364, subdivision (d) *expanded* the limitations period for battery is inconsistent with the spirit, if not the letter, of MICRA." *Id.* at 40 (emphasis in original).

170. *Central Pathology*, 832 P.2d at 931.

We recognize that in the medical malpractice context, *there may be considerable overlap* of intentional and negligent causes of action. Because acts supporting a negligence cause of action might also support a cause of action for an intentional tort, we have not limited application of MICRA provisions to causes of action that are based solely on a "negligent act or omission" as provided in these statutes. . . .

. . . .

court there focused on the exclusive nature of the term “professional negligence” as a term of art without considering whether the preceding phrase “based upon” present in both sections 340.5 and 364 expanded the scope of the statute.¹⁷¹ Furthermore, the *Noble* court held extending the statute of limitations for battery claims would be inconsistent with MICRA’s purpose.¹⁷² However, the court failed to recognize that including a cause of action for an intentional tort within MICRA as an action “based upon professional negligence” would allow other MICRA protections to apply.¹⁷³

Other cases interpreting the difference between Code of Civil Procedure 340 (3) (applicable to battery and breach of warranty),¹⁷⁴ and Code of Civil Procedure section 340.5 (applicable to actions “based upon . . . professional negligence”) have created just the opposite result. In *Brown v. Bleiberg*,¹⁷⁵ the court observed that only the plaintiff’s cause of action for professional negligence was subject to the absolute three year bar of section 340.5.¹⁷⁶ However, the court held it was error to grant summary judgment with respect to plaintiff’s causes of action for battery and breach of warranty because there was a factual issue whether the plaintiff discovered the defendant’s tortious conduct before the statute of limitations had run.¹⁷⁷

In *Nelson v. Gaunt*,¹⁷⁸ the court held that the trial court did not abuse its discretion in holding that the plaintiff’s cause of action for fraud was

. . . [I]dentifying a cause of action as an “intentional tort” as opposed to “negligence” does not itself remove the claim from the requirements of section 425.13(a).

Id. (emphasis added).

171. See *Noble*, 237 Cal. Rptr. at 40. The court notes that sections 364 and 340.5 apply to “actions against a health care provider based upon the provider’s alleged ‘professional negligence,’ which is defined as ‘a negligent act or omission to act.’” *Id.* (emphasis in original). However, this is precisely the focus taken by the *Bommareddy* court: “[T]he term ‘professional negligence’ [is] a more limited one and the choice of its use deliberate.” *Bommareddy*, 272 Cal. Rptr. at 250 (citing with approval *Noble*, 237 Cal. Rptr. at 40). In concluding that the phrase “professional negligence” was a deliberately chosen term of art, both courts failed to consider whether the words “based upon” were the result of a deliberate choice intended to expand the scope of the statute. Analysis based solely on the term “professional negligence” is misplaced. See *Central Pathology*, 832 P.2d at 930.

172. *Noble*, 237 Cal. Rptr. at 40.

173. Specifically, the cap on noneconomic damages (CAL. CIV. CODE § 3333.2) and the limitation on contingency fees (CAL. BUS. & PROF. CODE § 6146) would apply. Although holding a claim to be barred by the statute provides the greatest possible protection since naturally the claim cannot be brought at all. Consistency would dictate that all the MICRA provisions should apply with some uniformity. As a legislative scheme, MICRA should attempt the greatest overall reduction in judgments against health care providers. With respect to a cause of action for battery, the statute would only be extended by 90 days, whereas the other limitations imposed by MICRA would still apply. At best, the *Noble* and *Brown* decisions display a result-oriented analysis.

174. *Brown*, 651 P.2d at 817 n.1.

175. 651 P.2d 815 (Cal. 1982).

176. *Id.* at 820.

177. *Id.* at 821-22. Code of Civil Procedure section 340.5 extends the outside three year period upon proof of fraud. Therefore, “the outside limitations period of section 340.5 was tolled by its own terms.” *Id.* at 821.

178. 178 Cal. Rptr. 167 (Ct. App. 1st Dist. 1981).

governed by the three year statute of limitations for fraud, and was therefore not barred by the one year period in section 340.5.¹⁷⁹ The result of such reasoning is that a patient's claim against her physician for battery or breach of warranty could be tolled indefinitely,¹⁸⁰ whereas a claim for professional negligence would be barred after three years absent fraud, intentional concealment, or the presence of a nontherapeutic foreign body. This result, with its attendant effect on malpractice policy "tails," was surely unintended by the Legislature when MICRA was enacted.¹⁸¹

Finally, in *Szkorla v. Vecchione*,¹⁸² a decision ultimately depublished by the Supreme Court,¹⁸³ the Fourth District Court of Appeal held the cap on noneconomic damages imposed by Civil Code section 3333.2 did not apply to a cause of action for battery.¹⁸⁴ Although *Szkorla* cannot be cited or relied on as an authority,¹⁸⁵ the decision is useful as a reflection of the state of the law prior to *Central Pathology*.¹⁸⁶ "We begin our analysis in the judicial twilight zone otherwise known as depublished cases."¹⁸⁷

Szkorla sued her physician, Dr. Thomas Vecchione, following a series of three breast reduction surgeries, alleging that in the third surgery Vecchione removed too much tissue, leaving her disfigured.¹⁸⁸ A jury returned special verdicts against Vecchione on theories of professional

179. *Id.* at 174. The court observed: "The 1975 amendments to Code of Civil Procedure section 340.5, which narrowly define professional negligence, indicate that the Legislature attempted to curb fraud by health care providers by another route." The former section 340.5, added by Statutes of 1970, chapter 360, section 1, then covered any "action for injury or death against a physician . . . based upon such person's alleged professional negligence, or for rendering professional services without consent, or for error or omission in such person's practice." *Id.* In noting the changes in the two versions of the statute, the court may have read too much into the language used there. All the MICRA sections defining professional negligence differ slightly. See *supra* notes 103-114 and accompanying text.

180. In *Brown*, the plaintiff's cause of action lay dormant for 13 years. The court held that it was error to start summary judgment on the plaintiff's claims that were not based on professional negligence because there was a question of fact as to when the claim accrued. *Brown*, 651 P.2d at 820.

181. See *Steingart v. Oliver*, 243 Cal. Rptr. 678, 680 (Ct. App. 2d Dist. 1988), which outlines the history of delayed discovery and "long tail" problems in California malpractice actions, from 1936 onward.

182. 283 Cal. Rptr. 219 (1991), *review granted*, 286 Cal. Rptr. 779, 818 P.2d 62 (Cal. 1991), *reprinted for tracking pending review*, 2 Cal. App. 4th 1208 (4th Dist. 1991).

183. See discussion of the Court's depublication practice and its implications for the *Szkorla* decision, 283 Cal. Rptr. 219 (1991), *review granted*, 286 Cal. Rptr. 779, 818 P.2d 62 (Cal. 1991).

184. *Szkorla*, 283 Cal. Rptr. at 228.

185. CAL. RULE OF COURT § 977(a).

186. *Central Pathology* arguably has effectively reversed *Szkorla*. There is some speculation that the Court intends to address the issues raised in *Szkorla* at a future date. See *supra* note 60.

187. *In re Bosacki*, 213 Cal. Rptr. 834, 836 (Ct. App. 2d Dist. 1985).

188. *Szkorla*, 283 Cal. Rptr. at 220-223.

negligence, lack of informed consent and battery.¹⁸⁹ Szkorla was awarded \$600,000 in general damages and \$17,430 in special damages.¹⁹⁰ Vecchione appealed, contending the award of \$600,000 should have been reduced pursuant to section 3333.2.¹⁹¹

On appeal, Vecchione argued section 3333.2 limits noneconomic damages in *any* case against a health care provider.¹⁹² Vecchione contended that the Legislature, in enacting MICRA, intended to include all cases involving professional medical services and did not intend to distinguish between negligence and intentional torts.¹⁹³ The court disagreed. In so ruling, the court relied on *Waters v. Bourhis*¹⁹⁴ for the proposition that “in a non-MICRA action the plaintiff is not subject to (1) the \$250,000 limit on noneconomic damages.”¹⁹⁵ The court also read *Waters* to hold that “the provisions of MICRA do not apply to a recovery based on both professional negligence and an intentional tort.”¹⁹⁶ The court also relied on *Bommarreddy*¹⁹⁷ for the proposition that the term “‘professional negligence’ . . . has a specific meaning which does not include unconsented-to battery upon

189. *Id.* at 223. Specifically, the jury returned the following special verdicts:

(1) Vecchione was negligent in the medical care and treatment of Szkorla; (2) Such negligence was a proximate cause of damage to Szkorla; (3) Vecchione did not disclose all relevant information which would enable Szkorla to make an informed decision regarding the proposed operation; (4) a reasonable prudent person in Szkorla's position would have not consented to the operation if such person had been adequately informed of all the significant perils involved; (5) Vecchione performed a substantially different operation than the operation to which Szkorla consented; (6) Szkorla sustained \$600,000 in damages for pain and suffering, and (7) Szkorla sustained \$17,430 in special damages.

Id. Note that the jury awarded damages based on both negligence and intentional tort theories. Query whether this is a “hybrid” recovery under *Waters v. Bourhis*, 709 P.2d 469, 473 (Cal. 1985).

190. *Szkorla*, 283 Cal. Rptr. at 223. The special damages awarded reflected the cost of future medical care. *Id.* at 220.

191. *Id.* at 223. Trial judges generally have allowed juries to determine noneconomic damages in medical malpractice cases without regard to the \$250,000 limit. If the award exceeds \$250,000 it is reduced by the judge. *See generally* *McAdory v. Rogers*, 264 Cal. Rptr. 71 (Ct. App. 2d Dist. 1989) (upholding the practice); *accord* *Atkins v. Strayhorn*, 273 Cal. Rptr. 231, 236-37 (Ct. App. 4th Dist. 1990).

192. *Szkorla*, 283 Cal. Rptr. at 228.

193. *Id.*

194. 709 P.2d 469 (Cal. 1985).

195. *Id.* at 228 (quoting *Waters*, 709 P.2d at 478). The court reads more into this sentence than was intended by the Supreme Court. First, this statement out of *Waters* is merely dicta since it was not necessary to the Court's holding in that case. The *Waters* court expressly reserved ruling on the issue of whether a “technical battery” would be covered by MICRA. *Waters*, 476 P.2d at 476-77 n.11. Second, the *Waters* opinion never defines what constitutes a “non-MICRA” theory. *See supra* notes 122-145 and accompanying text.

196. *Szkorla*, 283 Cal. Rptr. at 228. *See also* *Flores v. Natividad Medical Center*, 238 Cal. Rptr. 24 (Cal. App. 1st Dist. 1987) (concluding it is not proper to apply the damage cap of section 3333.2 where one of the causes of action is outside the scope of MICRA).

197. 272 Cal. Rptr. 246 (1990) *rev'd*, *Central Pathology Service Med. Clinic v. Superior Court*, 832 P.2d 924 (Cal. 1992).

a patient."¹⁹⁸ Accordingly, the court rejected the argument that construing the statute to include causes of action based on technical battery would be consistent with the legislative purpose of the statute in controlling medical malpractice insurance costs.¹⁹⁹ Nevertheless, all of these arguments were accepted by the Supreme Court in another context in *Central Pathology*.²⁰⁰

Thus, the court in *Szkorla* treated the issue as having already been resolved by prior law.²⁰¹ However, if the issue had been resolved by prior decisions, the Supreme Court in *Waters* would not have reserved ruling on the issue of whether a "technical battery"—a battery motivated by a therapeutic purpose—would be covered by MICRA.²⁰² And, since the result in *Szkorla* was disapproved of by the Supreme Court through depublication,²⁰³ the Court has thereby reserved issue of whether MICRA covers claims for "technical battery."

B. Cases Holding MICRA Covers Intentional Torts

Herrera v. Superior Court,²⁰⁴ and *Baker v. Sadick*,²⁰⁵ addressed the issue of whether Code of Civil Procedure section 1295²⁰⁶ governing the means by which a physician and patient may agree that any dispute regarding claims for malpractice shall be submitted to arbitration, extends to cover actions other than those for "professional negligence." In both cases, the

198. *Szkorla*, 283 Cal. Rptr. at 229-230 (quoting *Bommarreddy*, 272 Cal. Rptr. at 249).

199. *Szkorla*, 283 Cal. Rptr. at 230; CMA BRIEF (*Szkorla*), *supra* note 96, at 4.

200. *See supra* notes 68-114 and accompanying text.

201. *Szkorla*, 283 Cal. Rptr. at 230. "In the face of the above-cited authority, Vecchione contends that the language of section 3333.2 supports his position." *Id.*

202. *See* note 125 *supra* and accompanying text. The court in *Szkorla* makes mention of *Waters* in this regard noting:

[T]he *Waters* court explicitly declined to consider a similar theory, namely "that 'professional negligence' in [Business and Professions Code] section 6146 and other MICRA provisions should be construed to encompass not only 'negligent' . . . but also those intentional acts of such a provider which are insurable under Insurance Code section 533 . . ." [Citations] The *Waters* court noted that the record did not establish whether the physician's conduct fell "into the 'uninsurable' as opposed to the 'insurable' category, any more than it establishes whether his conduct was 'intentional' rather than 'negligent.'" Similarly, nothing in the record here establishes whether Vecchione's battery of *Szkorla* is covered by insurance.

Szkorla, 283 Cal. Rptr. at 231. The record also did not indicate whether he committed the battery intentionally. *Id.*

203. *See supra* note 58.

204. 204 Cal. Rptr. 553 (1984).

205. 208 Cal. Rptr. 676 (1984).

206. *See supra* note 49.

courts of appeal concluded the patient's entire claim including allegations of intentional torts as well as negligent acts, was subject to arbitration.²⁰⁷

In *Herrera*, the plaintiff filed a complaint alleging professional negligence and negligent infliction of emotional distress.²⁰⁸ The defendants answered alleging as an affirmative defense plaintiff's action could not proceed since it was subject to arbitration as provided in a written agreement.²⁰⁹ Thereafter, plaintiff sought to amend her complaint to include several causes of action for intentional torts.²¹⁰ Following the amendment, the defendant sought a petition requiring plaintiff to arbitrate the entire controversy and to stay the action. The defendants contended all the claims were based on improper treatment, and thus were subject to arbitration under the agreement.²¹¹ The petition was granted and the plaintiff appealed contending section 1295 contemplates arbitration only of a physician's negligent acts and not their intentional torts.²¹²

At the outset the *Herrera* court noted the policy behind the enactment of section 1295 was the reduction of malpractice claims through arbitration.²¹³ The court also explained, while the statute specifies the language to be used in the arbitration contract as governing "any dispute as to professional negligence" which is "a negligent act or omission which proximately causes injury or death,"²¹⁴ the patient agrees to arbitrate "any dispute as to medical malpractice, that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently or incompetently rendered."²¹⁵ Thus, the statute's own definition of malpractice includes conduct traditionally a basis for both negligence and intentional torts.²¹⁶ "Moreover, it is settled law that a malpractice action can include theories other than negligence, such as battery, breach of

207. *Herrera*, 204 Cal. Rptr. at 557-558; *Baker*, 208 Cal. Rptr. at 681. In *Baker*, the court held an agreement pursuant to section 1295 which provides for arbitration of "any" issue of medical malpractice authorizes the arbitrator to award punitive damages in the arbitration of a medical malpractice claim. 208 Cal. Rptr. at 678.

208. *Herrera*, 204 Cal. Rptr. at 555.

209. *Id.*

210. *Id.* Plaintiff sought to amend her complaint on the basis of newly discovered facts which indicated the defendant did not perform the surgery he had claimed to perform, and thus committed a battery. Those causes of action were (1) assault and battery, (2) fraud and deceit, (3) negligent misrepresentation, (4) lack of informed consent, (5) intentional infliction of emotional distress, and (6) unjust enrichment. *Id.*

211. *Id.*

212. *Id.* at 555.

213. *Id.* at 556. See also *supra* note 48.

214. *Id.* at 556-57 (quoting § 1295(a) and (g)(2) respectively).

215. *Id.* (quoting § 1295(a)). For the full text of the statute see *supra* note 96.

216. *Id.* at 557. "It is perhaps worthy of note that this section purportedly regulates only those contracts for the arbitration of *professional negligence*, yet the mandatory clauses clearly contain language to cover other theories of recovery." *Id.* (citing *Selected 1975 California Legislation*, *supra* note 3, at 551).

contract and deceit."²¹⁷ The court further explained that the term "professional negligence" was intended only to set the "threshold of the type of action in which the arbitration provision will be used."²¹⁸ Finally, "the language which the Legislature specified must be included in the arbitration provision shows that the Legislature intended arbitration of disputes over medical services to extend beyond negligence."²¹⁹

In *Baker v. Saddick*, the plaintiff's claim was also based on intentional tort principles.²²⁰ The Fourth District Court of Appeal held section 1295, which provides for arbitration of "any" issue of medical malpractice, authorizes an arbitrator to award punitive damages.²²¹ On petition from the arbitration award, the superior court reduced the award for compensatory damages pursuant to Civil Code section 3333.2²²² to \$250,000.²²³ Similar to the plaintiff in *Szkorla*, Baker's claim was based upon damages arising out of a breast reduction surgery performed by the defendant.²²⁴ Curiously, Baker did not seek review of the superior court's application of section 3333.2 to her award which was based on her claim for intentional torts; an argument that might have met with success given the Fourth District's holding in *Szkorla v. Vecchione*²²⁵ seven years later.

IV. COVERAGE OF INTENTIONAL TORTS UNDER MICRA: A PROPOSAL

MICRA's policy of ensuring affordable health care through a reduction of malpractice insurance rates would undoubtedly be furthered by an interpretation of MICRA that provides for coverage of all malpractice torts whether intentional or unintentional. Tortious conduct which falls within the

217. *Id.* (citing respectively, *Cobbs v. Grant*, 502 P.2d 1 (Cal. 1972); *Depenbrok v. Kaiser Foundation Health Plan*, 144 Cal. Rptr. 724 (Ct. App. 2d Dist. 1964); *Weinstock v. Eissler*, 36 Cal. Rptr. 537 (Cal. App. 1st Dist. 1964)).

218. *Id.* at 558.

219. *Id.* As noted above, this difference in language shows that the wording of other sections of MICRA were perhaps the result of "drafting imperfections." See *supra* notes 103-114 and accompanying text.

220. *Baker*, 208 Cal. Rptr. at 681. Baker claimed "[t]he surgery was unnecessary; she was fraudulently induced to submit to surgery; Sadick falsified Baker's medical records; Sadick's surgical techniques were negligent; Baker received negligent post-operative management; and her consent to surgery was uninformed." *Id.*

221. *Id.* at 678.

222. See *supra* note 26.

223. *Id.* at 678. The defendant was ordered by the arbitration panel to pay Baker the following sums:

1. For medical expenses incurred to date: \$8,769.11
2. For future medical expenses: \$1,200.00
3. Compensatory damages: \$275,000.00
4. Punitive damages: \$300,000.00
5. Attorney's fees: \$100,163.40
6. For costs of suit upon proper application. *Id.*

224. *Id.* Baker suffered serious post-operative infections resulting in tissue death and scarring necessitating extensive reconstructive surgery.

225. 283 Cal. Rptr. 219 (Ct. App. 4th Dist. 1991).

scope of services for which a provider is licensed should be covered; regardless of the legal theory alleged. However, health care providers who commit torts outside the scope of their professional services should not receive protection since such torts have no connection to providing professional services.

If intentional torts are to be covered under MICRA as torts “arising out of” or “based on” professional negligence, which types of tortious conduct should receive protection? Clearly the purpose behind MICRA would be furthered if coverage under the Act was broadened.²²⁶ However, such additional protection would come at the cost of limiting plaintiffs’ recoveries. Therefore, a balance is required.²²⁷

Furthermore, because the primary purpose behind enacting MICRA was to ensure the availability and affordability of health care by lowering malpractice insurance rates,²²⁸ the criteria used to determine coverage under MICRA should be similar to the criteria used to determine whether such an act is insurable under the provider’s malpractice policy. Sound public policy dictates that certain “willful” or “intentional” acts be excluded from coverage under insurance policies including policies for malpractice insurance.²²⁹ A “wilful” act must be done with preconceived design to

226. See *supra* notes 68 and 71 and accompanying text.

227. As the Supreme Court, addressing the constitutionality of Civil Code section 3333.2, in *Fein* explained:

Faced with the prospect that, in the absence of some cost reduction, medical malpractice plaintiffs might as a realistic matter have difficulty collecting judgments for *any* of their damages—pecuniary as well as nonpecuniary—the Legislature concluded that it was in the public interest to attempt to obtain some cost savings by limiting noneconomic damages.

695 P.2d at 681 (emphasis in original).

As the *Fein* Court pointed out elsewhere:

Thoughtful jurists and legal scholars have for some time raised serious questions as to the wisdom of awarding damages for pain and suffering in any negligence case, noting, *inter alia*, the inherent difficulties in placing a monetary value on such losses, the fact that money damages are at best only imperfect compensation for such tangible injuries and that such damages are generally passed on to, and borne by, innocent consumers. While the general propriety of such damages is, of course firmly embedded in our common law jurisprudence, no California case of which we are aware has ever suggested that the right to recover for such noneconomic injuries is constitutionally immune from legislative limitation or revision.

Id.

228. See *supra* notes 20 and 23 and accompanying text.

229. This policy is embodied in CAL. INS. CODE § 533 which provides: “An insurer is not liable for a loss caused by the wilful act of the insured. . . .” The purpose of the statute is to discourage wilful torts. *California Casualty Management Company v. Martocchio*, 15 Cal. Rptr. 2d 277, 281 (Ct. App. 1st Dist. 1992) An analysis of whether an act would be covered when the insurer and insured’s interpretations of the policy language differ is beyond the scope of this article. For an outstandingly thorough analysis of the history of insurance contract interpretation in California, see John L. Romaker & Virgil B. Prieto, *Expectations Lost: Bank of the West v. Superior Court Places the Fox in Charge of the Henhouse*, 29 CAL. W. L. REV. 83 (1992).

inflict injury as opposed to those nonmalicious acts committed solely to do the act which caused harm.²³⁰ Thus, a sexual battery or similar act would be evidence of a tort committed with a preconceived design to inflict injury and would therefore also lack a therapeutic motive.

The test for MICRA applicability should therefore have two parts: The first should determine whether the injury complained of was caused by conduct which is directly related to the manner in which professional services were provided. The second part should determine whether that conduct was engaged in with a therapeutic motive.

A. Which Injuries Are "Directly Related" to the Performance of Professional Services?

The Supreme Court's interpretation of section 425.13 in *Central Pathology* provides the first prong to be used in interpreting the language used in the various MICRA provisions defining "professional negligence." In deciding which torts should receive protection under Code of Civil Procedure section 425.13(a), the *Central Pathology* Court explained:

The allegations that identify the nature and cause of a plaintiff's injury must be examined to determine whether each is directly related to the manner in which professional services were provided. Thus, a cause of action against a health care provider for battery predicated on treatment exceeding or different from that to which a plaintiff consented is governed by section 425.13 because the injury arose out of the manner in which professional services are provided. By contrast, a cause of action against a health care provider for sexual battery would not be directly related to the manner in which professional services were rendered. . . .²³¹

In so holding, the Supreme Court reaffirmed the distinction set forth in *Waters*; that torts which are committed with a therapeutic motive should be covered regardless of the level of intent involved. According to *Central Pathology*, the test for whether an injury is directly related to the performance of a health care provider's professional services is twofold. Whether an injury is directly related turns, not only on the provider's subjective motivations, but on whether—definitionally—"the injury that is the basis for the claim was caused by conduct that was directly related to the rendition of professional services."²³² Under this part of the test, to be directly related a claim must "emanate[] from the *manner* in which [the] defendant[]"

230. *Studley v. Benicia Unified School Dist.*, 281 Cal. Rptr. 631, 634 (Ct. App. 1st Dist. 1991); *California Shoppers Inc. v. Royal Globe Ins. Co.*, 221 Cal. Rptr. 171, 186 (Ct. App. 4th Dist. 1985). See also *Allstate Ins. Co. v. Overton*, 206 Cal. Rptr. 823, 828 (Ct. App. 2d Dist. 1984) (holding that a criminal conviction of battery does not necessarily determine that the defendant acted with "intent to harm" or a "preconceived design to inflict injury").

231. *Central Pathology*, 832 P.2d at 931.

232. *Id.*

performs medical services—which is defined as “a matter that is an ordinary and usual part of medical professional services.”²³³

Accordingly, the first prong of the test asks (1) whether the injury resulted from conduct directly related to the rendition of professional services, and (2) whether those services are a matter ordinarily and usually a part of medical professional services. Both prongs of this test set forth objective definitional criteria. The second part of the test asks whether the conduct from which the tort arose was engaged in for a therapeutic purpose.

The necessity for this second subjective prong of the test is obvious. An objective test alone would not necessarily ensure that MICRA’s protections apply in appropriate circumstances. Recall that in *Central Pathology*, the Hulls based their fraud cause of action on allegations the defendants intentionally failed to notify Constance Hull she should be retested despite the fact she was allegedly developing cancer, and that the defendants tried to cover up their alleged negligence.²³⁴ An additional subjective prong should apply to those provisions which are not simply hurdles to be crossed at the pleading stage. Rather, MICRA should apply only in situations where health care providers are performing the medical services for which the Legislature intended to ensure availability. Thus, for example, fraudulent conduct—if proven to have been engaged in for reasons unrelated to the performance of professional services—should not be subject to MICRA’s limitations.²³⁵

For example, the complaint in *Waters v. Bourhis*,²³⁶ against the psychiatrist contained allegations of sexual misconduct.²³⁷ The *Central Pathology* Court opined that this type of conduct would *not* be directly

233. *Id.* For example, the court in *Andrea N. v. Laurelwood Community Hospital*, 16 Cal. Rptr. 2d 894, 905 (Ct. App. 2d Dist. 1993) apply held that the failure to provide adequate security was not a claim “arising out of” the professional negligence of a health care provider because to do so would obliterate the distinction between professional and ordinary negligence.

234. *Id.* at 926.

235. That is not to say MICRA should not apply objectively at the initial stage where such allegations are not yet proven. For instance the 90-day notice and tolling provisions could use an objective “directly related” test similar to section 425.13(a). A similar problem is posed by the issue of a “hybrid” settlement which does not clearly specify the theory of recovery. See discussion of *Waters v. Bourhis*, *supra* notes 122-145 and accompanying text. One possible solution would be to apportion the settlement into MICRA and non-MICRA recoveries and make such a stipulation a part of the settlement.

236. 709 P.2d 469 (Cal. 1985).

237. *Waters*, 709 P.2d at 471. The *Waters* Court described the sexual misconduct.

According to the allegations of the complaint filed in the earlier action . . . Shonkwiler started to engage in a variety of sexual activities with plaintiff a few months after treatment began. These activities allegedly “rang[ed] from directing her to observe [him] as he masturbated to compelling her to submit to sexual intercourse.” The complaint alleged that at times Shonkwiler induced plaintiff to participate in sexual conduct by suggesting that it was part of the therapy designed to alleviate her sexual inhibitions, and at other times he coerced her to participate by threatening to have her institutionalized if she did not cooperate.

Id.

related to the manner in which professional services were rendered.²³⁸ The Court held *Waters*' claim stated a cause of action for "professional negligence" since it in part was based on the psychiatrist's "negligent mishandling of the so-called 'transference phenomenon.'"²³⁹ However, while such acts would constitute "professional negligence" and would therefore be directly related to the manner in which professional services were rendered, according to *Waters* at least part of the action fell outside of MICRA.²⁴⁰ With respect to the cause of action based on intentional infliction of emotional distress, the decision is less than clear.²⁴¹

B. Which Torts are Committed With a Therapeutic Motive?

Besides being directly related to the manner in which professional services were rendered, a tort covered by MICRA should arise only from conduct that was intended protection by the Legislature when it enacted MICRA. Not only does such conduct need to be within the scope of services for which the provider is licensed, it also must have been committed as a part of performing professional services.

Under this second, subjective test for coverage, a court would look at the *purpose* behind the alleged conduct that forms the basis for the complaint as well the nature of the conduct itself. Those acts committed with a "therapeutic" purpose should be covered, whereas those committed for purely personal reasons would not.²⁴² As *Waters* impliedly holds, nontherapeutic motive marks the distinction between MICRA and non-MICRA theories.²⁴³ This distinction, rather than that between negligence/intentional torts, is the appropriate demarcation.

This prong of the test states a subjective criteria; was there a "therapeutic motive?" A further explanation of the phrase "therapeutic motive" is best illustrated by some out of state decisions which have examined the issue.

238. *Central Pathology*, 832 P.2d at 931 (citing *Waters v. Bourhis*, 709 P.2d 469).

239. *Waters*, 709 P.2d at 475 n.8.

240. See *Waters*, 709 P.2d at 477-478 (explaining the purported difference between "MICRA" and "non-MICRA" theories).

241. See *supra* notes 141-151 and accompanying text.

242. CMA BRIEF (*Szkorla*), *supra* note 96, at 11. For an analysis of *Central Pathology* which focuses on the class of victims, rather than the defendant's conduct, see, e.g., Russell A. Gold, *Central Pathology Service Medical Clinic, Inc. v. Superior Court: Statute Limiting Punitive Damages For the Professional Negligence of Health Care Providers Includes Intentional Torts*, 30 SAN DIEGO L. REV. 621 (1993).

243. *Id.* at 10-11. For the contrary view see *Szkorla v. Vecchione*, 83 Cal. Rptr. at 230, where the court replies:

Amici also quote language from *Waters, supra*, [citations] that they claim implicitly holds a non-MICRA theory requires proof of intentional misconduct engaged in for personal as opposed to professional motives. However, the quoted language was used by the *Waters* court merely to frame the defendant's argument on appeal and is, at most, mere dicta, but, in no event, is it a holding of the case.

Nearly every state has enacted some type of malpractice reform statute. These statutes limit the amount malpractice plaintiffs can recover, require periodic payment of damages, limit contingency fees in malpractice cases, shorten the statute of limitations, or require that malpractice claims be submitted to an arbitration panel.²⁴⁴ Some malpractice reform statutes have been drafted to cover "malpractice" or "any tort . . . based on health care or professional services."²⁴⁵ The result has been that, the courts of those states have interpreted their statutes as including intentional torts.²⁴⁶ In deciding which causes of action are covered under those statutes one court has used a test similar to the "therapeutic motive" test proposed here. In *Collins v. Thakkar*,²⁴⁷ the plaintiff brought an action against her physician alleging wrongful abortion, assault and battery and intentional infliction of emotional distress based upon allegations that the defendant physician purposely performed an abortion without her consent.²⁴⁸ The court held that the complaint did not come within the scope of Indiana's Medical Malpractice Act which requires submission of all proposed malpractice complaints to a medical review panel before filing suit against a health care provider.²⁴⁹

244. For a partial listing of state malpractice reform statutes, see Elizabeth Urban Karzon, *Medical Malpractice Statutes: A Retrospective Analysis*, 3 ANN. SURV. AM. L. 693 (1934).

245. See, e.g., IND. CODE 16-9.5-1-1 (h) ("Malpractice" means a tort or breach of contract based on health care or professional services. . . ."); Others are drawn more broadly. See, e.g., MASS. GEN. L. ANN. c. 231, § 60B (medical malpractice tribunal has jurisdiction over actions for "malpractice, error or mistake."); VA. CODE ANN. § 8.01-581.1 (defining "malpractice" as "any tort based on health care or professional services rendered"). Compare LA. REV. STAT. ANN. § 40:1299.41A(8) (covers only unintentional torts).

246. See *Glisson v. Loxley*, 366 S.E.2d 68, 72 (Va. 1988) (arthroscopic knee surgery which physician agreed he would not perform was a battery but was nevertheless covered by the state medical malpractice review statute as a "tort based on health care or professional services rendered."); *Martin v. Southern Baptist Hospital of New Orleans*, 444 So. 2d 1309, 1312 (La. App. 4th Cir. 1984) (claim that hysterectomy was performed by a physician other than the physician with whom patient had contracted stated a cause of action for assault and battery which was nevertheless covered by malpractice statute); *Lubanes v. George*, 435 N.E.2d 1031, 1034 (Mass. 1982) (claim for battery covered as an action for "malpractice, error, or mistake against a provider of health care"). But see *Jackson v. Biscayne Medical Center*, 347 So. 2d 721, 722 (Fla. App. 3d Dist. 1977) (ordinary assault and battery by hospital employees not covered by malpractice statute); *Leger v. Delahoussaye*, 464 So. 2d 1, 4 (La. App. 3d Cir. 1984) (cause of action for assault and battery not covered by statute which defines "malpractice" as "any unintentional tort."); *Jure v. Raviotta*, 612 So.2d 255 (La. App. 4th Cir. 1992) (sexual misconduct not covered).

For a summary of various state malpractice reform statutes and their coverage of different types of tortious conduct see Holly Piehler Rockwell, Annotation, *What Patient Claims Against Doctor, Hospital, or Similar Health Care Provider Are Not Subject to Statutes Specifically Governing Actions and Damages for Medical Malpractice*, 89 A.L.R. 4th 887.

247. 552 N.E.2d 507 (Ind. App. 1st Dist. 1990).

248. *Collins*, 552 N.E.2d at 509. Collins alleged that the defendant entered into a romantic relationship with her while she was his patient. She alleged that she consulted him about concerns that she had become pregnant by him. The defendant performed an examination and, after advising her that she was not pregnant, proceeded to perform an abortion despite her protests and without her consent.

249. *Collins*, 552 N.E.2d at 511; IND. CODE 16-9.5-1-1 *et seq.*

The court explained that, while the statute was drafted to cover "any tort . . . based on health care or professional services rendered,"²⁵⁰ the Act was therefore intended to cover only those, "actions undertaken in the intent of or for the benefit of the patient's health, i.e., conduct engaged in by a physician which is curative or salutary in nature or effect. Acts or practices committed with something other than a *remedial purpose* would again be excluded by implication."²⁵¹ The court concluded that "the conduct described in the complaint is both wanton and gratuitous. In no way can it logically be said that the legislature intended such behavior to constitute the rendition of health care or professional services."²⁵² However, the court was careful to add:

We caution that this decision is not intended to reflect an opinion on the applicability of the act to intentional torts as a class as there may well be such torts based upon the rendition of health care or professional services which were intended to come within the Act's scope.²⁵³

The same court later distinguished *Collins* in *Van Sice v. Sentany*,²⁵⁴ where the plaintiff brought an action alleging causes of action for fraud and battery against the surgeon who operated on his finger. The court held that the plaintiff's claim was not removed from the requirements of the statute because the plain language of the statute suggested an interest to cover all conduct related to the promotion of the patient's health or the health care provider's exercise of professional judgment.²⁵⁵ Thus, the plaintiff's claims for fraud and battery were covered by the Act because they were torts based on the rendition of professional services.

*Hagan v. Antonio*²⁵⁶ shows the necessity of the second subjective prong of the test. There, the Virginia Supreme Court held that the plaintiff's allegation of sexual battery constituted malpractice which required prior notice before a suit could be filed.²⁵⁷ In *Hagan*, the plaintiff alleged that, while performing a breast examination, the defendant ran his hands over her nipples and asked her if she was excited. She then sued, claiming the defendant was liable for assault and battery as well as intentional infliction

250. *Id.* at 510 (citing IND. CODE § 16-9.5-1-1(h)).

251. *Id.* at 510 (emphasis added).

252. *Id.* at 511.

253. *Id.*

254. 595 N.E.2d 264 (Ind. App. 1st Dist. 1992).

255. *Van Sice*, 595 N.E.2d at 266.

256. 397 S.E.2d 810 (Va. 1990).

257. *Hagan*, 397 S.E.2d at 812. VA. CODE § 8.01-581.1 defines "malpractice" as "any tort based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient." VA. CODE § 8.01-581.1 defines "health care" as "any act . . . by any health care provider for, to, or on behalf of a patient during the patient's medical . . . care."

of emotional distress.²⁵⁸ The court held that such conduct was covered by the statute, focusing narrowly on the fact that the alleged battery occurred during the course of a physical examination.²⁵⁹ A vigorous dissent argued that “acts [which] would constitute the crime of sexual assault” should not be covered by the statute.²⁶⁰ “The tort alleged by Hagan was not a tort based upon the provision of health care but rather a tort arising out of Dr. Antonio’s *prurient interests and actions*.”²⁶¹

This reasoning correctly focused on the motivations of the defendant. An objective analysis such as that used by the majority would not provide sufficient protection. As the *Central Pathology* court observed, a sexual battery would not be directly related to the performance of professional services. Likewise, a tort that is committed without a therapeutic purpose should not receive the protection under MICRA.

In *Colton v. Dewey*,²⁶² the Nebraska Supreme Court interpreted language very similar to that used in MICRA to hold the plaintiff’s claim for fraud was barred by the ultimate 10 year period of repose imposed on actions for professional negligence. The language of that statute is similar to the language used in MICRA and applies to, “[a]ny action to recover damages based on alleged professional negligence.”²⁶³ In *Colton*, the plaintiff alleged that the defendant physician affirmatively misrepresented the effects of radiation therapy which she underwent in order to treat her chronic asthma. After upholding the constitutionality of the statute, the court remanded the case to consider whether the plaintiff’s action for fraud took her case out of the professional negligence period of limitations. In so ordering, the court noted that, “any professional misconduct or any

258. *Id.* at 811.

259. *Id.* at 812. As the court explained:

When the statutory definitions are applied to the facts alleged, the conclusion must be that defendant’s conduct, legitimate or improper, was ‘based on’ an ‘act’ by a health care provider to ‘a patient during the patient’s medical . . . care.’ In other words, the defendant’s conduct . . . stemmed from, arose from, and was ‘based on’ the performance of a physical examination.

Id. The court ignored plaintiff’s argument that, to so hold, would mean that any robbery or rape committed during the course of a physician’s exam would be covered by the statute, explaining:

It is undisputed that a breast examination, including the touching, is an inseparable part of a typical, complete physical examination of a woman. Rape or robbery during such an examination, or during treatment of a patient, could never arguably be classified as an inseparable part of examination or treatment.

Id.

260. *Id.* at 812 (Hassell, J. dissenting).

261. *Id.* (emphasis added).

262. 321 N.W.2d 913 (Neb. 1982).

263. *Colton*, 321 N.W.2d at 915 (quoting NEB. REV. STAT. § 25-222). The statute also covers actions for breach of warranty. The statute covers any professionals and is *not* limited to health care providers.

unreasonable lack of skill or fidelity in the performance of professional or fiduciary duties is 'malpractice' and comes within the professional or malpractice statute of limitations.²⁶⁴

Those decisions which have addressed the issue of whether malpractice reform statutes should cover torts other than negligence have resolved that issue in favor of coverage. However, this is mostly due to the fact that other statutes have been drafted very broadly to include all malpractice torts. Absent any action by the California State Legislature to redraft or amend MICRA to specifically include intentional torts, it will fall to the courts of this state to interpret the phrase "based on professional negligence" as broadly as possible, consistent with the policy for which MIRCA was enacted; to help lower insurance rates and increased the affordability of health care. In making this interpretation, the test proposed here should be used to determine which conduct falls within the scope of MICRA.

C. *Specific Torts*

1. "Technical" Battery

A claim for battery is only a short step away from negligence with respect to the intent required to commit the tort. A person is liable for battery if "he acts intending to cause a harmful or offensive contact with the person of the other . . . or an imminent apprehension of such a contact, and . . . an offensive contact . . . results."²⁶⁵ "[B]attery requires no showing of 'scienter' or any intent to do wrong—only an intent to cause the harmful unconsented touching."²⁶⁶

In *Cobbs v. Grant*,²⁶⁷ the California Supreme Court refined the distinction between battery and negligence in the medical malpractice context. "Where a doctor obtains consent of the patient to perform one type of treatment and subsequently performs a *substantially different treatment* for which consent was not obtained, there is a clear case of battery."²⁶⁸ The Court distinguished battery cases from those where the allegation was that the

264. *Id.* at 917.

265. RESTATEMENT (SECOND) OF TORTS, § 18 (4th ed. 1989).

266. *Freedman v. Superior Court*, 263 Cal. Rptr. 1, 4 (Ct. App. 4th Dist. 1989). "In short, just as [i]t has long been established, both in tort and criminal law, that 'the least touching may constitute battery,' a conviction of this offense neither requires nor necessarily determines that the defendant 'intentionally caused bodily injury' in the sense of physical harm." *Allstate Ins. Co. v. Overton*, 206 Cal. Rptr. 823, 827 (Ct. App. 2d Dist. 1984).

267. 502 P.2d 1 (Cal. 1972).

268. *Cobbs*, 502 P.2d at 7 (emphasis added).

physician failed to obtain an informed consent, holding that such cases properly sounded in negligence.²⁶⁹

Where a health care provider commits a battery through conduct that has a therapeutic purpose, the cause of action arising out of that conduct is a "technical battery."²⁷⁰ This level of intent is not so far removed from negligence.²⁷¹

As one author explains:

[T]he doctor's motivation may mark the difference between an act, on the one side, which constitutes battery as against one, on the other, which amounts to no more than a subspecies of professional negligence. Where,

269. The *Cobbs* court further explained:

The battery theory should be reserved for those circumstances when a doctor performs an operation to which the patient has not consented. When the patient gives permission to perform one type of treatment and the doctor performs another, the requisite element of deliberate intent to deviate from the consent given is present. However, when the patient consents to certain treatment and the doctor performs that treatment but an undisclosed inherent complication with a low probability occurs, no intentional deviation from the consent given appears; rather, the doctor in obtaining consent may have failed to meet his due care duty to disclose pertinent information. In that situation the action should be pleaded in negligence.

Id. at 8.

270. *Grieves v. Superior Court*, 203 Cal. Rptr. 556, 559 (Ct. App. 4th Dist. 1984) (a surgical procedure which exceeds the conditional consent of the patient constitutes a technical battery); *accord Ashcraft v. King*, 278 Cal. Rptr. 900, 904-905 (Ct. App. 2d Dist. 1991); *Valdez v. Percy*, 96 P.2d 142, 145 (Cal. Ct. App. 2d Dist. 1939) ("where a person has been subjected to an operation without his consent such an operation constitutes technical assault and battery."); *Pedesky v. Bleiberg*, 59 Cal. Rptr. 294, 297 (Ct. App. 2d Dist. 1967) ("When an action is based upon the theory of surgery beyond consent, the gist of such action is the unwarranted exceeding of the consent. This is a theory of technical battery."); *Weinstock v. Eissler*, 36 Cal. Rptr. 537, 551 (Ct. App. 1st Dist. 1964) (operation performed without consent constitutes technical assault and battery); *Hundley v. St. Francis Hospital*, 327 P.2d 131, 135 (Ct. App. 1st Dist. 1958) (unauthorized removal of organs constitutes a technical battery).

271. As the court in *American Employer's Ins. Co. v. Smith*, 163 Cal. Rptr. 649 (Ct. App. 3d Dist. 1980) explained:

Negligence has been variously defined and is, according to Prosser, one kind of conduct. Negligence is a matter of risk—that is to say, of recognizable danger of injury. It has been defined as "conduct which involves an unreasonably great risk of causing damage," or, more fully, conduct "which falls below the standard established by law for the protection of others against unreasonably great risk of harm." "Negligence is conduct, and not a state of mind." In most instances, it is caused by heedlessness or carelessness, which makes the negligent party unaware of the result which may follow from his act. But it may also exist where he has considered the possible consequences carefully, and has exercised his own best judgment.

.....
 Conduct which causes harm may extend from total innocence to intentional misconduct. "As the probability of injury to another, apparent from the facts within his knowledge, becomes greater, his conduct takes on more of the attributes of intent, until it reaches that substantial certainty of harm which juries, and sometimes courts, may find inseparable from intent itself. Such intermediate mental states, based upon a recognizable great probability of harm, may still properly be classed as 'negligence,' but are commonly called 'reckless,' 'wanton,' or even 'wilful.'"

Id. at 652 (emphasis added, citations omitted). So argued in CMA BRIEF (*Szkorla*), *supra* note 96, at 11-12.

for example, the patient agrees to go ahead on the basis of a deception that the permitted act will have a therapeutic benefit whereas, in reality, the doctor performs the touching with an ulterior motive unrelated to therapy, a battery may occur. However, even a deception of a "white lie" type that induces the patient to proceed will not rise to the level of a battery if the well meaning provider, in that deception, intended to deliver a therapeutic benefit.²⁷²

A physician may also be liable for battery if he is not the physician the patient consented to have perform the surgery.²⁷³ Nevertheless, many of these acts would be insurable and would be acts committed with a therapeutic purpose. MICRA should apply to all instances of "technical battery" where there is no preconceived design to harm the patient, or to intentionally deviate from the consent given.

2. Fraud

"Fraud is an intentional tort, the elements of which are (1) misrepresentation; (2) knowledge of falsity; (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage."²⁷⁴ A fiduciary relationship exists between the patient and the physician. Thus, the physician has a duty to fully disclose the nature and extent of injuries and treatment and any material concealment or misrepresentation constitutes fraud entitling the party injured thereby to a cause of action. The duty of disclosure is measured by a fiduciary standard and a physician who withholds facts necessary to total disclosure subjects himself to liability.²⁷⁵

For an action for fraud to be covered by MICRA under this proposal, the conduct giving rise to the action for fraud must have been engaged in with a therapeutic motive. In *Central Pathology*, the Court opined that the plaintiffs' cause of action for fraud was directly related to the performance of professional services in that it arose from the manner in which the defendant communicated the results of medical tests, "a matter that is an ordinary and usual part of medical professional services." However, while such conduct may definitionally fall within the scope of the physician's services, it may not satisfy the subjective therapeutic motive test. If fraudulent conduct was proven at trial to have been engaged in for reasons

272. GEORGE McDONALD, CALIFORNIA MEDICAL MALPRACTICE: LAW AND PRACTICE, 106 (West 1992) (footnotes omitted).

273. *Id.* at 107.

274. *Nelson v. Gaunt*, 178 Cal. Rptr. 167, 173 (Ct. App. 1st Dist. 1981).

275. *Nelson*, 178 Cal. Rptr. at 172; *Berkey v. Anderson*, 82 Cal. Rptr. 67, 77 (Ct. App. 2d Dist. 1969); *Garlock v. Cole*, 18 Cal. Rptr. 393, 396 (Ct. App. 3d Dist. 1962); *Bowman v. McPheeters*, 176 P.2d 745, 748 (Cal. 1947); *Stafford v. Shultz*, 270 P.2d 1, 8 (Cal. 1954). Such a duty may require that a physician disclose any financial or intellectual motives he may have in the patient's care. *See, e.g., Moore v. Regents of the University of California*, 793 P.2d 479 (Cal. 1990).

unrelated to the patient's care and treatment, any resulting judgment should not be covered by MICRA.

3. Intentional Infliction of Emotional Distress

A physician may be held liable for engaging in "extreme and outrageous conduct" which intentionally or recklessly causes severe emotional distress.²⁷⁶ As noted above, conduct which is engaged for purely personal as opposed to professional motives would not be covered by MICRA as conduct with a therapeutic purpose.²⁷⁷

4. Breach of Contract

In rare cases, a physician may be held liable for breach of contract as the result of the failure to perform an express oral contract to effect a cure or achieve a certain result.²⁷⁸ Such actions for breach of warranty are considered by the courts to be tort actions and are therefore governed by the one year statute of limitation in Code of Civil Procedure section 340(3) as "[a]n action for . . . injury to or for the death of one caused by the wrongful act or neglect of another."²⁷⁹ As one court observed, "the clear thrust of the cause [of action for breach of warranty] is one for personal injury. It is basically the same as the cause of action alleging negligence."²⁸⁰ Therefore, it not would be a much further leap to conclude that such action should be covered by MICRA as an action "based upon professional negligence."²⁸¹

276. MCDONALD, *supra* note 272, at 590. See, e.g., *Waters v. Bourhis*, 709 P.2d 469 (Cal. 1985) (psychiatrist's sexual misconduct with patient may constitute an intentional tort as well as professional negligence); Cf. *Urbaniak v. Newton*, 277 Cal. Rptr. 354, 362 (Ct. App. 1st Dist. 1991) (physician's disclosure of plaintiff's HIV status not "outrageous" conduct sufficient to present triable issue of fact on theory of intentional and negligent infliction of emotional distress). See generally *Recovery for Emotional Distress Resulting From Statement of Medical Practitioner or Official, Allegedly Constituting Outrageous Conduct*, 34 A.L.R.4th 688.

277. See discussion of *Waters v. Bourhis* *supra* notes 122-152 and accompanying text.

278. *McKinney v. Nash*, 174 Cal. Rptr. 642, 648-649 (Ct. App. 3d Dist. 1981). "[T]o recover for breach of warranty or contract in a medical malpractice case, there must be proof of an express contract by which the physician clearly promises a particular result and the patient consents to treatment in reliance on that promise."

279. *Brown v. Bleiberg*, 651 P.2d 815, 817 n.1 (Cal. 1982); *Rose v. Fife*, 255 Cal. Rptr. 440, 447-48 (Ct. App. 2d Dist. 1989); *Cardoso v. American Medical Systems*, 228 Cal. Rptr. 627, 630 (Ct. App. 1st Dist. 1986).

280. *Cardoso*, 228 Cal. Rptr. at 630. *Accord*, *Christ v. Lipsitz*, 160 Cal. Rptr. 498, 501 (Ct. App. 4th Dist. 1979) ("It is settled that an action against a doctor arising out of his negligent treatment is an action sounding in tort and not one based upon a contract.").

281. For the contrary view see *Selected 1975 California Legislation*, *supra* note 3, at 562.

CONCLUSION

In interpreting Code of Civil Procedure section 425.13(a), the court in *Central Pathology* has reopened the debate regarding coverage of certain intentional torts under MICRA. Like the various MICRA provisions on which it was based, section 425.13 applies to all intentional torts "arising out of" claims for professional negligence. Similarly, MICRA's provisions, apply to "any action" "based upon professional negligence." Furthermore, the Court's decision in *Waters v. Bourhis* explicitly reserved ruling on the issue of whether MICRA covers intentional torts "based upon" conduct engaged in for a therapeutic purpose. Since the Court in *Central Pathology* has opined that no distinction exists between the words "arising out of" and "based upon," MICRA should be interpreted to cover all torts which occur in the malpractice setting, intentional or otherwise, as actions "based upon" professional negligence.

MICRA was enacted to ensure affordable health care through a reduction in malpractice insurance rates. California's malpractice reform statute has been considered as a model for reform efforts at the national level.²⁸² Expanding MICRA's coverage would further this purpose. Indeed, it makes little sense to exclude from coverage other tortious conduct especially since the cost of paying judgments resulting from those torts would be born by insurers. In tort law there exists only the finest line between tortious conduct which is negligent and that which is intentional. The true litmus test for MICRA coverage should be whether the conduct complained of was committed by the health care provider with a therapeutic purpose.

282. Jost, *supra* note 22, at 69. The American Medical Association has advocated changes in the malpractice system which mirror those instituted by MICRA; specifically, a cap on pain and suffering damages, a limitation on attorneys fees, abolishing the "collateral source" rule, and periodic payment of future damages. *Id.*

