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MEDICAL MALPRACTICE— CONSTITUTIONALITY OF LIMITS ON LIABILITY

In the past few years the problem of medical malpractice has been discussed almost to exhaustion. Nevertheless, recent developments have added a new element requiring analysis. Several states have adopted statutes placing ceilings on medical malpractice recoveries.¹ Such limitations raise serious and difficult constitutional questions.

An examination of this legislative solution to the medical malpractice problem will be aided by a brief discussion of the dilemma itself. Medical malpractice has been defined as "the failure upon the part of a physician or dentist properly to perform the duty which devolves upon him in his professional relation to his patient, a failure which results in some injury to the patient."² The cause of action is based on a breach of the duty which arises as a matter of law out of the physician-patient relationship.³ The action can be either tortious or contractual,⁴ but the majority of jurisdictions

¹ IDAHO CODE § 39-4205 (Supp. 1975) (\$150,000/\$300,000); IND. ANN. STAT. § 16-9.5-2-2 (Supp. 1975) (\$500,000); LA. REV. STAT. ANN. § 40:1299.42(B) (Cum. Supp. 1976) (\$500,000); N.D. CENT. CODE § 26-40-11 (Supp. 1975) (\$500,000/\$1,000,000); OHIO REV. CODE ANN. § 2307.43 (Leg. Bull. 1975) (\$200,000 exclusive of death).

² L. REGAN, DOCTOR AND PATIENT AND THE LAW 17 (3d ed. 1956). For case law definitions of medical malpractice, see *Grainger v. Still*, 187 Mo. 197, 213, 85 S.W. 1114, 1119 (1905) ("the bad professional treatment of disease, pregnancy, or bodily injury, from reprehensible ignorance or carelessness, or with criminal intent," quoting from 22 AM. & ENG. ENC. LAW 798 *et seq.* (2d ed.); *Napier v. Greenzweig*, 256 F. 196, 197 (1919) ("treatment by a surgeon or physician in a manner contrary to accepted rules and with injurious results to the patient," quoting from WEBSTER'S NEW INTERNATIONAL DICTIONARY); *Hodgson v. Bigelow*, 335 Pa. 497, 504, 7 A.2d 338, 342 (1939) ("a negligent or unskillful performance by a physician of the duties which are devolved and incumbent upon him on account of his relations with his patients, or of a want of proper care and skill in the performance of a professional act," quoting from WHARTON & STILLE, 3 MEDICAL JURISPRUDENCE § 499 (5th ed.); *Forthofer v. Arnold*, 60 Ohio App. 436, 438-39, 21 N.E.2d 869, 871 (1938) ("whether the defendant, in the performance of his service to plaintiff, either did some particular thing or things that physicians and surgeons of ordinary skill, care and diligence would not have done under the same or similar circumstances, or failed or omitted to do some particular thing or things which physicians and surgeons of ordinary skill, care and diligence would have done under the same or similar circumstances").

³ L. REGAN, DOCTOR AND PATIENT AND THE LAW 17 (3d ed. 1956).

⁴ D. HARNEY, MEDICAL MALPRACTICE 247 (1973).

tend toward viewing malpractice as a tort.⁵ While recognizing that the action can sound in either tort or contract,⁶ the West Virginia Supreme Court of Appeals has held that a one-year statute of limitations governs,⁷ thus applying the predominant tort theory. One commentator attributed the preference for tort actions to the fact that the usual physician-patient relationship lacks well-defined contractual obligations,⁸ and accordingly designated the law of malpractice as a subdivision of the law of negligence, which in turn is a main division of the law of torts.⁹

Although medical malpractice is an old cause of action,¹⁰ only recently has it become a matter of utmost concern. An alarming increase in the number of suits has drawn the attention of both the medical and legal professions and of the public at large. Between 1930 and 1940, malpractice claims rose 1000%.¹¹ In 1958 the *Journal of the American Medical Association* reported that one out of every seven of its living members had had a claim filed against him at one time.¹² In the past ten years, the number of malpractice claims asserted in California has increased approximately 40%, from 13.5 per 100 physicians in 1965 to 18 per 100 in 1975.¹³

⁵ *Id.* at 248.

⁶ *Kuhn v. Brownfield*, 34 W. Va. 252, 258, 12 S.E. 519, 521 (1890). In *Kuhn*, the West Virginia Supreme Court of Appeals held the cause of action was not changed from contract to tort when the complaint was amended to delete reference to "contract to cure." The court stated that assumpsit may be maintained on the basis of an implied undertaking to exercise skill as a physician as well as on an express contract to cure. *Id.* at 257, 12 S.E. at 521. Nevertheless, the court concluded that, even though connected with an implied contract, the action was in reality "for a tort or wrong resulting in bodily suffering and injury, and would not survive the death of the party injured . . . and [was] thus limited to one year." *Id.* at 260, 12 S.E. at 522.

⁷ *Id.* at 260, 12 S.E. at 522.

⁸ C. CUSUMANO, *MALPRACTICE LAW DISSECTED FOR QUICK GRASPING* 26 (1962).

⁹ *Id.* at 23-24.

¹⁰ D. HARNEY, *MEDICAL MALPRACTICE* iii (1973), quoting from the 1544 Acts of Henry VIII of England:

[F]or although . . . the . . . craft of surgeons have small cunning, yet they will take great sums of money, and do little therefor and by reason thereof, they do oftentimes impair and harm their patients, rather than do them good.

¹¹ C. CUSUMANO, *MALPRACTICE LAW DISSECTED FOR QUICK GRASPING* 21 (1962). The information was obtained from a 1951 report of the American Medical Association. *Id.*

¹² 167 J.A.M.A. 227 (1958).

¹³ Waxman, *A Health Care Slide*, 11 TRIAL 23 (1975), quoting from the Preliminary Report of the Assembly Select Committee of Medical Malpractice. Congress-

Various factors have been proposed as the reason or reasons for the phenomenal increase in medical malpractice claims. One factor is that the general public has become what one critic has termed "lawsuit-conscious."¹⁴ This awareness of one's ability to bring suit has been reinforced by doctrines making recovery more certain. One important reason for easier success is the growing use of *res ipsa loquitur* in determining claims,¹⁵ a practice one writer referred to as "judicial socialization."¹⁶ Other factors to which one can attribute the multiplication of malpractice claims include adoption of the discovery doctrine,¹⁷ abrogation of charitable (hospital) immunity,¹⁸ application to physicians of a stricter standard of care,¹⁹ and depersonalization of the physician-patient relationship.²⁰ Whether caused by one of these factors or by a combination of them, medical malpractice has risen to the point that claims are now being filed at a rate of 18,000 per year.²¹

Along with the frequency of claims, the costs of medical malpractice have spiraled. In California the average recovery per claim was reported as follows: \$5,000 in 1969; \$7,500 in 1973; and \$12,000 in 1975; with \$25,000 as the figure projected for 1980.²² In addition,

man Waxman is the former chairman of the Assembly Health Committee (1973-74) and the Assembly Select Committee on Medical Malpractice of the California Legislature.

¹⁴ B. FICARRA, *SURGICAL AND ALLIED MALPRACTICE* 55 (1968). See also, C. CUSUMANO, *MALPRACTICE LAW DISSECTED FOR QUICK GRASPING* 22 (1962).

¹⁵ C. CUSUMANO, *MALPRACTICE LAW DISSECTED FOR QUICK GRASPING* 62 (1962). See also, MORRIS, *PRACTISING LAW INSTITUTE, PROFESSIONAL MALPRACTICE* 17-37 (1967).

¹⁶ MORRIS, *PRACTISING LAW INSTITUTE, PROFESSIONAL MALPRACTICE* 19 (1967).

¹⁷ See Knisely, *Modern Medico-Legal Trends*, 25 OHIO ST. L.J. 360, 363 (1964). See also, D. HARNEY, *MEDICAL MALPRACTICE* 267-70 (1973). The discovery doctrine is the rule that the period under the statute of limitations does not begin until the patient discovers (or through diligence should have discovered) he has a cause of action. *Id.* at 267.

¹⁸ Knisely, *Modern Medico-Legal Trends*, 25 OHIO ST. L.J. 360, 371 (1964).

¹⁹ *Id.* at 362.

²⁰ Waxman, *A Health Care Slide*, 11 TRIAL 23, 24 (1975).

²¹ O'Connell, *No-fault Insurance for Injuries Arising from Medical Treatment: A Proposal for Effective Coverage*, 24 EMORY L.J. 21, 25 (1975), quoting from U.S. DEP'T OF HEALTH, EDUCATION & WELFARE (HEW), REPORT OF THE SECRETARY'S COMM'N ON MEDICAL MALPRACTICE 6 (1973).

²² Mill, *Malpractice Litigation: Are Solutions in Sight?* 232 J.A.M.A. 369 (1975). Congressman Waxman reported the figures as \$4,500 per claim in northern California and \$5,800 in southern California in 1969 and as \$7,000-8,000 "today." Waxman, *A Health Care Slide*, 11 TRIAL 23 (1975).

there has been a geometric progression of awards over \$300,000 in California: three such awards in 1969, nine in 1971, thirteen in 1972, and twenty-four in 1973.²³ Consequently, it is not unusual for a doctor to pay from \$5,000 to \$12,000 annually in medical malpractice insurance premiums.²⁴

In response to this "malpractice epidemic,"²⁵ many states have adopted comprehensive malpractice statutes.²⁶ While most acts deal simply with insurance²⁷ or with procedural aspects of the action,²⁸ several legislatures have placed limits upon amounts recoverable for malpractice.²⁹ In 1975 Idaho passed a bill referred to as the Hospital-Medical Liability Act.³⁰ The act provides:

The limit of civil liability for damages of a licensed physician . . . to or on the account of injury to or death of any one (1) patient arising out of any treatment or course of treatment shall be one hundred fifty thousand dollars (\$150,000)³¹

The aggregate limit of liability to two or more patients arising out of one occurrence is set at \$300,000.³² Each physician and hospital is required to carry liability insurance.³³ However, if a physician is unable to comply with the requirements despite reasonable and

²³ Waxman, *A Health Care Slide*, 11 TRIAL 23 (1975).

²⁴ Keeton, *Compensation for Medical Accidents*, 121 U. PA. L. REV. 590, 595 n.16 (1973), quoting from Address by Ellsworth Calhoun, Malpractice Seminar for Doctors, Miami Beach, Mar. 3, 1972, at 3.

²⁵ B. FIGARRA, *SURGICAL AND ALLIED MALPRACTICE* 55 (1968).

²⁶ See, e.g., ALASKA STAT. §§ 09.55.530-.550 (1973); FLA. STAT. ANN. § 627.355 (Supp. 1976); IDAHO CODE §§ 39-4201 to -4213 (Supp. 1975); IOWA CODE ANN. §§ 519.1-.13 (1949); LA. REV. STAT. ANN. §§ 40:1299.41-.47 (Cum. Supp. 1976); MASS. ANN. LAWS ch. 175, § 111E (Supp. 1974); MO. ANN. STAT. §§ 383.010-.040 (Supp. 1976); N.H. REV. STAT. ANN. §§ 519-A:1-:10 (1974); N.Y. JUDICIARY LAW § 148-a (McKinney Supp. 1975); N.Y. INS. LAW §§ 681-95 (McKinney Supp. 1975); R.I. GEN. LAWS ANN. § 7-5.1-8 (Supp. 1975) (for professional service corporation); TENN. CODE ANN. §§ 23-3401 to -3421, 56-4301 to -4315 (Cum. Supp. 1975).

²⁷ FLA. STAT. ANN. § 627.355 (Supp. 1976); IOWA CODE ANN. §§ 519.1-.13 (1949); MASS. ANN. LAWS ch. 175, § 111E (Supp. 1974); N.Y. INS. LAW §§ 681-95 (McKinney Supp. 1975); R.I. GEN. LAWS ANN. § 7-5.1-8 (Supp. 1975) (for professional service corporation); TENN. CODE ANN. §§ 56-4301 to -4315 (Cum. Supp. 1975).

²⁸ ALASKA STAT. §§ 09.55.530-.550 (1973); N.H. REV. STAT. ANN. §§ 519-A:1-:10 (1974); N.Y. JUDICIARY LAW § 148-a (McKinney Supp. 1975); TENN. CODE ANN. §§ 23-3401 to -3421 (Cum. Supp. 1975).

²⁹ See note 1 *supra*.

³⁰ IDAHO CODE §§ 39-4201 to -4213 (Supp. 1975).

³¹ IDAHO CODE § 39-4204 (Supp. 1975).

³² *Id.*

³³ IDAHO CODE § 39-4206 (Supp. 1975).

good efforts, the requirements can be waived without also waiving the recovery limits.³⁴

The constitutionality of the Idaho statute was challenged in *Jones v. State Board of Medicine*.³⁵ Violations of the injured person's rights of due process, equal protection, and access of courts were alleged.³⁶ In examining the due process and equal protection allegations, the court used the two-tier test adopted by the Idaho Supreme Court in *Thompson v. Hagan*.³⁷ The two tests set forth by the court in *Thompson* were the strict scrutiny test, applied to fundamental rights and to suspect classifications, and the restrained standard of review for other areas of the law.³⁸ The question asked under the restrained review approach is whether the statutory classification is reasonably related to the purpose of the statute.³⁹ Presuming constitutionality, the court in *Jones* found the ceiling on liability bore a reasonable relationship to the objective sought, the availability of liability insurance.⁴⁰ In regard to the strict scrutiny test, the court held the legislation "does not fall within the 'suspect' classification under the various Supreme Court decisions classifying fundamental rights under the United States Constitution."⁴¹ Thus, the court in *Jones* rejected the due process and equal protection arguments.⁴²

With due process and equal protection allegations summarily dismissed, the constitutionality of the Hospital-Medical Liability Act was dependent upon compliance with the state constitution. The court held the limits on liability in violation of Article I, Section 18 of the Idaho Constitution,⁴³ which sets forth the right to access of courts. This right, provided by many, but not all, of the state constitutions,⁴⁴ mandates that "[c]ourts of justice shall be

³⁴ IDAHO CODE §§ 39-4211, 39-4206 (Supp. 1975).

³⁵ Civil No. 55527 (4th Jud. Dist. Idaho, Sept. 23, 1975). A copy of the memorandum decision was obtained through the courtesy of the Honorable Alfred C. Hagan, District Judge.

³⁶ *Id.* at 2-3.

³⁷ 96 Idaho 19, 523 P.2d 1365 (1974).

³⁸ *Id.* at 21, 523 P.2d at 1367.

³⁹ *Id.* Using this restrained review standard, the court in *Thompson* declared the Idaho guest statute unconstitutional. *Id.* at 23, 523 P.2d at 1369.

⁴⁰ Civil No. 55527 (4th Jud. Dist. Idaho, Sept. 23, 1975) at 3.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 5.

⁴⁴ A.E. HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTION-

open to every person, and a speedy remedy afforded for every injury of person, property, or character, and right and justice shall be administered without sale, denial, delay, or prejudice."⁴⁵ This guarantee originated from Article 40 of the Magna Carta,⁴⁶ which provided that "[t]o no one will We sell, to none will We deny or delay, right or justice."⁴⁷ This ancient right remains vital,⁴⁸ serving as "a basic and valuable guaranty that the courts of the state should be open to all persons who in good faith and upon probable cause believe they have suffered wrongs."⁴⁹ The court construed the provision as affording a "full and complete remedy" for every injury for which one could recover under the common law.⁵⁰ The Hospital-Medical Liability Act did not allow a full and complete remedy but rather recovery only to the extent of the imposed limits. Thus, the medical malpractice statute was held unconstitutional under the Idaho Constitution.⁵¹

The decision in *Jones*⁵² is of special importance in West Virginia, because a bill entitled Medical Malpractice Insurance Bill⁵³ was introduced at the 1976 regular session of the West Virginia Legislature.⁵⁴ One portion of the bill provides that "[t]he total amount recoverable for any injury or death of a patient may not exceed five hundred thousand dollars."⁵⁴ The ceiling is a generous one, and the objective of dealing with the medical malpractice problem before it reaches the epidemic stage in West Virginia is a valid one. However, the West Virginia Constitution contains a

ALISM IN AMERICA, Appendix 0 at 483-85 (1968). Nineteen states provide that "all courts shall be open," and five more require that the courts shall be "open to every person." *Id.* at 484-85. Thirty-seven states provide in one way or another that justice must be administered "without sale, denial, or delay." *Id.* at 483-84.

⁴⁵ IDAHO CONST. art. 1, § 18.

⁴⁶ Civil No. 55527 (4th Jud. Dist. Idaho, Sept. 23, 1975) at 4.

⁴⁷ A.E. HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA, Appendix A at 388 (1968).

⁴⁸ *Id.* at 296-97.

⁴⁹ Will of Keenan, 188 Wis. 163, 176, 205 N.W. 1001, 1006 (1925). *Keenan* held invalid as against public policy the condition of a will which provided that the legatee would forfeit his legacy by contesting the will upon probable cause and in good faith.

⁵⁰ Civil No. 55527 (4th Jud. Dist. Idaho, Sept. 23, 1975) at 4.

⁵¹ *Id.* at 5.

⁵² A copy of the 3d Discussion Draft of the proposed legislation was obtained through the courtesy of the West Virginia State Bar.

⁵³ S.B. 272 (H.B. 1206), 63d Leg., Reg. Sess. (1976).

⁵⁴ *Id.*

right to access of courts clause⁵⁵ very similar to that of Idaho. Therefore, upon passage of the proposed legislation, the West Virginia Supreme Court of Appeals may be presented with the question of its constitutionality. Because the West Virginia court is obviously not bound by *Jones*,⁵⁶ there is no precedent indicating what decision would be reached.

The West Virginia Supreme Court of Appeals has never before decided a case directly on point. Although three situations abolishing or limiting liability have been presented in West Virginia, each is distinguishable from the proposed limitations on medical malpractice recoveries. 1) The West Virginia court has previously confronted the access of courts clause with regard to modification of the common law. In 1969, the common law actions for breach of promise to marry and alienation of affections were statutorily abolished.⁵⁷ When challenged, the legislation was declared constitutional.⁵⁸ The access of courts clause of the West Virginia Constitution was held not applicable to the statute because the actions abrogated dealt with social or personal relations and did not affect an injury to a person in his "person, property or reputation."⁵⁹ 2) Closely analogous to the Medical Malpractice Insurance Bill is the Wrongful Death Act.⁶⁰ Under the Wrongful Death Act, liability is limited to \$10,000 for damages deemed "fair and just" and to \$100,000 "for such further damages."⁶¹ However, unlike medical

⁵⁵ W. VA. CONST. art. 3, § 17:

The courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay.

⁵⁶ The West Virginia Supreme Court of Appeals has been specifically authorized to determine the constitutionality of state laws under the West Virginia Constitution. W. VA. CONST. art. 8, § 3; *Farley v. State Road Comm'r*, 146 W. Va. 22, 32, 119 S.E.2d 833, 840 (1960).

⁵⁷ W. VA. CODE ANN. § 56-3-2a (Cum. Supp. 1975).

⁵⁸ *Wallace v. Wallace*, 184 S.E.2d 327 (W. Va. 1971) (denial of the right to an action for alienation of affections by a child against the father's new wife).

⁵⁹ *Id.* at 333. Also, see note 5 *supra*.

⁶⁰ W. VA. CODE ANN. § 55-7-6 (Cum. Supp. 1975):

In every such action the jury may award such damages as they deem fair and just, not exceeding ten thousand dollars, and the amount recovered shall be distributed to the parties In addition, the jury may award such further damages, not exceeding the sum of one hundred thousand dollars, as shall equal the financial or pecuniary loss sustained by the dependent distributee or distributees of such deceased person

⁶¹ *Id.*

malpractice, there was no common law right of action for damages from the death of a person by a wrongful act.⁶² The Wrongful Death Act was created by the legislature to provide for support and maintenance of the family of the deceased.⁶³ Granted by statute, the cause of action also may be limited by statute. 3) Like the Wrongful Death Act, the workmen's compensation system of West Virginia⁶⁴ "is wholly statutory and is not in any way based on the common law."⁶⁵ The proceeding is not one for damages for a wrong done, but to obtain compensation for a loss sustained by reason of disability.⁶⁶ As such, an administrative scheme with fixed figures for compensation⁶⁷ is constitutionally allowable. In contrast to the actions restricted by these three statutes, medical malpractice, whether tortious or contractual, is an injury to the person for which there was a cause of action under the common law.

An analysis of several opinions regarding the constitutionality of various limitations on liability supports the view of the Idaho court. The constitutionality of a statute restricting the time during which a tort action against an architect or builder for defects in design or construction can come into existence⁶⁸ has been challenged in several jurisdictions.⁶⁹ Although the act is generally con-

⁶² *Swope v. Keystone Coal and Coke Co.*, 78 W. Va. 517, 522, 89 S.E. 284, 286 (1916) (father who had abandoned infant son was not entitled to maintain wrongful death action when the boy was killed while working).

⁶³ *Id.* at 523, 89 S.E. at 286.

⁶⁴ W. VA. CODE ANN. §§ 23-1-1 to -5-6 (1973 Replacement Volume and Cum. Supp. 1975).

⁶⁵ *Ferguson v. Workmen's Compensation Comm'r*, 152 W. Va. 366, 371, 163 S.E.2d 465, 468 (1968) (held that as the statute required award to be made to claimant while living to entitle the widow to receive unpaid balance and as such condition was not met, the court could not award the widow benefits).

⁶⁶ *Burlington Mills Corp. v. Hagood*, 177 Va. 204, 210, 13 S.E.2d 291, 293 (1941) (allowed recovery for mental anguish despite lack of physical injury).

⁶⁷ W. VA. CODE ANN. § 23-4-6 (Cum. Supp. 1975), providing classification of disability benefits.

⁶⁸ See KY. REV. STAT. ANN. § 413.120 (1970):

The following actions shall be commenced within five (5) years after the cause of action accrued:

. . . .

(14) An action for personal injuries suffered by any person against the builder of a home or other improvements. This cause of action shall be deemed to accrue at the time of original occupancy of the improvements which the builder caused to be erected.

⁶⁹ Note, 27 OKLA. L. REV. 723, 727 (1974). In Illinois, the act was declared unconstitutional as a violation of the equal protection clause. *Skinner v. Anderson*, 38 Ill. 2d 455, 231 N.E.2d 588 (1967).

sidered constitutional,⁷⁰ it was struck down in Kentucky as a violation of the right to access of courts provided by the state's constitution.⁷¹ In West Virginia, the attorney general has said an attempt to regulate liability for automobile accidents would be unconstitutional.⁷² In the opinion of the attorney general, a no-fault automobile insurance plan with a pure threshold approach⁷³ would be violative of the rights to access of courts and to trial by jury,⁷⁴ both rights provided by the West Virginia Constitution.⁷⁵ In contrast to the previous examples, the California Supreme Court has held limitation of liability in libel cases constitutional.⁷⁶ However, since the California Constitution does not specifically grant the right to access of courts,⁷⁷ the decision is easily distinguishable. Thus, the prevalent interpretation of the right to access of courts precludes restrictions upon liability for actions, such as medical malpractice, which were maintainable at common law.

If presented the question of whether the legislature can constitutionally limit medical malpractice recoveries, the West Virginia Supreme Court of Appeals will not be bound by precedent. The court will be guided only by the United States Constitution and the West Virginia Constitution, the latter document guaranteeing the right to access of courts.⁷⁸ Granted, medical malpractice and its financial consequences are serious problems to which answers are sorely needed. In the effort to arrest the malpractice epidemic, however, constitutional rights cannot be compromised. The door guarding basic constitutional rights must remain closed in order to

⁷⁰ Note, 27 OKLA. L. REV. 723, 728 (1974).

⁷¹ *Saylor v. Hall*, 497 S.W.2d 218 (Ky. 1973). In *Saylor*, the statute barred an action by tenants against the builder for the death of one son and injury to another when the fireplace collapsed fourteen years after constructed. *Id.*

⁷² OP. ATT'Y GEN. (Mar. 30, 1973).

⁷³ Under a "pure threshold approach," no suit can be instituted if special damages or out of pocket damages are below a certain amount. *Id.* at 1.

⁷⁴ "In suits at common law, where the value in controversy exceeds twenty dollars exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved . . ." W. VA. CONST. art. 3, § 13.

⁷⁵ OP. ATT'Y GEN. at 9.

⁷⁶ *Werner v. Southern California Associated Newspapers*, 35 Cal. 2d 121, 216 P.2d 825 (1950), *appeal dismissed on motion of appellants*, 340 U.S. 910 (1951).

⁷⁷ A.E. HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA*, Appendix O at 483-85 (1968). California is not listed among the states with an access of courts clause. *Id.*

⁷⁸ W. VA. CONST. art. 3, § 17.

prevent a gradual erosion of fundamental guarantees on behalf of expediency.

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