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The Indiana Medical Malpractice Act: Legislative Surgery on Patients' Rights

NOTES

THE INDIANA MEDICAL MALPRACTICE ACT: LEGISLATIVE SURGERY ON PATIENTS' RIGHTS

INTRODUCTION

Medical malpractice litigation in the United States has been increasingly characterized by larger recoveries,[1] highly publicized suits,[2] and an expansion of the duty of care owed by health care providers.[3] The total number of claims filed each year has also drastically increased;[4] today, one out of every six doctors prac-

1. In 1974, California juries granted six $1 million awards and one $4 million award to injured patients. A Wisconsin resident is presently suing a doctor for nine million dollars. EVERYBODY'S MONEY, Autumn, 1975, at 10.

2. *See, e.g., The Patient Becomes the Plaintiff*, TIME, March 24, 1975, at 62 (reporting recoveries of $4,025,000, $300,000 and $1,000,000); NEWSWEEK, February 10, 1975, at 41.

Rapoport, *"Dr. Nork Will See You Now,"* NEW TIMES, August 22, 1975, at 27 (feature article on "perhaps the worst physician ever to practice medicine in the United States," reporting that ten million dollars in judgments against this one physician has already been entered, with twenty-five additional suits pending).

3. A particularly strict standard of care was imposed in Helling v. Carey, 83 Wash. 2d 514, 519 P.2d 981 (1974), where the Supreme Court of Washington reversed a jury verdict in favor of the defendant physicians despite unanimous expert medical testimony that the failure to administer a test for glaucoma was not an uncommon practice due to the very low incidence of glaucoma within that class. *See* Note, *Comparative Approaches to Liability for Medical Maloccurrences*, 84 YALE L.J. 1141 (1975).

Another example of the expansion of a health care provider's duty of care is the gradual erosion of the "locality rule." In early days the "locality rule" was adopted to protect rural doctors by restricting the physician's duty of care to that degree of care, diligence and skill used by physicians generally in the same locality or community. As communications improved, as well as the standardization of hospital procedures and physician's licensure, the need for protective locality rules has decreased, and most states have discarded the rule. Supporters for the continuation of the locality rule argue that the effect of the rule keeps down the number of malpractice cases and large jury verdicts. It has even been alleged that the elimination of the locality rule will open up the courts to expert witness "carpetbaggers." Washington Post, October 1, 1975, at 1.

4. Between 1955 and 1966 one Cleveland defense attorney estimated that the number of medical malpractice suits in which he had been involved had increased 400%. SENATE SUBCOMMITTEE ON EXECUTIVE REORGANIZATION, 91ST CONG., 1ST SESS., A STUDY ON MEDICAL MALPRACTICE: THE PATIENT VERSUS THE PHYSICIAN 1 (Comm. Print 1969).

ticing high risk operations can expect to be sued each year for medical malpractice.[5] The fear of being sued permeates the entire health care community and the impact of the medical malpractice crisis has affected all parties involved. Courts have been flooded with time consuming litigation.[6] Insurance companies maintain that they are losing huge amounts of money[7] as a result of the increasing cost of providing health care insurance.[8] Health care

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Contributing to the increased number of suits is a growing public awareness of incompetent health care providers oftentimes performing needless yet dangerous surgery. A recent series of articles in the Chicago Tribune, beginning February 8, 1976, § A, at 1, disclosed the findings of recent studies on the malpractice problem. Among the findings were:

—American surgeons, according to a Cornell University study, perform nearly 2.4 million unnecessary operations each year in which 11,900 patients die as the result of complications.

—An estimated 10,000 Americans die or suffer potentially fatal reactions after the administration of antibiotics that are not needed, according to studies at the University of Florida and Ohio State University medical schools.

—Errors in judgment result in 260,000 women undergoing needless hysterectomies each year, and 500,000 children are subjected to unwarranted removal of tonsils and adenoids.

5. Position Paper and Backgrounder, St. Paul Fire and Marine Company 11 (1975) (overall average of claims filed against doctors in lowest through highest risk category was one out of ten.)

6. Prior to the assignment of all medical malpractice cases in Chicago to a special judge, many of the malpractice suits were filed two years before the actual hearing. Chicago Tribune, November 27, 1975, § 3 at 1.

7. Jerrold V. Jerome, President of Argonaut Insurance Company, testified that his company lost $10,000,000 in 1974 in medical malpractice costs, but yet found $10,200,000 for a dividend to be sent upstream to its parent company, the conglomerate Teledyne Corporation. TRIAL, May/June, 1975, at 15. In 1974, Argonaut itself collected approximately $15,000,000 in premiums and only paid out $250,000 in claims. The average pay-out in 1974 for the industry as a whole was $750 per doctor, whereas the average premium collected per doctor was $3,500. Aitken, *Medical Malpractice: The Alleged "Crisis" in Perspective*, 637 INS. L.J. 91, 97 (February, 1976). In the same year Argonaut experienced a $90,000,000 decrease in the value of its bond and stock portfolio. Lindsey, *"For Argonaut Profits Proved Illusory,"* New York Times, June 8, 1975, at 49.

Unexplained increases in premiums have also been imposed upon hospitals in 1975 with an average increase of 106% reported in ten District of Columbia hospitals. One of these hospitals, Fairfax Hospital, has paid claims of $31,282 since 1961 and total premiums of 1.03 million dollars. Despite the excellent record of the hospital, the cost of professional liability insurance increased from $69,577 in 1973 to $76,660 in 1974 and to $646,072 in 1975. Pear, *Malpractice Insurance Fees Swamp Area Hospitals*, Washington Star, October 1, 1975, at 1, col. 1.

8. Insurance companies are quick to point out that the cost of defending and litigating malpractice claims increases proportionately with the num-

providers[9] if they are even able to find insurers willing to bear the risk,[10] are paying more for malpractice insurance.[11] Ultimately, consumer-patients are paying more for check-ups and treatment because of the costs which are passed on to them.[12]

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ber of claims filed. However, a recent study by the Department of Health, Education and Welfare revealed that 50% of the claims filed in 1970 were closed without the claims resulting in lawsuits. Of the other half of claims filed, eighty percent of them never went to trial; they were settled by negotiation and mutual agreement. UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE 10 (1973).

9. As defined by Indiana statute and as used in this note, health care provider includes:

> [A] person, corporation, facility or institution licensed by this state to provide health care or professional services as a physician, hospital, dentist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist or psychologist, or an officer, employee or agent thereof acting in the course and scope of his employment.

IND. CODE § 16-9.5-1-1(a) (Supp. 1975).

10. Resistance by state legislators and state administrative agencies to demands for further rate increases has caused insurance companies to terminate their coverage for health care providers in several states. For example, St. Paul Fire and Marine announced its withdrawal of all insurance policies in Maryland after it was refused a 48% rate increase. Rowland, *Maryland Eyes Malpractice Claim Panel*, Washington Star, October 1, 1975, § B, at 3, col. 4. Similarly, the Argonaut Insurance Company threatened to cancel all New York physician policies on July 1, 1975, after it was denied a hike of 196.8% in January, 1975. Argonaut had, however, received an earlier hike of 93.5% in July, 1974. *Malpractice Nightmare*, TIME, March 24, 1975, at 62.

In Rhode Island, eight physicians and six patients have filed a $100 million class action antitrust suit against the country's largest medical malpractice insurance carrier, St. Paul Fire and Marine, and three other carriers: Aetna Life and Casualty, Hartford Fire Insurance Co., and Travelers Insurance Co. The plaintiffs charge that the insurance companies conspired to discontinue writing policies unless the physicians accepted the "claims made" policy in lieu of the "occurrence" coverage formerly offered. BUSINESS WEEK, August 4, 1975, at 40.

11. Noticeable increases in rates for medical malpractice insurance began in New York about 1966 and increased 439% by 1971. Linster, *Insurance View of Malpractice*, 38 INS. COUNSEL J. 528, 529 (1971). Hartford Insurance Company has recently proposed a 267% increase for medical malpractice coverage in Illinois. The new rates would increase annual premiums for high-risk doctors from $10,000 to $35,000 for five million dollar liability insurance. Chicago Tribune, February 27, 1976, at 1.

12. A large amount of the increase paid by patients for health care services has resulted from "defensive medicine" techniques whereby overly precautionary treatment has resulted in redundant diagnostic tests and x-rays, extensive recordation for possible litigation purposes and hesitation in embracing proven new techniques. Havighurst and Tangredi, *"Medical Adversity*

Several remedial plans, as proposed by the Department of Health, Education and Welfare, Secretary's Commission on Medical Malpractice[13] and various state legislatures, have attempted to resolve malpractice disputes by non-adjudicatory means.[14] Some of these plans which have received the most frequent attention include: a medical review panel composed of doctors, lawyers and/or laypersons, who review the validity and substantiality of malpractice claims;[15] arbitration boards which, by agreement or operation of law, bind the litigating parties to an independent finding;[16] no-fault insurance plans which dispose of the concept of negligence;[17] and joint underwriting insurance plans whereby

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Insurance"—A No-Fault Approach to Medical Malpractice and Quality Assurance, 613 INS. L.J. 69, 92 (1974).

13. Pursuant to a mandate by President Nixon in 1971, the Secretary of Health, Education and Welfare developed a research plan to study the malpractice problem. The final report, completed in 1973, is contained in two volumes. *See* UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE (1973) [hereinafter cited as SECRETARY'S REPORT].

14. *See generally* SECRETARY'S REPORT at 214 *et seq.* (1973).

15. One of the earliest and most successful panel approaches is the Pima County (Tucson, Arizona) Plan which was established in 1957 and is composed of nine doctors and nine lawyers. The panel reviews the case and renders a decision as to whether there is a reasonable ground to believe malpractice was committed. Although a claimant is not barred from filing a suit following an adverse finding from the panel, an attorney is bound to use the greatest "professional good faith" before pursuing the matter further. The success of the plan is normally attributed to the cooperation demonstrated by the local bar and medical practitioners. This "*esprit de corps*" is maintained through the active participation of both parties in the panel's decision which promotes trust and confidence in the final determination. Morris, *Response to Ribicoff: Malpractice Suits vs. Patient Care*, 37 INS. COUNSEL J. 206, 237 *et seq.* (1970) (other types of panels which are known as the New Mexico Plan, the Portland Oregon Plan and the so-called New Jersey Plan are also discussed). *See also* Note, *Medical-Legal Screening Panels As An Alternative Approach to Medical Malpractice Claims*, 13 WILLIAM AND MARY L. REV. 695, 713 (1972).

16. *See Alternatives to Litigation, III: Contractual Problems in the Enforcement of Agreements to Arbitrate Medical Malpractice, Appendix:* SECRETARY'S REPORT (1973); Morris, *Medical Report: Malpractice Crisis—A View of Malpractice in the 1970's*, 38 INS. COUNSEL J. 521, 524 (1971).

17. For a favorable view of tort liability in medical malpractice occurrences, see Kretzmen, *The Malpractice Suit: Is it Needed?*, 11 OSGOOD HALL L.J. 55 (1973). *See also* Ehrenzweig, *Compulsory "Hospital-Accident" Insurance: A Needed First Step Toward the Displacement of Liability for "Medical Malpractice"*, 31 U. CHI. L. REV. 279 (1964); O'Connell, *It's Time for No Fault for Many Kinds of Accidents: A Proposal and an "Economic Analysis,"* 42 TENN. L. REV. 145, 146-47 (1974); Note, *Comparative Approaches to Liability for Medical Maloccurrences*, 84 YALE L.J. 1141 (1975).

all insurers within a state are required or agree to participate in a common undertaking to insure health care providers.[18]

Indiana approached the problem by enacting, on April 17, 1975, a new and comprehensive medical malpractice statute. The Medical Malpractice Act[19] essentially requires mandatory submission of all medical malpractice claims to a medical review panel before any claim can be filed in a court.[20] The panel, which is composed of three health care providers,[21] determines the liability of an accused health care provider based on a showing of negligence.[22] Damage determinations, however, are left for resolution by the parties.[23] If no agreement can be reached on the amount of damages or if the complaining party receives an adverse judgment from the panel,[24] a suit may then be filed in court for a jury determination on the question of liability and damages.

Two major provisions of Indiana's Medical Malpractice Act introduce severe and unprecedented restrictions on a patient's right to recover damages. One of these provisions places a maximum limitation of five hundred thousand dollars ($500,000) on the amount of damages recoverable by an injured patient.[25] Actual damages for any injury or death cannot cumulatively exceed this limit regardless of the amount or severity of loss incurred. An-

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Contra, Lanzone, *A Defense Lawyer Views Products Liability and Professional Liability No-Fault,* 625 INS. L.J. 82 (February, 1975).

18. For a recent legislative example of this plan, see WIS. STAT. ANN. § 619.01(1)(a) and (1)(c)(2) and (7) (1975).

19. IND. CODE §§ 16-9.5-1-1 to 16-9.5-9-10 (Supp. 1975) [hereinafter referred to also as the Act]. Examples of recent legislation with provisions similar to those adopted in the Indiana Act are cited in Brennan, *Torts,* 9 IND. L. REV. 304, 359 n.135 (1975).

20. IND. CODE § 16-9.5-9-2 (Supp. 1975).

21. IND. CODE § 16-9.5-9-3 (Supp. 1975). If there is only one party defendant in the suit, other than a hospital, two of the three panelists must be from the same class of health care provider as the defendant. IND. CODE § 16-9.5-9-3(e) (Supp. 1975). For a definition of a health care provider, see note 9 *supra.*

22. Negligence may be concluded if "defendants failed to comply with the appropriate standard of care as charged in the complaint." IND. CODE § 16-9.5-9-7 (Supp. 1975). Tort in general is defined in the Act as "any legal wrong, breach of duty, or negligent or unlawful act or omission proximately causing injury or damage to another." IND. CODE § 16-9.5-1-1(g) (Supp. 1975).

23. The medical review panel is not permitted to assess damages; it is limited in function to the determination of liability. IND. CODE § 16-9.5-9-7 (Supp. 1975).

24. IND. CODE § 16-9.5-9-8 (Supp. 1975).

25. IND. CODE § 16-9.5-2-2(a) (Supp. 1975).

other provision[26] makes the general legal disability statute[27] inapplicable to minors with medical malpractice claims. Indiana's legal disability statute formerly permitted all minors who incurred personal injuries during minority to file a claim for damages within two years after their eighteenth birthday.[28] Under the Indiana Malpractice Act, a "minor" is classified as a person less than six years of age. A "minor" between the ages of six and eighteen with a medical-related injury now must file a claim within two years after the negligent act before the statute of limitations bars a claim for damages.

This note examines the constitutional validity of limiting damages on personal injuries and of abrogating the general legal disability statute to minors with malpractice claims, reaching the conclusion that these two provisions are unconstitutional. The $500,000 limitation deprives injured patients of their due process of law by failing to provide a reasonable substitute for the loss of their common law right to damages commensurate with the injury incurred. Although a seemingly similar limitation on damages was upheld in workmen's compensation laws, a brief analysis will reveal that these compensatory laws, unlike the Indiana Act, provide a reasonable substitute in exchange for the abrogation of the common law right to damages. It will also be shown that the monetary limitation is an unwarranted violation of one's constitutional right to trial by jury in that a jury is not permitted to assess reasonable compensation on an individual basis. Finally, the limitation on damages creates an impermissible irrebuttable presumption by depriving an injured person of the right to prove that his individual claim is not excessive even though it exceeds the statutory limitation.

The second part of this note addresses the redefinition of "minors" with medical malpractice claims as arbitrary and capricious in violation of one's guarantee to equal protection of the laws. The Act establishes two classes of minors, one based on the type of claim involved and the other on age, both of which violate a minor's right to the protection extended to other minors

26. IND. CODE § 16-9.5-3-1 (Supp. 1975).

27. IND. CODE § 34-1-2-5 (1973), provides:

Any person, being under legal disabilities when the cause of action accrues, may bring his action within two (2) years after the disability is removed.

28. The phrase "under legal disabilities" was amended in 1973 from persons under the age of twenty-one (21) to persons under the age of eighteen (18) years. IND. CODE § 34-1-67-1 (Supp. 1975).

through the legal disability statute. However, before the constitutionality of these provisions can be addressed, it is necessary to become familiar with the general provisions in the Indiana Act.

PROVISIONS OF THE INDIANA ACT

The Indiana Medical Malpractice Act makes several sweeping changes in the areas of malpractice litigation and compensation. Several of the most innovative and significant features include the creation of a medical review panel and a patient's compensation fund, adoption of a reduced statute of limitations for minors, and monetary limitations on the amount of damages recoverable by patients, on the liability of individual health care providers, and on the size of attorneys' fees.

Medical Review Panel

An important section of the Indiana Act establishes the authority and procedure for using medical review panels to examine medical malpractice claims.[29] All malpractice claims against health care providers must be initiated with these panels as a condition precedent to later recourse in a court of law.[30] The panels are composed of three licensed physicians[31] and one attorney.[32] Although the attorney has no vote in the final decision by the panel, he participates in an advisory capacity as the panel's chairman.[33] Each party to the dispute has the right to select one physician or

29. IND. CODE § 16-9.5-9-1 (Supp. 1975).

30. No complaint may be filed in any court until the panel renders its opinion. IND. CODE § 16-9.5-9-2 (Supp. 1975).

A similar medical review panel, where claims are first submitted before any court action is taken, and composed of a circuit judge, a physician and a lawyer, was recently held unconstitutional by the Illinois Supreme Court as violative of the state constitutional right to trial by jury embodied in ILL. CONST. art. VI, §§ 1 and 9. *See* Wright v. Central DuPage Hospital Ass'n, No. 48075 (Ill. S. Ct., May 14, 1976). It was deemed violative of the constitutional provision because the panel empowered its non-judicial members to exercise a judicial function. The courts intimated, however, that such a review panel might be devised, but it set no guidelines by which a legislature might implement such a forum.

31. A physician is defined in the Act as a person with an unlimited license to practice medicine in Indiana. IND. CODE § 16-9.5-1-1(b) (Supp. 1975). Physicians who are engaged in the teaching profession are also available for selection to the panel. IND. CODE § 16-9.5-9-3(a) (Supp. 1975).

32. IND. CODE § 16-9.5-9-3 (Supp. 1975). If, however, a nonphysician is the only party defendant, other than a hospital, two of the panelists must be from the same class of health care provider as that defendant. IND. CODE § 16-9.5-9-3(e) (Supp. 1975).

33. IND. CODE § 16-9.5-9-3 (Supp. 1975).

health care provider as a member of the panel.[34] Within ten days after the complainant has forwarded notification of a selection, the respondent must make known his choice for a prospective panelist.[35] Either party may twice challenge without cause a selection by the opposing party.[36] If both challenges are exercised, the judge shall make a list of three qualified panelists.[37] Each side will strike one of the names, leaving the finalist as the other party's choice.[38] The two panelists who have been selected by the opposing parties will then choose a third health care provider to complete the panel.[39] If the complaining party and respondent fail to agree on the selection of an acceptable advisory attorney, a similar striking procedure is available.[40]

After the selection of a panel, all evidence which the parties intend to introduce must be promptly submitted.[41] The evidence must be in written form and "may consist of medical charts, x-rays, lab tests, excerpts of treatises, depositions of witnesses, including parties, and any other form of evidence allowable by the medical review panel."[42] Although depositions are available, oral testimony or evidence is not received unless requested by the panel.[43] The panel may obtain any additional information, including consultation with other medical authorities, which it deems necessary to fully inform itself regarding the issue to be decided.[44] Both parties have full access to any material submitted to the panel.[45]

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34. The panelist so selected is required to serve, IND. CODE § 16-9.5-9-3(b) (Supp. 1975), unless he can, by affidavit, show facts which constitute good cause for exclusion. IND. CODE § 16-9.5-9-3(d) (Supp. 1975).

35. IND. CODE § 16-9.5-9-3(f) (Supp. 1975).

36. The challenge must be in written form and made within ten days of any selection. IND. CODE § 16-9.5-9-3(g) (Supp. 1975).

37. *Id.*

38. *Id.*

39. IND. CODE § 16-9.5-9-3(b) (Supp. 1975).

40. IND. CODE § 16-9.5-9-3(h) (Supp. 1975). The procedure used to select the attorney-chairman differs slightly from that employed to choose the other panelists. The clerk of the Indiana Supreme Court must randomly select the name of five attorneys from the roles of the court. Each side will then strike two names and the attorney remaining serves as the attorney-chairman for that case.

41. IND. CODE § 16-9.5-9-4 (Supp. 1975).

42. *Id.*

43. *Id.*

44. IND. CODE § 16-9.5-9-6 (Supp. 1975).

45. *Id.*

Either party has the right to convene the panel after giving ten days' notice to the other side.[46] These meetings are intended to permit either party "to question the panel concerning any matters relevant to issues to be decided by the panel before the issuance of their report."[47]

When all evidence has been reviewed, the panel shall, within thirty days, render one or more of the following expert opinions:

> (1) The evidence supports the conclusion that the defendant or defendants failed to comply with the appropriate standard of care as charged in the complaint;
>
> (2) The evidence does not support the conclusion that the defendant or defendants failed to meet the applicable standard of care as charged in the complaint;
>
> (3) That there is a material issue of fact, not requiring expert opinion, bearing on liability for consideration by the court or jury;
>
> (4) The conduct complained of was or was not a factor of the resultant damages. If so, whether plaintiff suffered: (a) any disability and the extent and duration of the disability, and (b) any permanent impairment and the percentage of the impairment.[48]

If the panel finds that the accused physician violated the standard of care alleged in the complaint, the parties are free to settle the amount of damages.[49] Failure to reach an agreement forces the patient to file his claim in a trial court of competent jurisdiction.

Likewise, if the patient receives an adverse finding from the screening panel, he may still file his claim in the courts.[50] In the event of disagreement in either situation, the patient must again prove negligence and, providing that he is able to do so, the jury will determine the amount of damages to be awarded.[51]

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46. IND. CODE § 16-9.5-9-5 (Supp. 1975).

47. *Id.*

48. IND. CODE § 16-9.5-9-7 (Supp. 1975).

49. *See* IND. CODE § 16-9.5-9-7 (Supp. 1975). The only duty of the panel is to express its expert opinion as to whether the evidence supports the conclusion that the defendant acted or failed to act within the appropriate standards of care as charged in the complaint.

50. IND. CODE § 16-9.5-1-6 (Supp. 1975).

51. *Id.*

If either party decides to litigate the claim in a court of law, the findings of the panel may be later introduced as evidence; the findings do not, however, give rise to any presumptive conclusions.[52] Any member of the panel may also be called to testify as a witness for either party.[53]

Unlike the traditional policy of assigning costs of litigation to the losing party, the Indiana Act requires that the prevailing party who receives a majority opinion must pay all expenses of the panel.[54] If no majority opinion is given, each side pays one-half of the costs.[55]

Statute of Limitations

The filing of a claim before the panel tolls the applicable statute of limitations from the date of receipt by the commissioner to and including ninety days after the issuance of an opinion by the panel.[56]

No claim may be brought against health care providers based upon negligent professional services or health care rendered unless filed within two years from the date of the alleged act, omission or neglect.[57] Although this two-year statute of limitations is identical to a prior statutory limitation for adults,[58] the new Act modifies the law regarding minors. Minors who are less than six years of age at the time of injury have until the age of eight to file an action for damages.[59] Any claim by a minor, incurring injury while under legal disability but who is now older than eight, has two years after the effective date of the Act, July 1, 1975, to bring suit.[60]

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52. IND. CODE § 16-9.5-9-9 (Supp. 1975).

53. *Id.* Either party, at his own expense, shall have the right to call any member of the panel as a witness. Any panelist so called is required to appear and testify.

54. IND. CODE § 16-9.5-9-10 (Supp. 1975).

55. *Id.*

56. IND. CODE § 16-9.5-9-8 (Supp. 1975).

57. IND. CODE § 16-9.5-3-1 (Supp. 1975).

58. IND. CODE § 34-4-19-1 (1973).

59. IND. CODE § 16-9.5-3-1 (Supp. 1975). No legal disability, except for the explicit provisions regarding minority, has any tolling effect on the two-year malpractice statute of limitations. The general legal disability statute, IND. CODE § 34-1-2-5 (1971), which permitted persons to bring their action two years after the disability was removed, is thus abrogated with regard to all medical malpractice claims.

60. IND. CODE § 16-9.5-3-2 (Supp. 1975).

Damages: Their Source and Amount

Assuming that the parties did not agree upon a satisfactory amount of damages, the complaining party may submit this question to the trial court.[61] No claims submitted to the jury, however, are to include the dollar amount in the *ad damnum* clause. The prayer for relief must simply be for reasonable damages "in the premises."[62] Damages for injury or death, no matter how serious or consequential, may not be awarded in excess of $500,000 for any claim.[63]

Qualified health care providers[64] are immune to liability for any amount beyond $100,000.[65] Liability for any judgment up to this amount must be insured through private or personal insurance. A judgment or settlement rendered against an individual health care provider in excess of $100,000 will be paid from a newly created patient's compensation fund.[66]

The patient's compensation fund is to be collected, received and administered by the Commissioner of Insurance for the State of Indiana.[67] The funds are to be held in trust along with any interest or income arising therefrom and will be deposited in a segregated account; under no circumstances is it to become part of the general fund of the state.[68] The fund is to be used solely for the purpose of paying claims arising from health care provider injuries in excess of $100,000.[69]

To create the fund, a surcharge is levied on all health care providers in Indiana.[70] The individual insured is responsible for a percentage rate of the premium he pays for his private insurance coverage.[71] This percentage, determined by the insurance

61. IND. CODE § 16-9.5-1-6 (Supp. 1975).

62. *Id.*

63. IND. CODE § 16-9.5-2-2 (Supp. 1975).

64. To be qualified and thereby receive the protection of the Act, all a health care provider need do is obtain liability insurance in the amount of $100,000 per occurrence and pay a surcharge to the commissioner of insurance to finance the newly created patient compensation fund. IND. CODE § 16-9.5-2-1 (Supp. 1975). If a health care provider fails to qualify, he is subject to unlimited liability. IND. CODE § 16-9.5-1-5 (Supp. 1975).

65. IND. CODE § 16-9.5-2-2(b) (Supp. 1975).

66. IND. CODE § 16-9.5-2-2(c) (Supp. 1975).

67. IND. CODE § 16-9.5-4-1(a) (Supp. 1975).

68. *Id.*

69. *Id.*

70. IND. CODE § 16-9.5-4-1(b) (Supp. 1975).

71. *Id.*

commission and based upon actuarial principles, may not exceed 10% of the cost on the individual's premium.[72] Individual claims against the fund will not be paid until all claims are computed at the end of the year.[73]

Attorney's Fees and Miscellaneous Provisions

Indiana's Act also limits an attorney's contingency fee to 15% of any recovery from the patient's compensation fund.[74] This ceiling does not, however, restrict an attorney's rate on contingency fees from recoveries less than $100,000 which are payable from the health care provider's insurer. As an alternative method of payment, a patient can arrange to pay for costs and services rendered by an attorney on an hourly or daily basis.[75] Such an arrangement, however, must be evidenced by a written agreement at the time of employment.[76]

Several other sections of the Act further seek to reduce the incidence of malpractice claims and to protect the continuation of health care services. One of these sections requires a mandatory reporting of all claims filed with the panel to the state insurance commissioner,[77] who will notify the "appropriate board of professional registration and examination for review of the

72. *Id.*

73. IND. CODE § 16-9.5-4-1(a) (Supp. 1975).

74. IND. CODE § 16-9.5-5-1(a) (Supp. 1975). The amount of attorneys' fees collected from final judgments has been estimated to consume 50% of the premiums collected for medical malpractice insurance. Note, *Comparative Approaches to Liability for Medical Maloccurrences*, 84 YALE L.J. 1141, 1155 (1975). Another 25% is consumed by the insurer. This permits the patient to recover only 16% to 25% of the insurance premium. *Id.* at 1155 n.75.

It is not clear, however, that the contingency fee arrangement has been the primary cause of the increasing costs of insurance coverage. England has also experienced an extraordinary increase in the cost of malpractice litigation—a threefold increase in the past five years. Shayne, *Meritless Malpractice Cases: A Fragile Dilemma*, TRIAL, May/June, 1975, at 30. Since England does not utilize the contingency system in medical malpractice actions, it is absurd to conclude that the contingency fee system is responsible for the increased number of claims. *See generally* Addison and Baylis, *The Malpractice Problem in Great Britain*, SECRETARY'S REPORT, *supra* note 13, at 854 and 860.

75. IND. CODE § 16-9.5-5-1(b) (Supp. 1975).

76. *Id.*

77. The report, which must be filed both by the plaintiff's attorney *and* by the health care provider *or* his insurer, must be filed within sixty days following final disposition of the claim. IND. CODE § 16-9.5-6-1 (Supp. 1975). The report must inform the commissioner of the nature of the claim, damages asserted and alleged injury, attorney's fees and other litigation expenses, and the amount of any settlement or judgment. *Id.*

fitness of the health care provider to practice his profession."[78] The Act also provides insurance coverage for a health care provider who is unable to receive insurance from at least two private companies.[79] Finally, a temporary provision of the Act provides for the creation of a study commission to make additional and further analysis of the medical malpractice problem, the effect of the Indiana Act, and alternate approaches of comparable law.[80] The thirteen-member commission is to submit a final report to the Legislative Council and the Governor by December 31, 1976.[81]

Thus, Indiana's Act is a fairly comprehensive response to the medical malpractice insurance problem. Yet two provisions in particular, the $500,000 limitation on recoverable damages and the partial abrogation of the minor disability statute, will encounter serious constitutional challenge.

LIMITING THE RIGHT TO PERSONAL DAMAGES: DUE PROCESS VIOLATIONS

The Indiana Medical Malpractice Act limits all damages for any negligent conduct to a maximum of $500,000. This novel restriction raises several constitutional questions, one of which is the denial to injured patients of their right to due process of law. Foremost among the Act's deficiencies is its failure to provide any appreciable equivalent or reasonable substitute for the absolute limitation on a patient's right to damages. In absence of such *quid pro quo,* the maximum limitation violates due process rights found in the United States and Indiana Constitutions. Furthermore, the limitation violates the state constitutional right to a jury trial by depriving the jury from determining reasonable dam-

78. The board shall have the power to discipline the health care provider in the following ways: censure, probation, suspension, or revocation of his license. IND. CODE § 16-9.5-6-2 (Supp. 1975).

79. IND. CODE §§ 16-9.5-8-2; 16-9.5-8-6 (Supp. 1975). The risk manager, who is appointed by the commissioner, IND. CODE § 16-9.5-8-3 (Supp. 1975), may either accept or refuse a policy to the applicant. IND. CODE § 16-9.5-8-7 (Supp. 1975). The risk manager's decision is subject to appeal and review by the commissioner. *Id.*

The impact of this section may have little, if any, effect. There was no evidence throughout the legislative hearings preceding the Act that insurance coverage in Indiana was unavailable. Rather, the real problem, at least as urged by the medical profession, was the increasingly high cost of coverage. Mallor, *A Cure for the Plaintiff's Ills,* 51 IND. L.J. 103 (1975).

80. Section 2 of Acts 1975, P.L. 146. This section is to expire on January 1, 1977.

81. *Id.*

ages which are commensurate with the actual injury sustained. Finally, the $500,000 limitation creates an irrebuttable presumption based on the assumption that awards in excess of that amount are excessive. A patient is not permitted to rebut this assumption even though it is not necessarily or universally true in fact. Therefore, the presumption also violates due process of law by preventing a patient from recovering reasonable damages commensurate with the injury incurred.

A. *Failure of the Malpractice Act to Provide A Reasonable Substitute*

The $500,000 limitation on the recovery of damages in the Indiana Medical Malpractice Act has been defended as being analogous to the limitations found in workmen's compensation laws. Proponents of the limitation on medical malpractice recoveries point out several seeming similarities between workmen's compensation and the new Act. Both enactments set ceilings on the amount of recovery that a claimant is entitled to receive for a single claim, and both may compensate for personal losses from a special fund created for that purpose. Because of these similarities, it is argued that the Indiana Act should survive constitutional challenge for the same reasons that the workmen's compensation laws were accepted. A close examination of the two laws demonstrates the tenuous nature of this analogy and shows that the similarities are artificial and illusory. Workmen's compensation, a system which completely superceded the common law action, provided injured employees a reasonable substitute for their abridged common law rights. The Indiana Act, however, neither abrogates the common law cause of action nor provides a substitute for the loss of an injured patient's right to compensation commensurate with the damages sustained. Accordingly, the Indiana Act violates due process as secured by the fourteenth amendment.

1. *Workmen's compensation laws*

Workmen's compensation legislation was a response to the increasing number of industrial accidents and the simultaneous decrease in the employee's ability to recover damages for work-related injuries.[82] The decreased ability of an employee to recover damages from his employer under a common law action was caused in large part by the judicially created defenses of the fellow-

82. *See generally* A. LARSON, THE LAW OF WORKMEN'S COMPENSATION 37 (1975) [hereinafter referred to as LARSON].

servant rule,[83] contributory negligence,[84] and assumption of risk doctrine.[85] As a result of these defenses, together with difficulty in establishing causation and negligence, added costs of delay and expensive litigation, injured employees found it extremely difficult to recover damages for work-related injuries.[86] The employee's common law remedy was, as a practical matter, oftentimes illusory.[87]

In an effort to protect employees from bearing the entire loss of industrial accidents, courts began to abrogate the employer's common law defenses by making exceptions to the fellow-

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83. The fellow servant rule, a limitation to the rule of vicarious liability, held that the employer was not liable for injuries caused solely by the negligence of a fellow servant. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 528 (4th ed. 1971) [hereinafter cited as PROSSER].

The fellow servant exception to the general rule of vicarious liability had its origin in the famous case of Priestley v. Fowler, 3 M.&W. 1 (1837). In that case, an employee was denied recovery for damages from his employer when a fellow servant overloaded a van which broke down and injured the plaintiff-employee. The reason for that decision, according to Lord Abinger, was to avoid the "alarming" examples for employer's liability for employee's negligence.

American courts were quick to follow this rule. *See* Farwell v. Boston & Worcester R.R., 4 Metc. 49 (Mass. 1842) (railroad held immune from liability to one of its engineers for injury caused by one of its switchmen.)

84. Contributory negligence is conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection. PROSSER, *supra* note 83, at 416. Contributory negligence was first recognized as a defense in Butterfield v. Forrester, 11 East 60 (K.B. 1809).

85. A plaintiff who has,

> given his consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone,

is said to have assumed the risk and thereby loses a cause of action if injury occurs. PROSSER, *supra* note 83, at 440.

"Assumption of risk" was also recognized as an employer's defense in Priestley v. Fowler, 3 M.&W. 1 (1837). Lord Abinger recognized that,

> the servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself, and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master.

LARSON, *supra* note 82, § 4.30 at 26.

86. Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 P. 398 (1915).

87. "The employee at common law was remediless without question in 83 percent of all cases," and of the remaining 17 percent, the defense of assumption of risk precluded many claims. LARSON, *supra* note 82, § 4.30 at 17.

servant rule,[88] refusing to apply the defense of assumption of risk to violations of a safety statute,[89] and adopting comparative negligence rules to replace contributory negligence principles.[90] Although the reduced availability of these defenses increased the number of recoveries for some employees, the basic problem of inadequate recovery remained, since the majority of injuries were not caused through the negligence of the employer.[91]

Compensation laws were drafted to remove the concept of fault and to make the risk of accidents a part of the burden that industry itself should bear.[92] As an element in the cost of production, payments for employees' injuries could be added to the cost of the article and carried by the community in general.[93] The

88. *See generally* Northern Pac. R.R. v. Herbert, 116 U.S. 642 (1886); Tedford v. Los Angeles Elec. Co., 134 Cal. 76, 66 P. 76 (1901); Smith v. Erie R.R., 38 Vroom 636, 67 N.J.L. 636, 52 A. 634 (1902); Flike v. Boston and A.R.R., 53 N.Y. 549, 13 Am. Rep 545 (1873).

89. *See* Fitwater v. Warren, 206 N.Y. 355, 99 N.E. 1042 (1912).

90. *See* Augusta S.R. Co. v. McElmurry, 24 Ga. 75 (1858); Galena and C.U.R.R. v. Jacobs, 20 Ill. 478 (1858); L.N. & Gn. S.R.R. v. Fleming, 82 Tenn. 128 (1884).

91. The classification of causes of accidents resulting in personal injury to the employee have been categorized as:

(1)	Negligence or fault of employer	16.81%
(2)	Joint negligence of employer and injured employee	4.66
(3)	Negligence of fellow servant	5.28
(4)	Acts of God	2.31
(5)	Fault or negligence of injured employee	28.89
(6)	Inevitable accidents connected with the employment	42.05

LARSON, *supra* note 82, at 27, *citing* BUREAU OF LABOR BULLETIN (January, 1908).

92. *See* Ex Parte Puritan Banking Co., 208 Ala. 375, 94 So. 347 (1922); Edson v. Industrial Acc. Comm., 206 Cal. 124, 273 P. 572 (1928); Union Iron Works v. Industrial Acc. Comm., 190 Cal. 33, 210 P. 410 (1922); Sangamon Mining Co. v. Industrial Comm., 315 Ill. 534, 146 N.E. 492 (1925); Austin Co. v. Brown, 121 Ohio St. 271, 167 N.E. 874 (1929); Town of Germantown v. Industrial Comm., 178 Wis. 642, 190 N.W. 448 (1922).

93.

> They [compensation payments] might be catalogued with breakage and wear and tear of machinery and equipment, all of which are, in the final analysis, borne by the community, and such compensation may safely be said to be a charge upon the community rather than the industry because the expense thereof is always included in the sale price of the commodity, and hence is paid for by the consuming public.

W. SCHNEIDER, WORKMEN'S COMPENSATION § 1 at 5 (1932) [hereinafter cited as SCHNEIDER].

payments awarded to employees were calculated as compensation for lost wages rather than damages for wrongful injury.[94]

In departing from the view that amounts received by employees were damages, the workmen's compensation scheme was adopted as an entirely new and comprehensive system of law.[95] The common law cause of action based on negligence was displaced in its entirety.[96] Compensatory laws were instead founded upon the principle of insurance whereby employees received compensation for events not within the control of either employer or employee.[97] Therefore, compensation was no longer dependent upon wrongful conduct of the employer or fellow employees.

The workmen's compensation scheme was justified as promoting the interests of society in general and protecting both employee and employer. Society was protected from having injured employees, unable to recover in a damage action, from being placed on welfare rolls.[98] In addition, the tension between employer and employee which often followed the filing of claims for negligent actions was alleviated.[99] Employees were guaranteed of receiving at least moderate compensation in *all* cases of injury.[100] Although the employee was no longer able to recover as much as he could potentially receive in a traditional negligence action,[101] he was relieved of the almost insurmountable burden of establishing negligence or proving the amount of damages.[102] Furthermore, a speedy remedy made compensation less expensive to obtain and more valuable during times of need. Employers were protected from,

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94. Shelton Lead and Zinc Co. v. State Ind. Comm., 100 Okla. 188, 229 P. 255 (1924).

95. SCHNEIDER, *supra* note 93, at §§ 4, 17, 18; Hotel Equipment Co. v. Liddell, 32 Ga. App. 590, 124 S.E. 92 (1924).

96. Warren v. Indiana Tel. Co., 217 Ind. 93, 102 N.E.2d 399 (1940). It has been noted that:

> [C]ompensation laws constitute a statutory departure from, or as commonly stated are in derogation of the common law, they are not supplemental, cumulative, amendatory or declaratory of the common law, but wholly substitutional of it.

SCHNEIDER, *supra* note 93, at § 6. *See also* Federal Cement & Tile Co. v. Pruitt, 128 Ind. 126, 146 N.E.2d 557 (1957).

97. SCHNEIDER, *supra* note 93, at 3.

98. Val Blatz Brewing Co. v. Gerard, 201 Wis. 474, 230 N.W. 622 (1930).

99. SCHNEIDER, *supra* note 93, at 6-7.

100. New York Central R.R. v. White, 243 U.S. 188, 204 (1917).

101. *See* note 160 *infra*.

> uncertain verdicts and possible ruinous verdicts that might bankrupt the business, to the injury, not only of the particular employer and all other workmen employed by him, but of society generally.[103]

Thus, all parties benefitted from the workmen's compensation legislation. Because of this mutual benefit and because prior rights and benefits were reasonably exchanged for new rights and benefits, this no-fault system of reparations was upheld as a valid exercise of a state's police powers.[104]

While these laws were generally accepted by employees, who forfeited their common law right to damages and gained the statutory right to recover compensation for all work-related injuries, a strong challenge was advanced by employers. This challenge, questioning the constitutionality of abrogating common law defenses, was flatly rejected by the Supreme Court in *Arizona Employers' Liability Cases:*[105]

> [T]hese are no more than rules of law, deduced by the courts as reasonable and just . . . in the absence of legislation. They are not placed . . . beyond the reach of the state's power to alter them.[106]

Common law rights and defenses are merely duties, recognized by law, which are continuously altered by legislation to reflect changing relationships and needs within society. "No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit."[107] Thus, the abrogation of common law rights, through legislation, is generally permissible.[108]

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102. New York Central R.R. v. White, 243 U.S. 188 (1917).

103. Arizona Employers' Liability Cases, 250 U.S. 400, 403 (1919).

104. Arizona Employers' Liability Cases, 250 U.S. 400, 425 (1919); New York Central R.R. v. White, 243 U.S. 188, 207 (1917); Second Employer's Liability Cases, 223 U.S. 1, 52 (1911); Chicago, Burlington & Quincy R.R. v. McGuire, 219 U.S. 549, 571 (1911).

105. 250 U.S. 400 (1919).

106. *Id.* at 421 (emphasis omitted).

107. Munn v. Illinois, 94 U.S. 113, 134 (1876), *followed in* New York Central R.R. v. White, 243 U.S. 188, 198 (1917); Chicago & Alton R.R. v. Transbarger, 238 U.S. 67, 76 (1914); Second Employers' Liability Cases, 223 U.S. 1, 50 (1911); Martin v. Pittsburg & Lake Erie R.R. 203 U.S. 284, 294 (1906); Hurtado v. California, 110 U.S. 516, 532 (1884).

108. The Supreme Court stated with regard to a workmen's compensation statute:

A statute may not, however, displace common law rights in violation of due process of law.[109] A reasonable and just alternative for pre-existent rights must be substituted in its place.[110] One set of rights must be exchanged as a *quid pro quo* for the former source of rights.[111] This *quid pro quo* was found present in the workmen's compensation laws. This system for compensation satisfied the right under the old system which it replaced because all parties benefitted.[112] Since the abrogation of the common law defenses and imposition of liability without fault was neither arbitrary, unjust nor unreasonable, the adoption of the workmen's compensation laws was found to meet the requirements of due process.[113]

> It is settled by the decisions of this Court and by an overwhelming array of state decisions, that such statutes are not open to constitutional objection because they abrogate common law defenses or impose liability without fault.

Cudahy Packing Co. v. Parramore, 263 U.S. 418, 422 (1923). *See* Munn v. Illinois, 94 U.S. 113, 134 (1876); McKinster v. Sager, 163 Ind. 671, 72 N.E. 854, 859 (1904).

109.

> Except as forbidden or controlled by some provision of the state Constitution, or of the Constitution of the United States or laws and treaties made under it, the legislature has power to enact statutes which change the rules of the common law, however ancient.

Manley v. State, 196 Ind. 529, 532, 149 N.E. 51, 52 (1925).

110. In New York Central R.R. v. White, 243 U.S. 188 (1917), the Supreme Court observed with regard to a workmen's compensation statute:

> [I]t perhaps may be doubted whether the State could abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead. No such question is here presented, and we intimate no opinion on it. The statute under consideration sets aside one body of rules only to establish another system in its place. If the employee is no longer able to recover as much as before in the case of being injured through the employer's negligence, he is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of damages.

Id. at 201.

111. *See, e.g.*, Montgomery v. Daniels, 81 Misc. 2d 373, 367 N.Y.S.2d 419, 425 (Sup. Ct. 1975), *rev'd*, No. 359 (Ct. App., N.Y., Nov. 25, 1975). In reversing the trial court, the Court of Appeals did not reach the question of whether the "reasonable substitute" test was constitutionally mandated because it found that the "no fault" law under consideration did, in fact, contain a "reasonable substitute."

112. *See* notes 166-72 *infra* and accompanying text.

113. Page v. New York Realty Co., 59 Mont. 305, 196 P. 871 (1921); State *ex rel.* Amerland v. Hagan, 44 N.D. 306, 175 N.W. 372 (1919); Matthiesen & Hegler Zinc Co. v. Indian Bd., 284 Ill. 378, 120 N.E. 249 (1918).

Workmen's compensation law thus completely readjusted the relations between the employer and employee.[114] Although each party lost prior rights, each gained a corresponding benefit. The specific benefit moving to the employee for the loss of his common law right to damages was a fixed guarantee to compensation for all work-related injuries, not merely those where the employer was negligent. On the other hand, the employer lost his common law defenses in exchange for the protection against recurrent litigation and unknown damages. Accordingly, each party received a benefit for the particular interest which he surrendered to the common welfare. This *quid pro quo* is not present in the Indiana Medical Malpractice Act because the patient receives *no* appreciable benefit for surrendering his right to damages which are commensurate with his injury.

2. Indiana's Act distinguished

Indiana's Medical Malpractice Act is distinguishable from workmen's compensation laws examined above by several major differences. Unlike workmen's compensation, the Indiana Act fails to provide reasonable substitutes for the loss and severe impairment of certain common law rights. This failure to provide reciprocal benefits, especially for the ceiling on patients' recoverable damages, violates the minimal requirements of due process.

Although abrogating claimants' interests in common law rights,[115] workmen's compensation laws withstood constitutional challenge because they provided employees with reasonable substitutes for their former rights.[116] Under the compensatory laws, an employee's remedy was broadened to include all work-related injury, not merely injury for which the employer was negligent.[117] The concept of fault was removed as a basis for recovery, thereby eliminating the task of establishing liability for negligent acts.[118] The traditional defenses of contributory negligence, assumption of risk and fellow-servant rule were similarly removed.[119] Another benefit received by employees was the guarantee in all work-related injuries of a definite, *albeit* moderate, amount of compen-

114. New York Central R.R. v. White, 243 U.S. 188, 196 (1917.)

115. Warren v. Indiana Tel. Co., 217 Ind. 93, 102 N.E.2d 399, 403 (1940).

116. New York Central R.R. v. White, 243 U.S. 188, 201 (1916). *See* note 110 *supra* and accompanying text.

117. SCHNEIDER, *supra* note 93, at § 6.

118. *Id.*

119. *See* note 106 *supra.*

sation prescribed by a scheduled rate of recovery.[120] Parties were also assured of prompt recovery with minimal litigation expenses.[121] In exchange for these statutory benefits, an employee surrendered his common law right to damages, an independent determination of actual damages commensurate with the loss incurred, and the right to a trial by jury for a determination of employer liability and damages.[122] In short, courts found a *quid pro quo* resulting from the new system of compensation.

Indiana's Medical Malpractice Act does not, however, provide reciprocal benefits to the patient. In fact, the litigant receives none of the statutory benefits which employees obtained through workmen's compensation for the severe impairment of his right to recover damages. The basis for recovery, unlike workmen's compensation, remains the same as established by the common law.[123] Causation and negligence must still be proved as a prerequisite to damages; the patient remains subject to such defenses as contributory negligence and assumption of risk. There is no guarantee that any loss incurred by injured patients will be recompensed since recovery is completely dependent upon a successful showing of negligence. The requirement that all claims be initially filed with a medical review panel suggests that the new procedure will make prompt recovery and lower litigation costs even less likely than under the former system.

The *only* potential benefit received by patients under the Indiana Act is the guarantee, if the panel finds in his favor, of expert witnesses to appear and testify in his behalf.[124] But, as

120. *See* note 100 *supra.*

121. *See* note 103 *supra.*

122. *See* note 104 *supra* and accompanying text.

123. IND. CODE § 16-9.5-1-1(h) (Supp. 1975), provides:

> "Malpractice" means any tort or breach of contract based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient.

IND. CODE § 16-9.5-1-1(g) (Supp. 1975), defines tort as,

> any legal wrong, breach of duty or negligent or unlawful act or omission proximately causing injury or damages to another.

124. If called by one of the parties, the member of the panel is required to appear and testify at trial. IND. CODE § 16-9.5-9-9 (Supp. 1975).

It may be argued that injured patients will receive a benefit in lower medical costs and more available medical services, both of which will stem from the lower insurance rates which result from the limitation on damage awards. The difficulty with this argument is readily apparent. Malpractice victims must pay the costs of these benefits which would be enjoyed by all of society. *See* Note, *A Constitutional Perspective on the Indiana Medical*

before, the plaintiff must still bear the cost of this testimony.[125] More importantly, however, with the erosion of the "locality rule,"[126] it has become increasingly easier to find and retain qualified experts to testify. The "conspiracy of silence" is simply not the formidable problem it once was. It is clear, then, that this single "benefit" grants victims of malpractice relatively little.

The loss of common law rights and benefits without the substitution of any substantial statutory benefits is particularly unfortunate in light of the need of those particular individuals upon whom the Act forces the brunt of the burden. By limiting damages to $500,000, the Act deprives compensation to those persons who are least able to bear it—the acutely, grievously and oftentimes permanently injured. "Thus," as one commentator aptly observed, "the individual most severely injured will lose the most under the Malpractice Act."[127] Since the victims of malpractice, especially those most seriously injured, gain no perceptible benefit for the loss of their fundamental common law right to damages, the $500,000 maximum ceiling of damage awards in the Indiana Medical Malpractice Act violates due process of law as secured by the fourteenth amendment.[128]

This limitation of damages, coupled with the failure of the Indiana Act to alter the common law cause of action, suffers from yet another defect. The limitation, by restricting the right to a jury to be the sole arbiter on the appropriate amount of damages, violates a patient's right to damages commensurate with injury.

Malpractice Act, 51 IND. L.J. 143, 152 (1975). This societal *quid pro quo* argument was rejected by the Illinois Supreme Court in Wright v. Central DuPage Hospital Ass'n, No. 48075 (Ill., May 14, 1976), wherein the court stated:

> This *quid pro quo* does not extend to the seriously injured medical malpractice victim and does not serve to bring the limited recovery provision within the rationale of the cases upholding the constitutionality of the Workmen's Compensation Act.

Slip opinion at 8.

125. IND. CODE § 16-9.5-9-9 (Supp. 1975).

126. The "locality rule" generally holds that allowance in the standard of care must be made for the type of community in which the physician carries on his practice. W. PROSSER, HANDBOOK ON THE LAW OF TORTS 164 (4th ed. 1971).

127. Note, *A Constitutional Perspective on the Indiana Medical Malpractice Act*, 51 IND. L.J. 143, 152 (1975).

128. The $500,000 limitation in the Illinois medical malpractice act was held to violate due process as well as equal protection of the law in Wright v. Central DuPage Hospital, No. 75L 21088 (Cook Cty. Cir. Ct., Nov. 26, 1975), *appeal docketed*, No. 48075, Ill. Supreme Court, January Term, 1976.

By fettering the jury's discretion, the Act contravenes the constitutional right to a trial by jury.

B. *Deprivation of the Constitutional Right to a Jury Trial for Determination of Reasonable Damages*

The limitation of $500,000 on all malpractice claims under the Indiana Medical Malpractice Act effectively violates a patient's right to have a jury determine damages commensurate with the actual injury sustained. The jury's duty to determine damages is implicitly protected by the express guaranteed in Article 1, § 20 of the Indiana Constitution of a trial by jury in civil actions.[129] Although the Act does not expressly preclude the right to a jury in civil cases,[130] the legislative restriction on medical malpractice claims, by impeding the jury from freely performing its function of assessing damages, deprives the patient of his constitutional right to an unfettered jury determination of reasonable damages. A brief reflection on the historical context and the manner in which courts have interpreted the right to a jury trial reveals a constitutional violation resulting from this unprecedented legislative interference with a jury's duty to determine damages.

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129. IND. CONST. art. 1, § 20, provides: "In all civil cases, the right to trial by jury shall remain inviolate."

130. The Act does expressly prohibit the right to trial by jury in one limited respect. When the insurer admits liability up to the statutory maximum of $100,000, and the insurer, claimant and the commissioner of insurance are unable to agree on the additional amount owing from the patient compensation fund, the "court shall determine the amount for which the fund is liable and render a finding and judgment accordingly." IND. CODE § 16-9.5-4-3(5) (Supp. 1975). Since the claimant in this situation is not even given the opportunity to request a jury, the constitutional violation is quite obvious. It is argued by one writer, however, that since the Act compensates the claimant for the denial of a jury trial by establishing the liability of the provider as a matter of law, a court may find sufficient *quid pro quo* to overcome the rather obvious constitutional infringement. *See Recent Developments: Medical Malpractice*, 9 IND. L. REV. 358, 371 (1975).

Another recent writer has construed IND. CODE § 16-9.5-4-3 (Supp. 1975) to grant the court, when a claim against the compensation fund is made, the power to recompute *all* damage awards, thereby depriving the jury of the power to award damages. *See* Note, *A Constitutional Perspective on the Indiana Medical Malpractice Act*, 51 IND. L.J. 143, 156 (1975). A careful reading of Section 3 of Chapter 4 reveals that the provision is limited to settlement proceedings. Section 3 only applies when the insurer admits liability for the first $100,000 and the commissioner, insurer of the health care provider and the claimant cannot agree among themselves on the added sum which should be paid from the compensation fund.

The right to trial by jury has long been regarded as a basic and indispensable feature of Anglo-American jurisprudence.[131] Originating in the Magna Carta,[132] the right to trial by jury in civil cases was adopted, expanded, and strengthened in this country, as evidenced by its incorporation into the United States Constitution[133] and the constitutions of many states.[134]

Indiana, recognizing that the right to trial by jury is "the most transcendent privilege which any subject can enjoy or wish for,"[135] enacted its constitutional guarantee on November 1, 1885.[136] This constitutional provision has been interpreted to secure the right to a jury trial in all causes of action previously triable by a jury at common law.[137] The drafters of this provision did not intend that this Article extend the right; rather it merely maintained the right as it existed at common law.[138] Consequently, the right to a jury trial is not applicable to statutory actions,[139] special proceedings[140] or suits in equity,[141] but is re-

131. Bailey v. Central Vermont Ry., 319 U.S. 350 (1942). *See also* Collins v. Government of Virgin Islands, 366 F.2d 279 (3d Cir.), *cert. denied*, 386 U.S. 958 (1966); Ney v. Yellow Cab Co., 2 Ill. 2d 74, 117 N.E.2d 74 (1954); People v. Medcoff, 244 Mich. 108, 73 N.W.2d 537 (1955).

132. *See* Deberry v. Cavalier, 113 Cal. App. 30, 297 P. 611 (1931); 50 C.J.S. *Juries* § 9 (1947).

133.

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

134. Louisiana and Colorado are the only states which do not guarantee trial by jury in a civil suit for a common law action.

135. Indianapolis St. Ry. v. O'Donnell, 35 Ind. App. 312, 330-31, 74 N.E. 253, 254 (1905).

136. Coca Cola Bottling Works v. Harvey, 209 Ind. 262, 198 N.E. 782 (1936); Mitlers, Nat'l Ins. Co. v. American State Bank, 206 Ind. 511, 190 N.E. 433 (1934).

137. Dean v. State Bd. of Medical Registration and Examination, 233 Ind. 32, 116 N.E.2d 503 (1954). *See* Warren v. Indiana Tel. Co., 217 Ind. 93, 26 N.E.2d 399 (1940).

138. *Id.*

139. Lake Erie, W. & St. L. R.R. v. Heath, 9 Ind. 558 (1857).

140. Lipes v. Hand, 104 Ind. 503, 1 N.E. 871, *rehearing denied*, 104 Ind. 503, 4 N.E. 160 (1885); Shupe v. Bell, 127 Ind. App. 292, 141 N.E.2d 351 (1957) (statutory pleadings in juvenile court not triable by a jury).

141. Hiatt v. Yergin, 152 Ind. App. 497, 284 N.E.2d 834 (1972); Martin v. Martin, 118 Ind. 227, 20 N.E. 763 (1889); Small v. Binford, 41 Ind. App. 440, 83 N.E. 507, *rehearing denied*, 41 Ind. App. 440, 84 N.E. 19 (1908); McBride v. Stradley, 103 Ind. 465, 2 N.E. 358 (1885).

quired, if requested, in all common law suits based on negligence.[142] An action for medical malpractice, since it was and remains a common law action in tort,[143] is therefore protected by the constitutional guarantee of trial by jury.

Indiana courts have recognized the sanctity of the right to a jury trial and have scrupulously guarded it against any encroachment.[144] Accordingly, any usurpation of the ordinary functions of the jury must be deemed an infringement of the constitutional right; any legislation authorizing such an infringement is therefore unconstitutional.[145] Before demonstrating the manner in which the $500,000 limitation infringes upon the right to trial by jury, a brief examination of the jury's duties in civil actions is necessary.

The jury's responsibilities primarily include a determination of all material factual issues arising in a lawsuit.[146] A suit for

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142. In Warren v. Indiana Tel. Co., 217 Ind. 93, 26 N.E.2d 399 (1940), the Indiana Supreme Court held:

> Actions for injuries to the person caused by the negligence of another were known under the common law of England, and triable by a jury. It follows, therefore, that the right to a jury trial in common law actions for injuries to the person due to negligence is fully protected by Article 1, § 20 of our Constitution.

Id. at 102, 26 N.E.2d at 403; City of Terre Haute v. Deckard, 243 Ind. 289, 183 N.E.2d 815, 817 (1962). *See also* Magner, *A Plea for Proved Values: Keep the Jury in Accident Litigation*, 50 A.B.A.J. 1140 (1964).

143. The Malpractice Act did not supersede or otherwise alter the common law cause of action. Liability of health care providers is premised on a finding of malpractice which is defined as "any tort or breach of contract based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient." IND. CODE § 16-9.5-1-1(h) (Supp. 1975). Under the Act, tort is defined as "any legal wrong, breach of duty, or negligent or unlawful act or omission proximately causing injury or damage to another." IND. CODE § 16-9.5-1-1(g) (Supp. 1975).

144. Indianapolis St. Ry. v. O'Donnell, 35 Ind. App. 312, 74 N.E. 253 (1905). *Cf.* City of Terre Haute v. Deckard, 243 Ind. 289, 183 N.E.2d 815 (1962).

145. 17 I.L.E. *Jury* § 56 (1959). *See also* Kelly v. Herbst, 202 Ind. 55, 170 N.E. 853 (1930); Redinbo v. Fretz, 99 Ind. 458 (1884); Shaw v. Kent, 11 Ind. 80 (1858), Lake Erie, W. & St. L. R.R. v. Heath, 9 Ind. 558 (1857).

146. The seventh amendment right to trial by jury, which is a corollary to the individual state constitutional guarantees, has been construed by the United States Supreme Court to,

> preserve the substance of the common-law right by jury, as distinguished from mere matters of form and procedure, and particularly to retain the common-law distinction between the province of the court and that of the jury, whereby, . . . issues of law are to be

medical malpractice raises at least two material issues: one is the liability, if any, of the defendant;[147] and the other is the amount of damages, if any, incurred by the plaintiff.[148] Under the Indiana Medical Malpractice Act, the jury retains fully the function of resolving the question of liability when the contesting parties are unable to reach a settlement.[149] It still possesses the ultimate power to determine whether in a particular case the defendant-doctor was negligent. However, the jury's determination of damages is severely restricted by the statute's monetary limitation on recovery.

At common law, the right to compensatory damages was an integral aspect of the adjudicatory process.[150] Compensation commensurate with the injury incurred, being a question of fact,[151] was traditionally determined by the jury on an ad hoc basis because it was impossible to set a predetermined standard of recovery which was applicable to the many diverse personal injury

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resolved by the court and issues of fact are to be determined by the jury . . . .

Baltimore & C. Line v. Redman, 295 U.S. 654, 657 (1925). *See* Shearer v. Porter, 155 F.2d 77, 81 (8th Cir. 1946); Novak v. Chicago & Calumet Dist. Transit Co., 235 Ind. 489, 135 N.E.2d 1 (1956); E. CORWIN, THE CONSTITUTION OF THE UNITED STATES, REVISED AND ANNOTATED 895 (1952); Harrington, *Federal Rules of Civil Procedure—Severability of Issues—Do Separate Trials of Issues of Liability and Damages Violate the Seventh Amendment?*, 36 N.D. LAWYER 388 (1961).

147. 70 C.J.S. *Physicians and Surgeons* § 867 (1951); LOUIS AND WILLIAMS, MEDICAL MALPRACTICE, *Damages* ¶ 18.01 at 543 (1975).

148. In Cleveland, Cincinnati, Chicago & St. L. R.R. v. Hadley, 102 Ind. 204, 82 N.E. 1025 (1907), the Indiana Supreme Court concluded that a "determination of the extent of the injury complained of, and the proper compensation therefor, were peculiarly within the province and power of the trial jury. . . ." *Id.* at 216, 82 N.E. at 1030.

An excellent discussion of damages for a malpractice suit can be found in Coombs v. King, 107 Me. 376, 78 A. 468 (1910). *See also* C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES (1935); 4 BELLI, MODERN TRIALS (1959); Bauer, *Fundamental Principles of the Law in Medico-Legal Cases*, 19 TENN. L. REV. 255 (1946); Miller, *The Contractual Liability of Physicians and Surgeons*, 1953 WASH. U.L.Q. 412; *Developments in the Law—Damages*, 61 HARV. L. REV. 113 (1947).

149. IND. CODE § 16-9.5-1-6 (Supp. 1975).

150. *See* Harrington, *Federal Rules of Civil Procedure—Severability of Issues—Do Separate Trials of Issues of Liability and Damages Violate the Seventh Amendment?* 36 N.D. LAWYER 388 (1961).

151. State v. Jacobs, 194 Ind. 327, 142 N.E. 715 (1924); City of North Vernon v. Boegler, 103 Ind. 314, 2 N.E. 821 (1885); Auto Ins. Co. v. Mid-Century Ins. Co., 147 Ind. App. 258, 259 N.E.2d 424 (1970).

situations.[152] What constituted reasonable compensation was an individual determination based on the peculiar circumstances of the injured party.[153]

In Indiana, the ultimate question of the amount of damages in negligence actions also "rests within the province and sound discretion of the jury."[154] A judge may instruct as to the elements of damage but he cannot define or calculate them with mathematical certainty.[155] The jury's liberal discretion affords a plaintiff the opportunity to have objective parties make a reasonable estimate of incurred damages which are commensurate with the actual losses sustained.[156] This method of computation has been utilized repeatedly to resolve personal injury cases.[157]

The importance of the jury and its function of ascertaining damages is underscored by the near absolute discretion granted to the jury in determining the reasonable amount of the award. The jury's decision is controlling, notwithstanding the fact that the trial judge might have awarded a lesser amount.[158] Only when the judge can say that the jury was swayed by such improper motives as passion, prejudice or corruption may the court con-

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152. Haskell & Barker Car Co. v. Trzop, 190 Ind. 35, 128 N.E. 401 (1924); Jackson v. Rutledge, 188 Ind. 415, 122 N.E. 579 (1919); Vandalin Coal Co. v. Yerman, 175 Ind. 324, 92 N.E. 49 (1911); Kavanagh v. Butorac, 140 Ind. App. 139, 221 N.E.2d 824 (1966); Hooper v. Preuss, 109 Ind. App. 638, 37 N.E.2d 687 (1941).

153. Briggs v. Sneghan, 45 Ind. 14 (1873); Shelbyville Lateral Branch R.R. Co. v. Lewark, 4 Ind. 471 (1853); Kavanagh v. Butorac, 140 Ind. App. 139, 221 N.E.2d 824 (1966); Pixley v. Catey, 102 Ind. App. 213, 1 N.E.2d 658 (1936).

154. Illinois Cent. R.R. v. Cheek, 152 Ind. 663, 678, 53 N.E. 641, 646 (1899). *See* Cleveland, Cincinnati, Chicago & St. L. R.R. v. Hadley, 102 Ind. 204, 216, 82 N.E. 1025, 1030 (1907). *See also* Collins v. Clayton & Lambert Mfg. Co., 299 F.2d 362, 365 (6th Cir. 1962); Culbertson v. Haynes, 127 F. Supp. 857 (N.D. Ind. 1955).

155. Vandalin Coal Co. v. Yerman, 175 Ind. 324, 92 N.E. 49 (1911).

156. Magner, *A Plea for Proved Values: Keep the Jury in Accident Litigation*, 50 A.B.A.J. 1140 (1964).

157. *See generally* C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 86 (1935).

158. The "thirteenth juror" rule has been used to describe the relationship of the judge to the twelve jurors and, more specifically, the judge's duty and right to condition a jury verdict or order a new trial if the damages awarded by the jury are in his opinion not supported by a preponderance of the evidence. For a good discussion of the "thirteenth juror" rule, see Borowski v. Rupert, 151 Ind. App. 9, 281 N.E.2d 502 (1972). *See also* Bailey v. Kain, 135 Ind. App. 657, 192 N.E.2d 486 (1963); 2 I.L.E. *Appeals* § 579 (1957).

dition a judgment on an agreement to remittitur of damages or order a new trial on the issue of damages.[159] Even in this situation, however, the judge cannot directly affect the jury award since he cannot force the injured party against his will to accept the lower amount of damages.[160]

In enacting the Indiana Medical Malpractice Act, the legislature infringed on the state constitutional right to a trial by jury for civil suits.[161] The $500,000 limitation on the amount of recoverable damages is an undeniable restraint on the plaintiff's right to have the ultimate damages issue adjudicated by the jury.[162] Whether the specific amount of the limitation established in the Indiana Act is fair and just is not as much a paramount concern as is the constitutionality of the legislature's attempt to invade the

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> On the question of excessive damages in order to justify a reversal "on such ground, the amount of damages assessed must appear to be so outrageous as to impress the court at 'first blush' with its enormity."

Indianapolis Transit, Inc. v. Moorman, 134 Ind. App. 572, 189 N.E.2d 111, 115 (1963), *citing* New York Cent. R.R. v. Johnson, 234 Ind. 457, 127 N.E.2d 603 (1955). *See generally* 2 I.L.E. *Appeals* § 579 (1957).

160. Kennon v. Gilmer, 131 U.S. 22 (1889). *See also* C. McCORMICK, HANDBOOK ON THE LAW OF DAMAGES 77-84 (1935).

161. The seventh amendment to the United States Constitution, which provides for a jury trial in all civil cases over twenty dollars, has not been incorporated into the fourteenth amendment and hence does not apply to the states. *See, e.g.*, Fay v. New York, 332 U.S. 261 (1947); Walker v. Sauvinet, 92 U.S. 90 (1875). Notwithstanding its inapplicability to the states, the seventh amendment is controlling when a malpractice action under Indiana law is filed in federal court under diversity jurisdiction. *See* Simler v. Conner, 372 U.S. 221 (1963); Byrd v. Blue Ridge Rural Elec. Cooperative, Inc., 356 U.S. 525 (1958).

162. One writer has recently stated that the $500,000 limitation on recoverable damages does not violate the right to jury trial. *See* Note, *A Constitutional Perspective on the Indiana Medical Malpractice Act*, 51 IND. L.J. 143, 154 n.65 (1975). The argument runs as follows: Juries decide triable issues of fact. The legislature in enacting a damage limitation eliminates any triable issue of fact above $500,000. Consequently, no question is raised regarding the right to trial by jury. *Id.* Under this analysis, the legislature could presumably limit damages to one dollar without violating the right to trial by jury.

The fallacy of the above argument is plain; it ignores the fact that liability under the Malpractice Act remains based in common law actions of tort or contracts. Unlike workmen's compensation, as the same writer admits elsewhere, "The Malpractice Act . . . in no sense abolishes the cause of action for malpractice." *Id.* at 159. Since the right to jury trial attaches fully to common law actions, see note 142 *supra*, the legislature cannot infringe upon that right either in whole or in part.

established province of a jury. It is contradictory to say that a person has the constitutional right to a trial by jury while tying the hands of the jury by restricting their award to an arbitrary figure, despite the clear weight of the evidence on actual damages. Hence, because the right to a jury trial embraces the guarantee of a jury which freely weighs the evidence presented and awards damages after an independent finding of fact, the $500,000 limitation in the Indiana Act is unconstitutional.

Nor is this constitutional infirmity remedied by arguing that the proposed limitation on damages is a limitation on a patient's right to damages and not a limitation on the right to trial by jury. To accept such a contention would allow the legislature to infringe substantially upon a major function of the jury indirectly even though it could not do so directly. So long as injured patients in Indiana must obtain relief for medical malpractice by suing on common law negligence, they are entitled to a trial by jury. This guarantee includes the independent determination of damages assessed by the jury. Any attempt by the legislature to circumvent the constitutional requirement of civil jury trials in medical malpractice actions is an indefensible violation of the Indiana Constitution. Accordingly, the $500,000 limitation on recoverable damages can only be seen as a clearly unwarranted and illegal infringement on the fundamental right of trial by jury. Furthermore, the $500,000 limitation must be stricken as creating an irrebuttable presumption which denies due process of law.

C. *Precluding A Patient from Proving the Extent of Actual Loss: An Irrebuttable Presumption*

An additional constitutional defect in the Indiana Medical Malpractice Act is the irrebuttable presumption created by the $500,000 damage limitation. By limiting damages to $500,000, the statute conclusively assumes that an injured patient's loss can never exceed that amount in all cases and it precludes him from proving otherwise. Where alternative means are available for accomplishing the legislative purpose of eliminating excessive awards to victims of medical malpractice, a statutory presumption, made conclusive without regard to actualities, contravenes the due process clause of the fourteenth amendment to the United States Constitution. Even administrative convenience and "necessity" cannot justify "denying a litigant the right to prove the facts of his case."[163] Accordingly, the $500,000 ceiling on recoverable damages must fail.

163. Heiner v. Donnan, 285 U.S. 312, 329 (1932).

The rule against statutory irrebuttable presumptions is an integral part of the procedural due process protection afforded by both the fifth and fourteenth amendments.[164] Its force is derived from the requirement that the state may not deprive a person of benefits or property rights without a fair hearing.[165] Stated simply, a statute will be struck down as creating an unconstitutional, irrebuttable presumption if it denies rights and benefits to certain persons on the basis of a legal conclusion which rests upon nonexistent facts and does so without affording the litigant an opportunity to rebut that conclusion.[166] Often such statutes have been advocated on the grounds of administrative efficiency and necessity. But the Supreme Court has been firm in rejecting such contentions, particularly where alternate and less intrusive means are available to the state for accomplishing its objectives.[167]

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164. *See* Vlandis v. Kline, 412 U.S. 441, 446 (1973); Heiner v. Donnan, 285 U.S. 312, 325-26 (1932); Collidge v. Long, 282 U.S. 582, 596 (1930).

It has also been determined that statutes creating irrebuttable presumptions violate the fourteenth amendment right to equal protection. *See* Vlandis v. Kline, 412 U.S. 441, 447 n.40 (1973), *citing* Dunn v. Blumstein, 405 U.S. 330, 349-52 (1972); Shapiro v. Thompson, 394 U.S. 618, 656 (1969), and Carrington v. Rash, 380 U.S. 89, 96 (1965). *See generally* Bezanson, *Some Thoughts on the Emerging Irrebuttable Presumption Doctrine*, 7 IND. L. REV. 644 (1974).

165. United States Dep't of Agriculture v. Murry, 413 U.S. 508, 517 (1973) (Marshall, J., concurring); Bell v. Burson, 402 U.S. 535 (1971).

166. Vlandis v. Kline, 412 U.S. 441, 453 (1973); Stanley v. Illinois, 405 U.S. 645, 657 (1972); Bell v. Burson, 402 U.S. 535, 542 (1971); Heiner v. Donnan, 285 U.S. 312, 325 (1932).

167. In Stanley v. Illinois, 405 U.S. 645 (1972), the Supreme Court stated:

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Id. at 656. The next year, in Vlandis v. Kline, 412 U.S. 441 (1973), the Court, after citing the above *Stanley* quote, continued:

> The State's interest in administrative ease and certainty cannot in and of itself save the conclusive presumption from invalidity under the Due Process Clause *where there are other reasonable and practicable means of establishing the pertinent facts on which the State's objective is premised.*

Id. at 451 (emphasis added). *See* United States Dep't of Agriculture v. Murry, 413 U.S. 508, 513-14 (1973).

The various statutes which have been nullified for creating irrebuttable presumptions illustrate the impermissible character of a statute which denies rights on the basis of a conclusion not necessarily true in fact without affording opportunity to rebut that conclusion. An early example of a statute creating an irrebuttable presumption is a section of the estate tax which treated all gifts made within two years of death as gifts in contemplation of death for estate tax purposes.[168] The underlying assumption was that all such gifts were transferred for tax avoidance and that necessity required including those gifts springing from other motives.[169] Holding that,

> [t]he State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever,[170]

the Court declared:

> [A] statute which imposes a tax upon an assumption of fact which the taxpayer is forbidden to controvert, is so arbitrary and unreasonable that it cannot stand under the 14th Amendment.[171]

An irrebuttable presumption is unconstitutional, the Court concluded, because "a legislative body is without power to . . . deny . . . a litigant the right to prove his case."[172] Although more recent cases have discussed the availability of alternative means for the states to obtain their objective,[173] the Court has continued to nullify statutes which do not allow a person to disprove statutory presumptions.[174]

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168. Heiner v. Donnan, 285 U.S. 312 (1932).

169. *Id.* at 328.

170. *Id.* at 325.

171. *Id.*

172. *Id.* at 329.

173. *See, e.g.*, Vlandis v. Kline, 412 U.S. 441 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Bell v. Burson, 402 U.S. 535 (1971). There is, however, no reported case known to this author which upheld a statute creating an irrebuttable presumption on the sole ground that no alternatives were available to the state to obtain its legitimate objective.

174. *See, e.g.*, United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973) (statute denying food stamp eligibility on basis of irrebuttable presumption of lack of need held unconstitutional); Vlandis v. Kline, 412 U.S. 441 (1973) (irrebuttable presumption of nonresidency of student invalidated); Stanley v. Illinois, 405 U.S. 645 (1972) (irrebuttable presumption preventing unwed fathers' custody of their children violative of due process); Stewart v. Wohlgemuth, 355 F. Supp. 1212 (W.D. Pa. 1972) (irrebuttable presumption terminating welfare benefits of college students violative of due process);

That the $500,000 limitation in the Indiana Medical Malpractice Act establishes an unconstitutional, irrebuttable presumption is clear. Assuming that injuries to victims of medical malpractice cannot exceed $500,000 in value[175] and that necessity requires eliminating excessive awards for this type of personal injury, the statute precludes plaintiffs from proving otherwise. As such, gravely injured patients whose reasonably foreseeable medical expenses and compensable injuries actually do exceed $500,000 are denied "the right to prove [their] case."[176] This denial cannot be countenanced, particularly since alternative means are available for preventing excessive judgments and since no award in Indiana, to this author's knowledge, has ever exceeded this arbitrary amount.

Owens v. Parlam, 350 F. Supp. 598 (N.D. Ga. 1972) (irrebuttable presumption reducing shelter allowance on ground that members of household bear pro rata share of expenses violative of due process); Boucher v. Minter, 349 F. Supp. 1240 (D. Mass. 1972) (irrebuttable presumption terminating shelter allowance where stepfather lives in same house violative of due process).

175. Some may argue that the Indiana Legislature in enacting the $500,000 limitation did not assume any facts at all; that this limitation is a substantive rule of law designed to curb excessive damage awards. Thus, it is contended, the legislature was not at all concerned with making a procedural rule of law which denies injured parties from proving their case. However, even assuming the propriety of this viewpoint, the monetary ceiling on malpractice awards still violates due process. The substance and effect of this statute acts precisely as if it were a procedural presumption—the litigant is deprived of rebutting the statutory presumption that an award to him of greater than $500,000 is excessive.

In Heiner v. Donnan, 285 U.S. 312 (1932), the Supreme Court rejected the contention that a statute which created an irrebuttable presumption is a rule of substantive law rather than procedural law and, hence, should be upheld. In reaching its decision, the Court expressly held the distinction between substantive and procedural law with regard to incontrovertible distinctions immaterial:

> However, whether the latter presumption be treated as a rule of evidence or of substantive law, it constitutes an attempt by legislative fiat, to enact into existence a fact which here does not, and cannot be made to, exist in actuality. . . . It is apparent . . . that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions.
>
> If a legislative body is without power to enact as a rule of evidence a statute denying a litigant the right to prove the facts of his case, certainly the power cannot be made to emerge by putting the enactment in the guise of a rule of substantive law.

Id. at 329.

176. 280 U.S. at 329.

Several less intrusive methods for preventing excessive medical malpractice awards presently exist, and others may be adopted by the state, if large recoveries are shown to be excessive in fact and to pose a real threat to medical services. One means of reducing excessive claims has already been established by the Act itself. The medical review panel[177] enables parties to negotiate a settlement since both sides can compromise and arrive at a satisfactory award. If the panel's decisions are accepted by all parties, the chance of a sympathetic jury and the additional expense of actual litigation are eliminated. Another safeguard which has always been available to the trial judges is remittitur.[178] If the trial judge believes that the jury's award is excessive for any amount due to sympathy, he may condition the monetary judgment on a lower amount of damages. In addition, Indiana could enact laws similar to the workmen's compensation system and abolish the traditional tort-based system of liability. As part of the new system of laws, a scheduled rate of recovery could be enacted making all recoveries subject to a specific limitation.[179] A further remedy to the treatment of excessive damages which the legislature included in the Act is a ceiling on attorney's contingency fees.[180] It is possible that the jury may award lesser amounts to compensate injured persons if they know that the lawyer's fee will not leave the patient undercompensated.

Another reason for striking the irrebuttable presumption established by the $500,000 limit is that although there has never been an award in excess of $500,000, the legislature has adopted a measure which drastically reduces individual rights but does not make anywhere near a commensurate return in achieving the goal of eliminating excessive recoveries. In *United States De-*

177. IND. CODE § 16-9.5-9-1 (Supp. 1975). Similar panels have been declared unconstitutional as violative of due process and free access to the courts. *See, e.g.*, Wright v. Central DuPage Hospital Ass'n, No. 48075 (Ill. S. Ct., May 14, 1976). Pollard v. Hendry County Hospital Authority, No. 75-11 (Hendry Cty. Cir. Ct., Nov. 28, 1975); and Arnold v. Tennessee, No. A-6030 (Tenn. Chancery Ct., Dec. 4, 1975). For a general discussion of the details see 19 A.T.L.A. NEWS LETTER 18 (February, 1976).

178. 9 I.L.E. *Damages* § 168 (1971). *See generally* Indianapolis St. Ry. v. Kane, 169 Ind. 25, 80 N.E. 841 (1907); Conwell v. Jeger, 21 Ind. App. 110, 51 N.E. 733 (1898); Lambert v. Blackman, 1 Blackf. 59 (1820).

179. Replacement of the present malpractice system by a compensatory scheme like workmen's compensation laws would have to provide injured patients with a reasonable substitute for their lost rights. *See* notes 105-14, *supra* and accompanying text.

180. Under the new Act, lawyers' contingency fees are limited to 15% of any recovery above $100,000. IND. CODE § 16-9.5-5-1(a) (Supp. 1975).

partment of Agriculture v. Murry,[181] the Supreme Court struck down a statute which "creates 'an irrebuttable presumption contrary to fact'"[182] and which statute "goes far beyond [Congress'] goal. . . ."[183] The statute under consideration[184] rendered an entire household ineligible for food stamps for two years if a member of that household had been claimed as a tax dependent during the first year by taxpayers who were themselves ineligible for food stamp relief.[185] The Court noted that in enacting the provision, Congress' main concern was with "abuses of the program by 'college students, children of wealthy parents.'"[186] Yet the Act was nullified since,

> [H]ouseholds containing no college student, that had established clear eligibility for Food Stamps and which still remain in dire need and otherwise eligible are now denied stamps if it appears that a household member 18 years or older is claimed by someone as a tax dependent.[187]

Because of the overkill in individual rights compared with the contribution toward eliminating welfare abuse, the Act could not withstand constitutional challenge.

The Indiana Act is similarly defective. A recent commentator has revealed that as of 1975, no award in Indiana has ever exceeded $500,000.[188] It is self-evident, then, that this ceiling will

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181. 413 U.S. 508 (1973).

182. *Id.* at 512, *quoting* district court's opinion, 348 F. Supp. 242, 243 (D.D.C. 1972).

183. *Id.* at 513.

184. 7 U.S.C. § 2014(b) (1973).

185. 413 U.S. at 511.

186. *Id.* at 513.

187. *Id.*, *quoting* district court's opinion, 348 F. Supp. 242, 243 (D.D.C. 1972).

188. One commentator suggests that the medical malpractice problem in Indiana has worsened drastically in the past five years and that preceding this recent phenomena "a malpractice action was rare, and settlement or recovery was even less frequent." Stewart, *The Malpractice Problem—Its Cause and Cure: The Physician's Perspective*, 51 IND. L.J. 134 n.1 (1975). In support of this observation an article in the *Bloomington Daily Herald-Telephone*, Jan. 14, 1975, at 1, col. 1, was cited which stated that the average award in malpractice cases during the 1970 to 1975 period was reportedly $282,403. During the period 1930 to 1970 the average award was reported to be $23,127. *Id.* at n.1.

In direct contrast to these statistics are the findings published by the Department of Health, Education and Welfare and known as the REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE (1973). In this comprehensive report, it was disclosed that more than half of the claimants

do little, if anything, to alleviate the purported problem of excessive awards. To deny those few, very seriously injured litigants who are in actual need of and who are entitled to care and compensation in excess of $500,000, because juries *might* impermissibly make greater awards, cannot be countenanced.

In sum, the $500,000 statutory limitation on awards for medical malpractice creates an unconstitutional irrebuttable presumption. By conclusively presuming that the value of a patient's injuries and his reasonably foreseeable medical expenses can never exceed that limit, the Act denies him the fair hearing guaranteed by due process of law. This deprivation is particularly indefensible in light of the availability of other means for preventing excessive judgments and the slight contribution which this provision will make toward eliminating them.

Thus, the $500,000 limitation on recoverable damages may be assailed on several constitutional grounds. In contravention of due process guarantees and unlike workmen's compensation legislation, it abridges a common law right; yet it does not provide a reasonable substitute. Furthermore, by fettering the jury's discretion to determine damages commensurate with actual sustained injury, the provision violates the right to trial by jury. An additional due process deprivation is the Act's conclusive presumption

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nationwide who received payment obtained less than $3,000 and that only 3 percent of all claimants received amounts in excess of $100,000. *Id.* at 10-11. According to the annual statements filed with the Department of Insurance in 1974 by Medical Protective Company and St. Paul Fire and Marine, the total amount of direct losses paid to Indiana claimants in 1974 was 1.5 million dollars from 6.7 million dollars collected in premiums. *See* Memorandum by John Dickerson and Gavin Lodge, SENATE SUBCOMMITTEE ON INSURANCE AND CORPORATIONS, March 21, 1975.

An extremely thought provoking article recently appeared in C. Hoodenpyl, *Medical Malpractice Litigation in Indiana*, 20 RES GESTAE 126 (March, 1976). A recent survey was conducted of the medical malpractice cases reported by the Court of Appeals and the Supreme Court of Indiana during the last ten years (Jan. 1, 1965 to Dec. 31, 1975) in an effort to evaluate the so-called "crisis" in Indiana. The result of the survey indicated that,

> only twelve medical malpractice cases were reported during the survey period. Of the twelve reported cases, the defendant won six and the plaintiff won six. . . . [I]n only one reported case did the defendant argue on appeal that the damages awarded to the plaintiffs were excessive.

Id. at 128. That case, Carpenter v. Campbell, 149 Ind. App. 189, 271 N.E.2d 163 (1971), involved a jury award for $15,000 in damages to compensate a claimant for hand injuries due to the negligent administration of a caustic drug while hospitalized. *See* C. Hoodenpyl, *Medical Malpractice Litigation in Indiana*, 20 RES GESTAE 126, 128 n.5 (March, 1976) for a list of the cases reported.

that the value of litigants' injuries and reasonably foreseeable medical expenses does not exceed $500,000. Hence, both due process and trial by jury rights require that the limitation on damages be nullified. However, not only is the $500,000 limitation constitutionally suspect, so too is the new statute of limitations applicable to minors who are injured by medical malpractice.

STATUTE OF LIMITATIONS: AMPUTATION OF MINORS' RIGHTS TO EQUAL PROTECTION OF LAWS

In addition to limiting recoverable damages to $500,000, the Indiana Medical Malpractice Act further reduces the financial liability of health care providers by drastically decreasing the time period in which a minor may file a malpractice claim. Prior to this Act, minors were not subject to the two year medical malpractice statute of limitations.[189] As with any legal claim, minors had until their twentieth birthday to bring a malpractice action. The new Act, however, removes the legal disability privilege from minors with malpractice claims[190] by establishing a statute of limitations whereby children under the age of six have until their eighth birthday to file and those over six have only two years from the date of occurrence.[191] It is the contention of this note that this unique statutory provision makes two distinct and arbitrary classifications whereby minors with malpractice claims are deprived of the equal protection of the laws as secured by the fourteenth amendment.

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189. In Chaffin v. Nicosia, 261 Ind. 698, 310 N.E.2d 867 (1974), the Indiana Supreme Court overruled Byrd v. McCullough, 217 F.2d 159 (7th Cir. 1954), which had applied the former two year malpractice statute of limitations, IND. CODE § 34-4-19-1 (1973), to minors. Holding that the malpractice statute "must not be allowed to produce an absurd result, which the legislature, as a reasonably minded body, could not have possibly intended," *Chaffin* held that the legal disability statute, IND. CODE § 34-1-2-5 (1973), was a "legislative recognition of an exception to an otherwise absolute bar on medical malpractice suits." 261 Ind. 698, 310 N.E.2d at 870. Thus, *Chaffin* changed the law so that minors would have two years after the termination of their disability (eighteen years) to file their malpractice claim.

190. The new statute removes *all* legal disability except for the explicit provisions for minors. IND. CODE § 16-9.5-3-1 (Supp. 1975).

191. IND. CODE § 16-9.5-3-1 (Supp. 1975), provides:

> No claim, whether in contract or tort, may be brought against a health care provider based upon professional services or health care rendered or which should have been rendered unless filed within two (2) years from the date of the alleged act, omission or neglect except that a minor under the full age of six (6) years shall have until his eighth birthday in which to file. This section applies to all persons regardless of minority or other legal disability.

The first challenged classification affects all minors and is based upon the type of tortious activity which causes injury. While minors with medical malpractice claims are denied the protection of the legal disability statute, minors with other personal injury actions retain this privilege and, thus, may file their claim at any time prior to their twentieth birthday. The constitutional infirmity of such a classification based on the type of claim is that the state's interest in this field is highly suspect and possibly without merit. Even assuming the validity of that interest, the classification does not rationally promote the purported state interest.

Minors with malpractice claims are further discriminated against by age classification. Those who are less than six years of age are given until their eighth birthday to file their malpractice claims; minors between the ages of six and eighteen lose their cause of action two years after the injury. This legislative classification, based solely on age, it is contended, is arbitrarily and unnaturally drawn, and, hence, cannot withstand an equal protection challenge. Since the two classifications, one based on type of claim and the other on age, are entirely distinct, they will be examined separately. Before analysis begins with the classification based on the type of claim, a brief review of equal protection analysis is warranted.

As a general rule, legislation which classifies groups of citizens does not constitute a denial of equal protection.[192] All classifications must, however, be reasonable, not discriminatory, and apply to and affect equally all persons within the specified classes.[193] To determine whether a particular statute violates the

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192.

> It is unnecessary to say that the "equal protection of the Laws" required by the Fourteenth Amendment does not prevent the States from resorting to classification for the purposes of legislation. Numerous and familiar decisions of this court establish that they have a wide range of discretion in that regard.

F.S. Royster Guana Co. v. Virginia, 253 U.S. 412, 415 (1920). *See also* Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911); District of Columbia v. Brooke, 214 U.S. 138, 150 (1909); Thompson v. Kentucky, 209 U.S. 340, 348 (1908).

193. McLaughin v. Florida, 379 U.S. 184, 190-91 (1964); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920); Barrett v. Indiana, 229 U.S. 26, 29-30 (1913). But, in defining the bounds within which such classifications will be upheld, the court in McLaughin added that,

> [j]udicial inquiry under the Equal Protection Clause, . . . does not end with a showing of equal application among the members of the class defined by the legislation. The courts must reach and deter-

provisions of the equal protection clause, it must be determined whether the statute does, in fact, create different classes of citizens and, if so, whether that classification has any discriminatory effect on either class.[194] The state's interest and purpose in creating the classification must then be examined to determine the authority of the state to interpose its authority on behalf of the public interest.[195] Finally, and most importantly, a determination must be made as to whether the classification created bears any rational relation to the articulated state interest.[196] A statute will be invalidated as violative of equal protection unless it satisfies each of these tests.

A. Classification Based on Type of Claim

The statute of limitations for minors in the Medical Malpractice Act clearly establishes different classes of minors. Minors with malpractice claims are now treated differently than minors with any other type of legal claim. By design, the protection of the legal disability statute, which guarantees to all minors free and meaningful access to the courts,[197] is abrogated for minors with malpractice claims.

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mine the question of whether the classifications drawn in a statute are reasonable in light of its purpose.

379 U.S. at 191. *See* note 196 *infra.*

194. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 20 (1973); State Bd. of Tax Commissioners v. Jackson, 283 U.S. 527, 537 (1931).

195. *See generally Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1077-78 (1969). *Cf.* Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

196. Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 40, 55 (1973); McGinnis v. Royster, 410 U.S. 263, 270 (1973).

197. A fundamental premise of our legal system is that every man, woman and child will have an equal opportunity to present their cases to an impartial court. Willging, *Financial Barriers and the Access of Indigents to the Courts*, 57 GEO. L. REV. 253, 285 (1968), *citing* Address by Professor Lon Fuller, Harvard Law School Sesquicentennial, Sept. 22, 1967. The right to free access to the courts is guaranteed in art. 1, § 12 of the Indiana Constitution. *See* Chaffin v. Nicosia, 261 Ind. 698, 310 N.E.2d 867, 871 (1974). *See also* Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 18:

> Adjudication we may define as a social process of decision which assures to the affected party a particular form of participation, that of presenting proofs and arguments for a decision in his favor. . . . Whatever impairs that participation detracts from its integrity. When that participation becomes a matter of grace, rather than of right, the process of decision ceases to deserve the name of adjudication.

Id. at 19.

Furthermore, minors with malpractice claims are directly injured by the statutory classification. Indeed, the combination of the victim's physical immaturity and often hard-to-detect injuries combine to make the consequence of the deprivation of the protection afforded by the legal disability provision particularly harsh on minors with malpractice claims.[198] Present medical science and technology are understood only by specialists extensively trained in special areas of medicine. The obvious complexity inherent in medical diagnosis and treatment is compounded by the fact that many of the serious injuries are internal and, hence, are detectable only with great difficulty. In addition, certain injuries may not be apparent until the child is an adult. Yet minors, at the peril of losing their right to compensation altogether, are presumed capable of detecting their injuries and are held responsible for filing their malpractice claims at a very early age. Ironically, a child in a personal injury case, who sustains obvious external injuries, is given until his twentieth birthday to file his claim, because he is assumed unable to detect the extent of his disabilities and unable to appreciate their legal ramifications. Yet a child injured by medical personnel is expected to discover and appreciate, both medically and legally, the consequences of complex and severe internal injuries.

Those fortunate minors who do have their day in court have the additional burden of recovering adequate and accurate compensation due to the uncertainty regarding the extent of their injury. It is hornbook law that a plaintiff must prove the extent of his injury with reasonable certainty.[199] But the severity of injury sustained by children is often indeterminable. Accordingly, damage awards and the evidence upon which they are based are more speculative when a child is ten, for instance, than when he matures to the age of majority. A jury faithfully following a court's instructions on reasonable certainty may not adequately compensate an injured child. On the other hand, a jury conscious of these inequities might return a very large award to compensate for these contingencies. Should the latter frequently occur, the Malpractice Act will have contributed to an increase in medi-

198. *See* Chaffin v. Nicosia, 261 Ind. 698, 310 N.E.2d 867, 870-71 (1974).

199.

> The plaintiff has the burden of proving the nature, extent, and permanence or probable duration of his injuries and his loss of time and impairment of future earning capacity.

2 LOUISELL & WILLIAMS, MEDICAL MALPRACTICE ¶ 18.10 (1975). *See generally* W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 30 at 143-44 (4th ed. 1971).

cal costs to insurance companies, rather than the decrease for which it was designed. Should the former occur, the minor or his family will be forced to bear the additional expense incurred by the negligence of a legislatively protected health care provider. In either case, the abrogation of legal disability of minors injured by medical personnel is difficult to support. Not only is it readily apparent that the harshness of immediate liability determinations clearly discriminates against minors with medical malpractice claims, but it is even questionable as a solution to the supposed malpractice insurance crisis. Why then did the state enact such a measure, and what were its interests in doing so?

The Indiana Medical Malpractice Act is a response to the medical profession's highly publicized complaints that they are being victimized by spurious and excessive claims which threaten the future of their profession.[200] In order to protect public health, safety and welfare, the state is attempting to preserve its health care system by eliminating excessive malpractice claims, which are seen as a major factor endangering the health care system. One source of excessive malpractice claims, the legislature apparently feels, is injuries to minors for which claims may not be made until years after their occurrence. Although the state's authority to protect the general public health, safety and welfare is unassailable when a valid threat appears,[201] the need to deprive one class of minors of protection from the legal disability statute in the present situation appears to be a premature exercise of the state's power.

To begin with, no hard data has been introduced to warrant the diminution of rights of injured patients in Indiana. According to the annual financial statements filed by Medical Protective Company and St. Paul Fire and Marine Insurance Company, the number of suits and amount of awards against health care providers in Indiana actually decreased in 1974.[202] In 1973, these two companies processed forty-four hundred claims; in 1974, the num-

200. *See generally* Gray, *The Insurer's Dilemma*, 51 IND. L.J. 120 (1975); Chicago Tribune, February 27, 1976 § 1, at 1, col. 1. A spokesman for the Illinois State Medical Society's board of trustees indicated that "there is a strong sentiment on the part of many doctors to dramatize the seriousness of the problem." One recourse under consideration was a doctors' strike similar to the one earlier this year in California. *Id.*

201. *See* Goldbatt v. Town of Hempstead, 369 U.S. 590, 595 (1962).

202. *See* Memorandum by John Dickerson and Gavin Lodge, SENATE SUBCOMMITTEE ON INSURANCE AND CORPORATIONS, March 21, 1975.

ber of malpractice suits dropped to thirteen hundred.[203] Along with the decreased number of suits, there was a corresponding decrease in the amount of claims paid by insurance companies through settlements and judgments.[204] Thus, Indiana passed this restriction on minors' rights in order to decrease the amount of unwarranted recoveries despite the fact that statistics suggest that insurers of Indiana health care providers were not facing an excessive increase in either the number or amount of claims.

The Indiana Act may also have been based on the assumption that the state should intervene to protect the health care system by decreasing the number of frivolous and spurious suits. There is absolutely no reason, however, to conclude that the claims of minors were either spurious or excessive. No evidence was presented to show that the number of medical malpractice suits was even influenced by the number of suits filed by minors. Regardless of the number of suits initiated by minors, it is irrational to conclude that the claims of minors are always frivolous or spurious when they are not filed for several years after the complained-of negligence.

Perhaps the strongest interest of the state in abrogating the legal disability privilege for minors with medical malpractice claims may have been to protect the insurance industry.[205] It is claimed that in an inflationary economy, the prolonged period in which insurers are exposed to liability makes risk coverage highly uncertain and speculative. According to insurance companies, this uncertainty is partially responsible for causing drastic increases in insurance rates for medical malpractice coverage.[206] But this

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203. The number of suits filed against insureds covered by Medical Protective Company decreased from 658 in 1973 to 137 in 1974. During the same period of time, St. Paul Fire and Marine experienced a similar decline in the number of claims from 3,746 to 1,156. *Id.*

204. In 1973, Medical Protective paid $828,538 in Indiana for "direct losses incurred" (amounts attributed to awards and settlements); in 1974 this amount dropped to $610,117. St. Paul Fire and Marine experienced an increase from $783,779 in 1973 to $946,284 in 1974. The net effect, therefore, in "direct losses paid" by these two companies (writing 80 to 85% of all policies in Indiana) was a decrease of $55,000. *Id.*

205. *See* Mallor, *A Cure for the Plaintiff's Ills?*, 51 IND. L.J. 103, 104 (1975), *citing* STAFF OF SUBCOMM. ON EXECUTIVE REORG. OF THE SENATE COMM. ON GOV'T OPERATIONS, 91st Cong., 1st Sess., *Medical Malpractice: The Patient Versus the Physician* 12 (Comm. Print, 1969).

206. *See generally* ST. PAUL FIRE AND MARINE INSURANCE COMPANY, POSITION PAPER AND BACKGROUNDER [pertaining to medical malpractice coverage] (1975).

extended exposure is not unique to the health care system; all tortfeasors who injure minors are subject to the same threatened financial loss. If insurance companies can effectively force the state to eliminate the legal disability statute to make losses more predictable in medical malpractice, there is no reason why they cannot and would not attempt to do the same for all other types of insurance.[207] Furthermore, no evidence has been presented to justify such harsh treatment of minors injured by negligent medical personnel as opposed to minors injured by negligent automobile operators. In fact, there is absolutely no evidence that the alleged high cost of insurance is caused by minors' malpractice claims.[208] Insurance companies have failed to come forward with any statistical proof of the real causes of rising claims and consequent need for increasing rates in Indiana. In the absence of any true threat to public health or welfare caused by minors, Indiana has no authority to infringe upon their rights by the present assertion of state police power. In any event, insurers can avoid much of the uncertainty which the former legal disability statute causes in rate making by writing "claims made" rather than "occurrence" based insurance.[209]

Even if the state could show a need to protect the health care provider by eliminating minors' legal disability in the Indiana Act, equal protection analysis still demands a determination of whether the classification of minors with medical malpractice claims bears any rational relation to the state's purpose.[210] As noted, the state has an interest in reducing the number of excessive or spurious claims against health care providers and the high cost of insurance. However, a statutory classification,

> must involve something more than mere characteristics which will serve to divide or identify the class. There

207. An excellent brief develops this idea of the so-called "crisis" approach. Brief of Plaintiff-Appellee, Wright v. Central DuPage Hospital Association, *et al.*, No. 48075 (Supreme Court of Illinois, 1976).

208. Noticeably absent from the POSITION PAPER AND BACKGROUNDER by St. Paul insurers was any reference to excessive risks posed by the delayed suits incurred by minors. *See* note 206, *supra.*

209. *See* Note, *The "Claims Made" Dilemma in Professional Liability Insurance*, 22 U.C.L.A. L. REV. 925, 928-29 (1975). A "claims made" policy is one whereby the carrier agrees to assume liability for any errors, including those made prior to the inception of the policy, as long as a claim is made within the policy period. An "occurrence" policy provides coverage for any acts or omissions that arise during the policy period, regardless of when claims are made. *Id.* at 925-26.

210. *See* cases cited in note 196 *supra.*

must be inherent differences in situations related to the subject matter of the legislation.[211]

Under the Indiana Act, minors are denied the protection of the legal disability statute merely because their claims are against health care providers. The purpose of the legal disability statute, however, is to guarantee all minors the right to free access to the courts.[212] Therefore, the privilege may not be denied to minors because of the claims they assert. Rather, the right to extended access to the courts is granted on the assumption that minors, as a natural class, cannot, by using reasonable diligence, utilize the judicial system to protect personal and constitutional rights. Since minors are presently unable to sue for themselves, the legal disability statute affords them an extended period of time to protect those rights.

While the legislature has the power to determine the ages of majority and competency, the competence of a minor to file a claim for damages cannot be distinguished or said to be less impaired because his claim is for medical malpractice. For example, assume that a person negligently runs into another car and injures a child passenger. Although the child may be quite aware of the resultant pain and injury, he is entitled to await his eighteenth birthday and two years thereafter before bringing an action against the negligent party.[213] On the other hand, if a doctor leaves a scalpel or sponge in a six-year-old child, the child will lose his cause of action for negligent injury if he fails to file a suit before he reaches age eight.[214] Identical disabilities and infirmities are shared by both minors; yet the Indiana Act distinguishes minors with medical malpractice claims and denies them the protection available under the legal disability statute.

The same reasons for permitting a minor to postpone a claim for damages applies in both malpractice and non-malpractice cases. Damages are difficult to establish during minority. Indeed, the nature of the injury, its permanency and its subsequent effects are not easy to ascertain. Furthermore, the minor cannot be expected to appreciate and, hence, fully protect the legal rights avail-

211. Heckler v. Conter, 206 Ind. 376, 381, 187 N.E. 878, 879 (1933).

212. *See* Chaffin v. Nicosia, 261 Ind. 698, 310 N.E.2d 867 (1974). *See generally* 43 C.J.S. *Infants* § 19 (1945).

213. The age of majority in the legal disability statute was amended in 1973 to change "persons within the age of twenty-one [21] years" to "persons under the age of eighteen [18] years." IND. CODE § 34-1-2-5 (1973).

214. IND. CODE § 16-9.5-3-1 (Supp. 1975).

able to him. Despite the identical disabilities faced by the minor, in other types of negligence cases he will be able to postpone his claim for damages until age twenty, but in the malpractice case his right to recover damages is lost at age eight, if he is injured when under six, or two years after infliction of an injury when he is older than six.

The extremely harsh and potentially unconstitutional consequences which minors deprived of the legal disability privilege in medical malpractice actions sustain is not ignored by Indiana courts. In *Chaffin v. Nicosia*,[215] the Supreme Court of Indiana, evidencing a deep concern for fully protecting minors, unequivocally rejected an attempt to deny to minors the legal disability privilege in medical malpractice suits. To avoid the "extraordinary harsh result" of a minor losing a valid cause of action,[216] the court construed the legal disability statute as a privilege rather than a statute of limitations so that it would not be in conflict with and therefore superseded by a two-year statute of limitations which ostensibly related to all medical malpractice claims.[217] Admonishing against impeding the rights of minors, the court declared:

> To construe the medical malpractice statute as a legislative bar on all malpractice actions under all circumstances unless commenced within two years from the act complained of (discoverable or otherwise) would raise substantial questions under the Article 1, § 12 guarantee of open courts and redress for injury to every man, not to mention the offense to lay concepts of justice.[218]

Yet, in spite of this recent pronouncement by the Indiana Supreme Court, the Indiana legislature has forged ahead, unhindered by hard, supportive data, and has stripped minors of the protection which the Indiana Supreme Court was so careful to preserve.

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215. 261 Ind. 698, 310 N.E.2d 867 (1974).

216. 261 Ind. 698, 310 N.E.2d at 871.

217. The prior statute of limitations for malpractice read:

> No action of any kind for damages, whether brought in contract or tort, based upon professional services rendered or which should have been rendered, shall be brought, commenced or maintained, in any of the courts of the state against physicians, dentists, surgeons, hospitals, sanitariums, or others, unless said action is filed within two (2) years from the date of the act, omission or neglect complained of.

IND. CODE § 34-4-19-1 (1973).

218. 310 N.E.2d at 870.

Thus, the state's exercise of its police power in denying legal disability protection to minors injured by medical personnel is improvident and perhaps unconstitutional. Many medically caused injuries may go undetected until too late or, for fear of losing a valid claim, minors and their parents might be more likely to file an action. As a result, the number of medical malpractice claims could increase rather than decrease. Furthermore, it is foreseeable that juries would increase the size of verdicts in order to compensate for uncertain but possible complications. Again, the result would be increased insurance premiums. On the other hand, conscientious jurors, faithfully adhering to time-honored legal doctrine, might under-compensate injured minors and thus force the minors and their families to pay for their doctors' mistakes. Regarding the constitutionality of this provision, neither data relating to the general need for malpractice reform nor data relating to malpractice suits by minors has been produced which support the legislature's creation of a classification which works such harsh results on minors. In addition, the Indiana Supreme Court recently cast grave doubt on whether such a provision can pass constitutional muster. As shall be shown, the legislature will probably not fare much better with its age-based classification.

B. Classification Based on Age

The second classification created by the Indiana Act classifies minors with malpractice claims on the basis of age. Minors under six years of age are permitted to file suit until age eight, regardless of when the injury occurred.[219] Minors who are six years or older, however, are given only two years after the date of injury to file a claim for damages.[220] This classification overlooks the characteristic disabilities shared by all minors when it arbitrarily assumes that minors between the ages of six and eighteen years should be treated like adults for purposes of litigating medical malpractice claims.

The gravamen of an equal protection violation is unreasonably treating like groups differently.[221] The legislature cannot take what might be termed a,

219. IND. CODE § 16-9.5-3-1 (Supp. 1975).

220. *Id.*

221. *See* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). *See also Developments in the Law: Equal Protection*, 82 HARV. L. REV. 1965, 1079 (1969).

> natural class of persons, split that class in two, and then arbitrarily designate the dissevered factions of the original units as two classes and thereupon enact different rules of government on each.[222]

The Indiana Medical Malpractice Act, however, redefines the age of legal disability for medical malpractice actions, and, in so doing, enacts one rule of government for one group of children and another rule of government for another group of children. Classes created by changing age limits for legal disability cannot be legitimized where there is no reasonable difference between children of one age and those of another. Absent any reasonable distinction between children under six years and those over six, the classification arbitrarily discriminates in its application.[223]

Minors over six years as well as minors under six have a real need for protection from tortfeasors endowed with superior knowledge of complex medical and legal issues. Regarding the ability to detect latent injury and to assert legal rights, the only difference between a five-year-old and a ten-year-old is that the ten-year-old is five years closer to being able to fend for himself. A child of ten may be more aware and more articulate than a five-year-old child, but it would be ridiculous to assert that the ten-year-old is as astute or as responsible as an adult. Until the child can assume responsibility for the decisions he makes, it would be manifestly unjust to deprive him of a fair opportunity to make those decisions. Instead of recognizing the obvious limitations of all children which mitigate against the effective assertion of their legal rights in the medical malpractice context, the Indiana Act chooses to ignore the disadvantages of those children between six and eighteen years of age.

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222. Fountain Park Co. v. Hensler, 199 Ind. 95, 155 N.E. 465, 467 (1927), *citing* State v. Julow, 129 Mo. 163, 31 S.W. 781 (1895); and State v. Miksicek, 225 Mo. 561, 125 S.W. 507 (1910).

223. A vivid illustration of the necessary distinction required in classifications for legislative purposes can be found in the often repeated language of Tanner v. United States, 240 U.S. 369 (1915):

> Red things may be associated by reason of their redness, with disregard of all other resemblances or of distinctions. Such classification would be logically appropriate. Apply it further; make it a rule of conduct; depend upon it; and distinguish in legislation between red-haired men and black-haired men, and the classification would have only arbitrary relation to the purpose and province of legislation.

Id. at 382.

The discriminatory treatment which is worked by the Indiana Act against minors over six years of age with malpractice claims cannot be justified by their exposure to teachers, medical examiners and other public officials at school. Proponents of the age distinction apparently theorize that school personnel will be able to discover injuries from malpractice which parents do not. But it is difficult to see how a teacher could discover all but the most obvious physical or mental impairment, and, most importantly, know its source. None would deny that children develop at different rates and that some are brighter than others. Similarly, how will the standard vision and hearing examiner discover an internal injury which is not readily apparent? Even if he does, how will he know its full effect on a maturing body? Without substituting an alternative form of adequate protection for those minors above age six, equally in need of that protection afforded by the legal disability statute to those under age six, the Act's two year statute for six- to eighteen-year-olds is a denial of the equal protection of the laws and, as such, cannot be sustained.

Thus, as with the classification based on the type of tortious conduct giving rise to the claim, the Indiana legislature has acted both improvidently and unconstitutionally. Instead of protecting its minor constituents, all of whom suffer from, for all practical purposes, the same limitations, it has denied them the necessary time to discover the existence and the extent of their injuries, and the time necessary to be able to adequately assert their rights. Such legislative largess was accomplished without even providing a reasonable substitute.

In sum, the Indiana legislature, by enacting the statute of limitations for minors with medical malpractice claims, has carved out special privileges for the health care industry. In so doing, it seriously infringes upon the rights of minors who are the victims of this privileged class' negligent acts. Minors who suffer injury through medical malpractice are deprived of any meaningful exercise of their constitutional right to access to the courts. This substantial loss is permitted even though their weaknesses, disabilities and needs are identical to minors injured by non-medical tortfeasors, while this latter group of minors still enjoys the protection of the legal disability statute. The legislature, by protecting the pocketbook of the medical tortfeasor, has amputated the rights of the victim. In addition, and more seriously, this amputation affects those who most need the protection of the Constitution—minors, who cannot articulate their physical and mental condition,

who cannot know the full extent of their injuries, and who cannot act competently to assert and preserve their legal rights.

CONCLUSION

The Indiana Medical Malpractice Act contains several legislative provisions which may be explained with the benefit of reflection and additional information as an overreaction to the present panoply of "crisis" situations. Responding to this "crisis," measures were taken to unduly restrict the rights of injured patients. Persons least able to bear the financial consequences of wayward medical and health care treatment were chosen to sacrifice the greatest protection of the laws. When tested in the courts, several provisions of the Act can expect to receive severe constitutional challenges.

Among the most objectionable provisions of the Act is the $500,000 limitation on recoverable damages. By granting the negligent health care providers limited liability, the Act deprives a patient of the right to reasonable compensation in violation of due process of law. The ceiling on damages is initially a retraction of the common law right to recover a fair award for negligent acts. Unlike the workmen's compensation laws, no reasonable substitute is given in return for the invasion of this right. Additionally, the restriction on the common law right to damages violates the constitutional guarantee of a jury trial by infringing on the jury's duty to determine reasonable damages. Finally, the $500,000 limitation, based on the assumption that awards in excess of that amount are excessive, denies due process of law by creating an irrebuttable presumption which precludes a patient from proving and receiving actual damages beyond that amount.

A second aspect of the Act's unconstitutional restrictions eliminates the legal disability statute for minors who are injured by medical malpractice. By treating minors with malpractice claims differently from minors with other tort claims, the Act creates two separate classifications which are violative of equal protection. The first, based upon the cause of injury, treats more favorably children injured by non-medical tortfeasors. The second, distinguishing between children under six years and older children, grants more favored status to the younger group. In both cases, there are no relevant differences between the classes which warrant unequal treatment. Accordingly, the provision which alters the minor legal disability statute must be stricken as an arbitrarily drawn statute which denies minors equal protection of laws.

Aside from the particularly objectionable portions of the Act itself, the real danger which it presents is the ready resort to limiting individual access to unfettered jury determinations. If the legislature can be influenced by insurance companies and negligent insureds to limit damages in medical malpractice, there is no reason why the same persuasion cannot be as effectively applied to all other claims based on negligence or contract. All lawyers and insurance companies are familiar with the sudden growth of products liability. Is that the insurance companies' next target?[224] Such speculation can hardly be dismissed as alarmism on what seems to be the eve of enactment of federal no-fault legislation for automobile related torts.[225] If the no-fault experience is any indicator, the sad result is that the victims will bear increased cost, and litigation will not be significantly diminished. The genius of the common law is its adaptability. The same is true with capitalism as an economic system. Certain means for reducing malpractice premiums, for example, writing "claims made" insurance, are already available. Rather than hastily impairing full access to courts, legislatures should allow economic factors and the judiciary to solve the "crisis," by means less oppressive to individual freedoms.

224. O'Connell, *Bypassing the Lawyers*, The Wall Street Journal, April 8, 1976, at 16, col. 4.

225. *See, e.g.*, Brock, *Federal "No-Fault" Insurance*, 42 INS. COUNSEL J. 359 (1975); Kircher, *Federal "No-fault" Insurance—S. 354*, 41 INS. COUNSEL J. 602 (1974); Janata, *The National No-fault Motor Vehicle Act*, 41 INS. COUNSEL J. 211 (1974).