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NOTES

CONSTITUTIONALITY OF THE INDIANA MEDICAL MALPRACTICE ACT: RE-EVALUATED

In the early 1970's insurance companies declared a nationwide "medical malpractice crisis."¹ Insurance carriers feared that excess jury verdicts would result in extensive losses due to the insurance industry's inability to anticipate future awards.² As a result, insurance carriers refused to guarantee future insurance coverage to all health care providers.³ The Indiana Legislature responded to this "crisis" by enacting the Indiana Medical Malpractice Act.⁴

Indiana's Medical Malpractice Act was designed to guarantee that health care providers would continue to receive malpractice insurance coverage.⁵ In order to accomplish this guarantee, the Legislature enacted several limiting provisions. A monetary limitation on the amount of damages of \$500,000 per incident⁶ and a reduction in the

1. The "medical malpractice crisis" was not brought about by medical practice but by malpractice insurance carriers. *See generally* L. LANDER, DEFECTIVE MEDICINE: RISK, ANGER, AND THE MALPRACTICE CRISIS (1978).

2. Questions have been raised as to the validity of the "fears" of the insurance industry. In 1974, the average pay out per doctor was \$750, while the average premium paid per doctor was \$3,500. Aitken, *Medical Malpractice: The Alleged "Crisis" in Perspective*, 637 INS. L. J. 90, 97 (February, 1976). *See also* Note, *Alternatives To Litigation: Pretrial Screening and Arbitration of Medical Malpractice Claims: Has Missouri Taken a Giant Step Backward?* 50 UMKC L. REV. 182 (1982).

3. Insurance companies argued that the increased cost of providing health care services, the increase in the number of claims and suits against health care providers, and the unusual size of such claims were forcing them to withdraw from the insuring the high risk health care providers. Hoodenpyl, *Medical Malpractice Litigation in Indiana*, 20 RES. GESTAE 126, 127 (March 1976).

4. Medical Malpractice Act of 1975, IND. CODE § 16-9.5 et seq (1976).

5. Indiana's Legislature failed to state a purpose for the Medical Malpractice Act, however, the Indiana courts have explained the purpose of the legislation. *See, e.g.,* Rohrabough v. Wagoner, ___ Ind. ___, ___, 413 N.E.2d 891, 894 (1980) (the legislature enacted this legislation to prevent the loss of insurance to health care providers); Johnson v. St. Vincent Hosp., ___ Ind. ___, ___, 404 N.E.2d 585, 590 (1980) (the limitations of the Act were written to allow health care insurance carriers to better anticipate their expenses and to guarantee insurance to all health care providers).

6. IND. CODE § 16-9.5-2-2 (1982).

age of disability for minors to age six⁷ are the harshest of the limitations placed on the health care tort victim. Moreover, the legislature defined a statute of limitations for the filing of claims to begin two years from the date of "occurrence" instead of the date of "discovery."⁸ In addition to these limitations, the Legislature created a review panel to screen malpractice claims.⁹ The purpose of the review panel process is to expedite the review of malpractice claims which ordinarily proceed to trial, as well as screen out non-meritorious claims.¹⁰ As a result of these provisions, the Legislature hoped to increase the delivery of health care services and decrease the costs of medical care.¹¹

This note discusses the constitutional implications of the Indiana Medical Malpractice Act. Limitations on the amount of damages available to an injured patient, the age of disability for minors, and the two years from "occurrence" statute of limitations have resulted in classifications which violate the patient's equal protection rights as guaranteed by the Fourteenth Amendment.¹² Admissibility of the review panel's decision in a future court action denies the patient his right to trial by jury.¹³ Actual application of the review panel process has resulted in oppressive delays contrary to the intent of the Legislature.¹⁴ These delays are a violation of both the patient's right to trial by jury and the patient's right of access to the courts.¹⁵ Constitutional implications of the Indiana Medical Malpractice Act make it an invalid method of dealing with the "medical malpractice crisis."

7. IND. CODE § 16-9.5-3-1 (1982). Prior to the Medical Malpractice Act the age of disability for minors was eighteen.

8. *Id.*

9. IND. CODE § 16-9.5-9-3 (1982).

10. The rationale behind legislative provisions establishing review panels or arbitration panels was to screen out unmeritorious claims and to encourage parties to settle valid claims, thereby, expediting the review of malpractice claims. *See supra* note 2 at 185.

11. Sakayan, *Arbitration and Screening Panels: Recent Experiences and Trends*, 17 FORUM 682, 683 (1982).

12. *See infra* notes 123-39 and accompanying text. The two-year statute of limitations is beyond the scope of this Note. Indiana courts have questioned the constitutionality of this limitation. "We have not though, ruled out the possibility of deciding in a future case that this occurrence rule must be applied as though it was a discovery rule due to the questionable constitutionality of the occurrence rule." *Alwood v. Davis*, ___ Ind. App. ___, ___, 411 N.E.2d 759, 761 (1980). *See also Chaffin v. Nicosia*, 261 Ind. 698, 310 N.E.2d 867 (1974).

13. *See infra* notes 162-67 and accompanying text.

14. *See supra* note 5.

15. *See infra* notes 198-201 and accompanying text.

THE INDIANA MEDICAL MALPRACTICE ACT

Patients' claims against health care providers¹⁶ were originally governed by the same statutes governing other tortfeasors.¹⁷ The statute of limitations for filing a malpractice complaint was two years from the date the "cause of action accrued."¹⁸ This statute of limitation was construed to run from the date the injury resulted and damages were ascertainable.¹⁹ A malpractice plaintiff would file his complaint in a court of law and had the right to demand a jury trial.²⁰ An injured patient could recover, without limitation, any amount of damages which the jury awarded and the court found to be reasonable.²¹ However, in 1975 the Indiana legislature enacted the Indiana Medical Malpractice Act which separated "medical malpractice" tortfeasors from all other tortfeasors. In order to understand the implications of separately classifying the "medical malpractice" tortfeasor, one has to be familiar with the procedures involved.

A. *Procedure under the Malpractice Act*

A health care provider qualifies for protection under the Indiana Medical Malpractice Act by meeting the minimal prerequisites of the Act.²² First, the health care provider is required to file proof of financial responsibility²³ with the Indiana Commissioner of Insurance.²⁴ Secondly, the health care provider must pay an annual surcharge²⁵ within thirty days after the premium for malpractice insurance

16. The term "health care provider" includes a person, partner, corporation, registered or licensed nurse, officer or employee, college, university, blood bank and mental health center. IND. CODE § 16-9.5-1-1 (a)(1)(2)(3) (1982).

17. IND. CODE § 34-4-19-1 (1982).

18. IND. CODE § 34-1-2-2 (1982).

19. *Montgomery v. Crum*, 199 Ind. 660, 679, 161 N.E. 251, 259 (1928).

20. *Id.*; see also IND. CODE § 34-1-54-8 (1971).

21. IND. CODE § 34-1-22-1 (1982).

22. IND. CODE § 16-9.5-2-1 (1982).

23. Proof of financial responsibility requires that the health care provider's insurance carrier file proof of the health care provider's policy of malpractice liability insurance. Each health care provider is required to have liability insurance of at least \$100,000 per occurrence and \$300,000 in annual aggregate insurance. A hospital with 100 or fewer beds is required to keep an annual aggregate policy of \$2,000,000, while a hospital with over 100 beds is required to have a minimum of \$3,000,000 in annual aggregate liability insurance. See IND. CODE § 16-9.5-2-6 (a)(1) (1982).

24. A health care provider may also qualify his officers, agents and/or employees for malpractice insurance. In order to qualify they must be named individually or by class in the statement of proof of financial responsibility. Such insurance covers only malpractice within the scope of employment See IND. CODE § 16-9.5-2-1(b) (1982).

25. IND. CODE § 16-9.5-4-1(b)(1982). The annual surcharge is determined by the Commissioner of Insurance based upon actuarial principles.

coverage is received by the health care provider's insurer.²⁶ Failure to pay the surcharge within the time limit results in the suspension of the Act's protection until payment is made.²⁷ If a health care provider fails to meet the prerequisites of the Malpractice Act, a malpractice victim will not be restricted by the terms of the Act.²⁸

The patient of a health care provider that has qualified under the Malpractice Act is similarly required to follow the requirements of the Act to initiate a claim. The injured patient must file a complaint with the Commissioner of Insurance²⁹ within two years of the alleged act, omission, or neglect of the health care provider.³⁰ If the patient is under six years of age at the time of the alleged malpractice, he has until his eighth birthday to file a claim.³¹ After filing the complaint, the patient and the health care provider must wait at least twenty days, at which time either party may file a request for the formation of a medical review panel.³² After the complaint is heard by the medical review panel,³³ the patient has ninety days to refile the complaint with a state court.³⁴

The medical review panel consists of one attorney and three health care providers.³⁵ Time constraints are set for the selection of the panel members to expedite the selection process. The attorney member sits in an advisory capacity, as chairman, and has no vote

26. IND. CODE § 16-9.5-4-1(d)(1982).

27. IND. CODE § 16-9.5-4-1(g)(1982).

28. If a health care provider does not qualify under the Act, the patient's right of action would be governed by the same statutes as other tort claimants' actions. Thus there is no cap on recovery. IND. CODE § 16-9.5-1-5 (1982).

29. IND. CODE § 16-9.5-9-1 (1982). In addition, the statute provides, "no dollar amount or figure shall be included in the demand in any malpractice complaint, but the prayer shall be for such damages as are reasonable in the premises." IND. CODE § 16-9.5-1-6 (1982).

30. IND. CODE § 16-9.5-3-1 (1982). Indiana courts interpret this statute of limitations to be based on an "occurrence" rule rather than a "discovery" rule. Therefore, if the patient fails to discover the malpractice within two years of the day of the physicians conduct, the patients cause of action is lost. *See Colbert v. Waitt*, ___ Ind. App. ___, ___, 445 N.E. 2d 1000, 1002 (1982). The only exception to the statute of limitations is the doctrine of fraudulent concealment. To invoke this doctrine the health care provider must have defrauded the patient in such a manner as to mislead the patient or elude the investigation of the patient who claims the cause of action. *Id.* at 1003.

31. IND. CODE § 16-9.5-3-1 (1982).

32. IND. CODE § 16-9.5-9-1 (1982).

33. Before any action can be commenced in state court, the plaintiff's complaint must be heard by a review panel. IND. CODE § 16-9.5-9-2 (1982).

34. As the statute is written, a defendant cannot file a complaint in a state court. The statute only provides for a filing by the plaintiff. *Id.* *See also* IND. CODE § 16-9.5-5-6 ((1976).

35. IND. CODE § 16-9.5-9-3 (1982).

in the panel's decision.³⁶ The parties must agree upon a chairman within fifteen days after the request for formation of the panel.³⁷ If the parties fail to agree on a chairman the Clerk of the Supreme Court will draw at random a list of five qualified attorneys.³⁸ After a chairman is selected, the Clerk of the Supreme Court has five days to inform the chairman of the selection.³⁹ Within fifteen days after notification, the chairman must inform the Clerk of his acceptance or make a showing of good cause as to his inability to serve.⁴⁰ Once the chairman is confirmed, each party has fifteen days to choose a health care provider to sit on the panel.⁴¹ The third health care provider is selected by the first two health care providers⁴² within fifteen days of their selection.⁴³ After all the members are selected, the chairman must notify the Commissioner of Insurance within five days.⁴⁴ Therefore, the selection process encompasses seventy to ninety days from the request for a formation.⁴⁵

36. It is the chairman's duty to expedite the selection of the panel members, convene the panel, and the panel's decision. The chairman may also schedule reasonable dates for submission of evidence. *Id.*

37. IND. CODE § 16-9.5-9-3(a)(1976).

38. Once the clerk of the Supreme Court has compiled a list of five attorneys, both parties alternatively strike names until only one name remains. If a party fails to strike a name within five days, the opposing party must request the Clerk of the Indiana Supreme Court to strike for them. *Id.*

39. *Id.*

40. IND. CODE § 16-9.5-9-3(a)(2)(1982). The requirements for showing "good cause" are found in subsection (c).

41. If a party is unable to select a health care provider in the prescribed time limit the chairman will choose someone and notify both parties. IND. CODE § 16-9.5-9-3(b)(1)(1982).

42. *Id.*

43. IND. CODE § 16-9.5-9-3(b)(2)(1982). If the two panel members fail to choose the third health care provider within 15 days, he will be chosen by the chairman. *Id.* Either party can challenge the selection of any panel member within ten days of his selection without cause. The party whose member was challenged shall select a replacement. If the challenge involved the third health care provider, the first two health care providers make another selection. If two such challenges are made the chairman shall choose three members and each side shall strike one, the remaining one will take that position. IND. CODE § 16-9.5-9-3(b)(3)(1982).

44. IND. CODE § 16-9.5-9-3(b)(4)(1982).

45. Addition of the minimum number of days under each subsection of section 3 results in 70 days:

| <u>Number of days</u> | <u>Subsection</u> |
|-----------------------|-------------------|
| 15 | (a) |
| 5 | (a) |
| 15 | (a) |
| 15 | (b)(2) |
| 15 | (b)(2) |
| 5 | (b)(4) |

Total 70 days

The medical review panel's sole duty is to determine the validity of the patient's complaint against the defendant health care provider.⁴⁶ Each party may submit evidence to the review panel, including: medical charts, depositions of witnesses, x-rays, lab reports, and excerpts from treatises.⁴⁷ All evidence must be submitted by the parties in written form.⁴⁸ Panel members will review the submitted evidence and may also request additional information, consult with medical authorities, and examine reports prepared by other health care providers.⁴⁹ After submission of the evidence, either party may convene the panel and ask questions concerning any relevant issues before the panel.⁵⁰ The panel has thirty days in which to render an opinion after receiving all of the information and meeting with the parties.⁵¹ The panel has a maximum of 180 days from the date of the selection of the last member to render its expert opinion.⁵² Therefore, the entire panel process should take a maximum of nine months from the date the complaint is filed to the date the decision is rendered.⁵³

A determination by the panel that the defendant's care fell below the community standard of care is followed by the patient's claim for

An additional 20 days can be added to the selection process if lack of agreement between parties causes the clerk of the supreme court to strike names or the chairman to choose names of qualified members. IND. CODE § 16-9.5-9-3 (1982).

46. IND. CODE § 16-9.5-9-7 (1982).

47. IND. CODE § 16-9.5-9-4 (1982).

48. *Id.*

49. IND. CODE § 16-9.5-9-6 (1982).

50. The chairman is the presiding member of the informal meetings of the review board. IND. CODE § 16-9.5-9-5 (1982).

51. One or more of the following expert opinions must be rendered by the panel:

(a) The evidence supports the conclusion that defendant or defendants failed to comply with the appropriate standard of care as charged in the complaint.

(b) 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.

(c) That there is a material issues of fact, not requiring expert opinion, bearing on liability for consideration by the court or jury.

(d) The conduct complained of was or was not a factor of the resultant damages. If so, whether the plaintiff suffered: (1) any disability and the extent and duration of the disability, and (2) any permanent impairment and the percentage of the impairment.

IND. CODE § 16-9.5-9-7 (1982).

52. IND. CODE § 16-9.5-9-3.5 (1982).

53. The total of 270 days or nine months for the panel process includes a maximum of 90 days for the panel selection and 180 days for the panel to render its decision.

damages. If the claim is in excess of one hundred thousand dollars (\$100,000.00),⁵⁴ the plaintiff must file a petition in the court named in the proposed complaint.⁵⁵ The petition will either seek approval of an agreed settlement,⁵⁶ or demand payment of damages from the patient's compensation fund.⁵⁷ After the petition is filed, the Commissioner and either the health care provider or his insurer may agree to settle with the claimant from the compensation fund or file written objections to the payment of the amount demanded.⁵⁸ The judge of the court then sets a court date for the approval of the petition⁵⁹ or a hearing if objections were filed by the health care provider.⁶⁰

A hearing will result in a decision by the court of the amount of the plaintiff's damages. Relevant evidence may be submitted by the Commissioner of Insurance, the claimant, the health care provider, and the health care provider's insurer.⁶¹ After hearing the relevant evidence, the court decides what damages, if any, will be paid by the health care provider and the patient's compensation fund.⁶²

The maximum award the patient can recover from the health care provider and the patient's compensation fund is \$500,000.00. The first \$100,000.00 of the court's judgment or approved settlement is paid by the health care provider's insurance.⁶³ Judgments or settlements in excess of \$100,000.00 are paid from the patient's compensation fund up to the Act's \$500,000.00 limitation.⁶⁴ To receive payment, the patient's attorney must report the judgment or approved settlement to the Commissioner of Insurance within sixty days of the

54. A maximum amount of up to \$100,000 in damages is paid by the health care provider or his insurer. Therefore, damage settlements below \$100,000 do not require review by the Commissioner of Insurance. IND. CODE § 16-9.5-4-3 (1982).

55. IND. CODE § 16-9.5-4-3(1) (1982). A Petition can be filed, in any case, in the circuit or superior courts of Marion County. *Id.*

56. Settlement of the claim at any time during the proceedings is encouraged, the only requirement is that the settlement be approved by the court. *Id.* § 16-9.5-4-2.

57. *Id.*

58. IND. CODE § 16-9.5-4-2 (1982).

59. Any settlement approved by the court cannot be appealed. IND. CODE § 16-9.5-4-3(6) (1982).

60. IND. CODE § 16-9.5-4-3(4) (1982).

61. IND. CODE § 16-9.5-4-3(5) (1982).

62. Any amount awarded in excess of the insurer's liability of \$100,000 is assessed against the patient's compensation fund. *Id.*

63. IND. CODE § 16-9.5-2-2(d) (1982).

64. A balance of \$400,000 is the total portion assessable against the patient's compensation fund. This figure equals the \$500,000 cap on recoveries less the amount of \$100,000 assessable to the health care provider or his insurer. IND. CODE § 16-9.5-2-2(c) (1982).

final disposition.⁶⁵ All claims received by the Commissioner will be computed as of the last day of the year of the decision.⁶⁶ If the full payment of all claims would exhaust the patient's compensation fund, the fund will be prorated over the number of unpaid judgments and the balance paid in the following year.⁶⁷

A patient has ninety days after the panel's decision to file a complaint in a court of law demanding trial by jury.⁶⁸ The complaint cannot include a demand for specific damages, but can include a prayer for "reasonable damages."⁶⁹ At trial the panel's decision is admissible as evidence⁷⁰ and, in addition, either party may call any member of the panel as a witness.⁷¹ The jury may award an appropriate amount of damages up to the \$500,000.00 limitation.⁷² The jury's decision is appealable by either party.⁷³

Indiana Medical Malpractice legislation was drafted to expedite the reviewing of malpractice claims.⁷⁴ All of the steps of the review process are to be completed within prescribed time limits. If one party fails to meet a time limit in the panel selection process, the other party may have the Clerk of the Supreme Court expedite the selection. However, the legislature has failed to provide a remedy if the panel members or non-party participants do not follow the prescribed time limits.⁷⁵ Lack of a remedy for failure to meet prescribed time limitations has resulted in delays in the panel process and, therefore,

65. The statute provides that the report to the commissioner must state: "(a) nature of the claim; (b) damages asserted and alleged injury; (c) attorney's fees and expenses incurred in connection with the claim or defense; and (d) the amount of any settlement or judgment." IND. CODE § 16-9.5-6-1 (1982).

66. IND. CODE § 16-9.5-4-1(j) (1982).

67. *Id.*

68. A decision by a medical review panel is a prerequisite to filing a complaint in state courts. IND. CODE § 16-9.5-1-6 (1982).

69. *Id.* After a panel decision, the complaint must be filed in a court of law having requisite jurisdiction.

70. IND. CODE § 16-9.5-9-4 (1982).

71. *Id.*

72. IND. CODE § 16-9.5-2-2 (1982).

73. IND. CODE § 16-9.5-4-3 (1982). Appeal of a state court decision can be made by either and is governed by the Indiana Rules of Civil Procedure. IND. CODE § 34-1-47-1 (1982).

74. *See supra* notes 5, 10 and accompanying text.

75. The statute provides that "a party, attorney or panelist who fails to act as required by this chapter without good cause shown is subject to mandate or appropriate sanctions upon application to the court designated in the proposed complaint as having jurisdiction." IND. CODE § 16-9.5-9-3.5 (1982). However, this has not been proven to be an adequate remedy for keeping the panel process within the prescribed time limitations. *See infra* notes 76-90 and accompanying text.

few claims receive a review panel decision within the nine month prescribed limitation.

B. Statistical Analysis of the Operation of the Act

Following the legislative procedures, a review panel decision should be rendered within nine months of a request for a panel formation.⁷⁶ However, this nine-month legislative scheme is rarely met due to various delays occasioned during the process.⁷⁷ These delays have been exacerbated by the growing strain on the system caused by the yearly increase in the number of complaints filed.

Complaints against health care providers have steadily increased since the Medical Malpractice Act's inception. In 1975, only one complaint was filed.⁷⁸ The following year the number of complaints increased to eighteen and in 1983 a total of 629 complaints were filed.⁷⁹

76. See *supra* note 53 and accompanying text.

77. See *infra* note 176 and accompanying text.

78. 1983 Ind. Dept. of Ins., Patients Compensation Division year end report [hereinafter cited as INSURANCE REPORT].

79. STATUS OF COMPLAINTS FILED PER YEAR
AS OF DECEMBER 31, 1983

| YEAR | COMPLAINTS FILED PER YEAR | COMPLAINTS PENDING (A) | COMPLAINTS PROGRESS- ING (B) | PROBLEM STATUS (C) | CLOSED (D) | PANEL OPINIONS (E) |
|-------|---------------------------------|------------------------------|------------------------------------|--------------------------|---------------|--------------------------|
| 1975 | 1 | 0(.00) | 0(.00) | 0(.00) | 1(1.0) | 0(.00) |
| 1976 | 18 | 0(.00) | 2(.11) | 0(.00) | 8(.44) | 8(.44) |
| 1977 | 142 | 3(.02) | 5(.04) | 4(.03) | 75(.53) | 55(.30) |
| 1978 | 272 | 11(.04) | 13(.05) | 2(.01) | 151(.55) | 95(.35) |
| 1979 | 319 | 13(.04) | 22(.07) | 9(.03) | 159(.50) | 116(.36) |
| 1980 | 401 | 34(.08) | 56(.14) | 19(.05) | 179(.45) | 113(.28) |
| 1981 | 431 | 63(.15) | 112(.26) | 16(.04) | 143(.33) | 97(.22) |
| 1982 | 556 | 131(.24) | 230(.41) | 14(.03) | 130(.23) | 51(.09) |
| 1983 | 629 | 377(.60) | 191(.30) | 18(.03) | 39(.06) | 4(.01) |
| CUMM. | | | | | | |
| TOT. | 2,769 | 632(.23) | 631(.23) | 82(.03) | 885(.32) | 539(.19) |

- (A) (B) (C) - Current active cases filed with the Patients Compensation Division.
- (A) PENDING - Complaint has been filed, and a request for a medical review panel has been received.
- (B) PROGRESSING - Complaint has been filed, and a request for a review panel has been received. The file will remain in this stage until all the members of a panel have been selected.
- (C) PROBLEMS - Complaint has been filed, but either a dollar amount has been referred to in the prayer, or the health care provider did not comply with the Malpractice Act, or a possible statute of limitations problem.

Accordingly, the number of complaints awaiting panel decisions has also increased.⁸⁰

A total of 2,769 complaints have been filed with the Commissioner of Insurance since July 1, 1975.⁸¹ Of the total number of complaints filed, 1,345 (49 percent) are still awaiting completion.⁸² Only 1,424 (51 percent) of the complaints filed have been completed, and 539 (38 percent) of these completed have received panel decisions. The remaining 885 (62 percent) complaints have been settled prior to the rendering of a panel decision.⁸³ Almost twenty-five percent of the cases filed prior to 1981 are still awaiting a panel decision.⁸⁴ Thirty-six percent of the complaints filed have been pending for a year or longer.⁸⁵ This backlog of complaints can be attributed, in part, to the system's inability to cope with the ever increasing need for decisions.

-
- (D) CLOSED Complaint was filed, but it was closed prior to the rendering of a panel opinion.
- (E) PANEL OPINION - Complaint was filed and a medical review panel rendered an opinion..

1983 Ind. Dept. of Ins., Patient Compensation Division year end report.

80. See *supra* note 79. Each year the number of complaints pending decision has increased significantly.

81. Information available on the status of complaints filed prior to January 1, 1984, is as follows:

| | <u>Number of complaints</u> | <u>% of Total number of complaints filed</u> |
|--------------------------------|---------------------------------|--|
| Opinions rendered | 539 | 19 |
| Settled prior to opinion | 885 | 32 |
| "Problem status" unsettled | 82 | 3 |
| Review panel requested | 631 | 23 |
| Review panel not yet requested | 632 | 23 |
| TOTAL | 2,769 | 100% |

See INSURANCE REPORT, *supra* note 78.

82. The figure of 1345 complaints awaiting completion is computed by adding complaints where a review panel has been requested to the number of complaints where a review panel has yet to be requested and those considered to be in a "problem" status. Of those complaints where a review panel has been requested, 175 have completed the selection process and 456 are still in the selection process.

83. See INSURANCE REPORT, *supra* note 78; see also *supra* note 79.

84. By 1981, a total of 1584 cases had been filed. As of 1983, only 1200 had been completed through settlement or panel decision. The remaining 384 (24%) had yet to be completed. See INSURANCE REPORT, *supra* note 78.

85. In 1982, a total of 2,140 cases had been filed. Of these cases, 759 had yet to be completed as of December 31, 1983. See INSURANCE REPORT, *supra* note 78.

The total number of decisions rendered in any one year has failed to equal the number of complaints pending decisions in that year.⁸⁶ The percentage of panel decisions was at its highest in 1983 when it equalled twenty-seven-and-one-half percent of the complaints filed that year.⁸⁷ As of December 31, 1983, the percentage of complaints requiring panel decisions equalled thirty-eight percent of the total number of causes filed.⁸⁸ If the percentage of panel decisions per complaint continues to increase at the rate of three-and-one-half percent per year,⁸⁹ the backlog of complaints will continue to increase until the year 1986.⁹⁰ Efficient operation of the panel process, as envisioned by the legislature, cannot be achieved until the number of decisions rendered equals the caseload presented and the massive backlog is alleviated.

Medical review panels were established to expedite the procedures involving medical malpractice complaints. Each segment of

86. See *infra* notes 86-90 and accompanying text.

87. MEDICAL MALPRACTICE PANEL OPINIONS

| YEAR | COMPLAINTS | | MATERIAL | | | OPINIONS RENDERED (%) |
|------|------------|-------------|-------------------|------------------|------------|-----------------------------|
| | FILED | MALPRACTICE | NO MALPRACTICE | ISSUE OF FACT | VARIATIONS | |
| 1975 | 1 | 0 | 0 | 0 | 0 | 0(.00) |
| 1976 | 18 | 1 | 0 | 0 | 0 | 1(.05) |
| 1977 | 142 | 1 | 2 | 0 | 0 | 3(.02) |
| 1978 | 272 | 1 | 13 | 0 | 1 | 17(.06) |
| 1979 | 319 | 6 | 33 | 1 | 0 | 40(.12) |
| 1980 | 401 | 7 | 55 | 1 | 6 | 69(.17) |
| 1981 | 431 | 16 | 94 | 4 | 4 | 118(.27) |
| 1982 | 556 | 25 | 85 | 6 | 7 | 123(.22) |
| 1983 | 629 | 21 | 133 | 6 | 13 | 173(.275) |

1983 Ind. Dept. of Ins., Patients Compensation Division year end report.

88. The total number of cases completed as of December 31, 1983 was 1424. Of these 1424 cases, 539 (38.5%) required the rendering of a panel decision. See *supra* note 87.

89. On average, the number of panel decisions per complaint has increased at the rate of 3.5% per year. This figure is computed by taking the percentage of panel opinions in 1983 (27.5%) dividing by the total number of years the Act has been in operation (8.5). See *supra* note 87.

90. Complaints have increased at the rate of 74 per year:

629 (complaints filed in 1983)

(divided by) 8.5 (number of years Act has been in operation)

74 (average amount of additional complaints each year)

Using this figure, as well as the increase percentage of 3.5% as constants, it is possible to estimate when the number of panel decisions will equal the number needed. However, several assumptions must be made. First, the number of complaints needing panel decisions will remain at 38.5 percent. Second, the number of complaints will continue to increase at 74 per year. See *supra* note 90. Third, the number of decisions

the procedure has a prescribed time limitation. However, due to the absence of a penalty for failure of a party to meet a deadline, the number of complaints continue to backlog. Presently, an average of two years is needed for a complaint to pass through the panel process which is far in excess of the statutory nine-month guideline. Therefore, medical review panels in Indiana have failed to expedite the review of claims against health care providers.

THE STATUTORY LIMITATIONS OF THE INDIANA MEDICAL MALPRACTICE ACT AND THE EQUAL PROTECTION CLAUSE

The Indiana Medical Malpractice Act imposes three limitations upon patients injured by health care providers. The first is a two-year statute of limitations for filing claims.⁹¹ A second limitation is a lowered age of disability for minors, from age eighteen to age six, where a health care provider is the tortfeasor.⁹² The third is a \$500,000.00 limitation on the amount of damages a malpractice victim can recover.⁹³ All three of these limitations are constraints on a malpractice victim's equal protection rights as guaranteed by the Fourteenth Amendment.

The equal protection clause of the Fourteenth Amendment guarantees that no state shall "deny to any person within its jurisdiction the equal protection of the laws."⁹⁴ Courts have interpreted this clause to mean that all those who are similarly situated must be

will continue to increase at the rate of 3.5 percent of complaints filed. The following is a mathematical analysis of these assumptions:

| <u>Year</u> | <u>% of opinions/ complaint filed</u> | <u>% short of the needed 38.5%</u> |
|-------------|---|--|
| 1984 | 31% | 7.5 |
| 1985 | 34.5% | 4.0 |
| 1986 | 38% | .5 |

Following the given assumptions the number of opinions rendered equal the number of cases needing decision in 1986. Continuing this analysis one step further, the backlog created prior to 1987 would not be completed until 1994.

91. IND. CODE § 16-9.5-3-1 (1982). The statute of limitations reads: "No claim, whether in contract or tort, may be brought against a health care provider based upon professional services of 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 . . ." *Id.* The doctrine of fraudulent concealment is the only means by which to get an extended period to file. *See supra* note 30.

92. IND. CODE § 16-9.5-3-1 (1982).

93. A plaintiff cannot receive in excess of \$500,000 per injury or death. IND. CODE § 16-9.5-3-1 (1976).

94. U.S. CONST. amend. XIV, § 1.

similarly treated.⁹⁵ Under this interpretation, all victims of tortfeasors are similarly situated since all tort victims have been harmed by the action or inaction of another.⁹⁶ Victims of health care tortfeasors are a lesser-included classification of the larger classification of tort victims. Medical malpractice claimants are dissimilarly treated since they are the only classification regulated by the Indiana Medical Malpractice Act.⁹⁷

The initial question in an equal protection analysis is what standard of review is to be used. Courts traditionally use two standards of review to determine whether a legislative classification violates the equal protection clause.⁹⁸ These standards of review are the "strict scrutiny" and the "rational basis" test.⁹⁹ The Supreme Court over the last fifteen years has been searching for an intermediate standard of review for legislation which does not easily fit under either of the traditional standards.¹⁰⁰ This search has produced a third level of scrutiny which falls somewhere between "strict scrutiny" and "rational basis" tests. This third approach has been referred to as a "means scrutiny" test.¹⁰¹

The "strict scrutiny" standard has the most exacting requirements. A "strict scrutiny" approach is invoked only when a suspect classification or a fundamental right is involved.¹⁰² When a court invokes the "strict scrutiny" standard, the legislature is forced to show a great justification for the classification involved.¹⁰³ For a

95. *Frost v. Corporation Comm'n*, 278 U.S. 515, 522 (1929).

96. All tort victims are harmed due to the negligent action or inaction of another. Under the Medical Malpractice Act those victims who suffer injury due to the negligence of a "health care provider" are treated separately from other tort victims.

97. IND. CODE § 16-9.5-1-1 (1982).

98. See Comment, *Constitutional Challenges to Medical Malpractice Review Board*, 46 TENN. L. REV. 203, 208 (1978-79); Taylor and Shields, *The Limitation on Recovery in Medical Negligence Cases in Virginia* 16 U. RICH. L. REV. 799, 835 (1982).

99. See *supra* note 98.

100. See Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759, 771-72 (1977).

101. A similar test is the "means focused" test. Both tests are an intermediate approach to Equal Protection analysis. For a more detailed discussion on this evolving doctrine, see Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). The reason given for the title "Means Scrutiny" is "[a] 'substantial relationship' must be established between the means and ends of the challenged legislation." *Id.* at 20.

102. In the past, suspect classifications have been based on race and national origin. Rights that have been considered fundamental are voting, procreation, interstate travel, and the ability to present a defense in criminal actions. *Johnson v. St. Vincent Hosp. Assn.*, ___ Ind. ___, ___ 404 N.E.2d 585, 596-97 (1980).

103. *Horton v. Califano*, 472 F.Supp. 339, 343 (W.D.Va. 1979).

statute to remain valid under a "strict scrutiny" approach the legislature is forced to prove that the statute's classification is required by a "compelling state interest" and that no "less drastic means" are available to accomplish the "compelling state interest."¹⁰⁴

Legislation that involves neither a suspect class nor a fundamental right¹⁰⁵ is reviewed under the "rational basis" test. Under the "rational basis" approach a statute is valid as long as the legislation is not arbitrary and is reasonably suited to achieve the legislature's objective.¹⁰⁶ In applying the rational basis test, the court need only find a rational nexus between the legislative classification and a permissible government goal.¹⁰⁷ The governmental goal identified by the court need not be the goal intended by the legislature.¹⁰⁸ Due to the minimal level of scrutiny and the court's ability to find a permissible governmental goal, classifications which are analyzed under the "rational basis" test are almost always upheld.¹⁰⁹

Review under a "means scrutiny" approach falls between that of the "strict scrutiny" and "rational basis" approaches. "Means scrutiny" analysis was first used by the United States Supreme Court in *Reed v. Reed*,¹¹⁰ when it declared an Idaho statute unconstitutional because it gave preference to men over women as estate administrators.¹¹¹ Under the "means scrutiny" test a legislative "classification must be reasonable, not arbitrary, and must rest upon

104. See *Britton v. Rogers*, 631 F.2d 572, 576 (8th Cir. 1980) (governmental action against blacks as a racially defined class is subject to "strict scrutiny"); *Fullilove v. Kreps*, 584 F.2d 600, 603 (2d Cir. 1978) (public works employment does not require "strict scrutiny" evaluation).

105. See note, *Legislative Purpose, Rationality and Equal Protection*, 82 YALE L.J. 123 (1972).

106. *McGowan v. Maryland*, 366 U.S. 420 (1961). The Supreme Court explained, "A statutory discrimination will not be set aside if any statement of facts reasonably may be conceived to justify it." *Id.* at 425-26.

107. See *supra* note 104, at 144; see also, e.g., *Ohio Bureau of Employment Serv. v. Hodory*, 431 U.S. 471 (1977).

108. The rational basis test allows the court to find a justifiable purpose for a particular statute. Thus an imaginative reviewing court could validate any discriminatory legislation depending on its adherence to the theory of judicial restraint. *Jones v. State Board of Medicine*, 97 Idaho 859, 871, 555 P.2d 399, 411 (1976).

109. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 426 (1961).

110. 404 U.S. 71 (1971).

111. 404 U.S. at 77. "Regardless of their sex, persons within any one of the enumerated classes of [administrators of estate] are similarly situated with respect to that objective. By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause." *Id.*

some ground of deference having a fair and substantial relationship to the object of the legislation."¹¹² The legislature must show the means utilized are reasonable.¹¹³ If the legislature fails to state a rational objective for the means used, the court will not search for a legitimate state purpose, and will hold that the legislative classification is violative of the equal protection clause and, therefore, unconstitutional.¹¹⁴

Indiana's Supreme Court has not found the classifications of the Indiana Malpractice Act to be a violation of the equal protection clause.¹¹⁵ Indiana's Supreme Court has always applied the "rational basis" test when analyzing equal protection questions involving medical malpractice legislation.¹¹⁶ "Strict scrutiny" analysis has not been applied because the courts have never found a fundamental right to exist in collecting damages for medical malpractice injuries,¹¹⁷ nor have the courts found a suspect class in health care tort victims.¹¹⁸ Due to the court's ability to find a permissible legislative goal under the "rational basis" approach, the Indiana Medical Malpractice Act has not been found to be a violation of the equal protection clause.¹¹⁹ However, Indiana courts should reach a different conclusion if the "means scrutiny" analysis were applied to the classifications resulting from the limitations of the Indiana Medical Malpractice Act.¹²⁰

112. *Id.* at 76. The Idaho Supreme Court opined that Medical Malpractice legislation needs to be analyzed under a stricter standard than the traditional "rational basis" analysis and applied the "means scrutiny" analysis in evaluating its Medical Malpractice legislation. The "means scrutiny" analysis was also used by the North Dakota Supreme Court in *Arneson v. Olson*, 270 N.W.2d 125 (N. D. 1978) to evaluate a medical malpractice act.

113. *See supra* note 101, at 21.

114. Taylor and Shields, *supra* note 98, at 843. The Act violates the equal protection clause if the court fails to find that the "means reasonably, fairly, and realistically achieve the objectives of the legislation." *Id.*

115. *See Rohrbaugh v. Wagoner*, ___Ind.___, 413 N.E.2d 891 (1980); *Johnson v. St. Vincent Hosp.*, ___Ind.___, 404 N.E.2d 585 (1980).

116. *Id.*

117. *Rohrbaugh*, ___Ind. at ___, 413 N.E.2d at 893.

118. *See supra* note 102. The challenged classifications under the medical malpractice act do not fall among those listed as "suspect" by the United States Supreme Court.

119. *See supra* note 114.

120. [T]hose courts striking down medical malpractice legislation on equal protection grounds have all utilized a more exacting standard of review than mere rationality. Although these courts have explicitly concentrated on the factual nexus between purpose and means, an implicit evaluation of conflicting interests also appears to play a prominent role in the judicial decisionmaking process. The courts have balanced state goals, assuring adequate health care and lowering malpractice insurance costs, with the

The great significance of the right to recover for bodily injury justifies application of the intermediate, "means scrutiny" standard. Full compensation for tort injuries is a state-created right.¹²¹ Since, as a state-created right, the right to collect for bodily injury is not considered a "fundamental" right the "strict scrutiny" standard cannot be applied.¹²² However, as a state-created right, the right to collect for bodily injury warrants application of a stricter standard than "rational basis."¹²³ Therefore, the Medical Malpractice Act should be examined under a "means scrutiny" approach.¹²⁴

Following a "means scrutiny" examination, the disability age for minors classification of the Act is a violation of equal protection. The Act grants children a "disability" classification until the age of six.¹²⁵ If the malpractice occurred any time prior to the child's sixth birthday, he can file a claim until he reaches his eighth birthday.¹²⁶ The victims of other types of tortfeasors receive a disability until they reach age eighteen allowing them the ability to file a claim until age twenty.¹²⁷ Under "means scrutiny" analysis the legislature must show that the different treatment of minor tort victims is legitimately related to an objective of the malpractice statute.¹²⁸

The aim of the Indiana Medical Malpractice statute is to keep

interests of victims of medical malpractice. In each instance, the constitutional balance has favored those victims.

Note, *California's Medical Injury Compensation Reform Act: An Equal Protection Challenge*, 52 S. CAL. L. REV. 829, 880 (1979).

121. A plaintiff is entitled to damages for injuries proximately caused by the breach of a duty owed to him. *Indiana Bell Tel. Co., Inc., v. O'Bryan*, ___ Ind. App. ___, ___, 408 N.E.2d 178, 184 (1980).

122. See *supra* note 102, for a list of rights the Supreme Court has considered "fundamental."

123. *Carson v. Maurer*, 12 N.H. 925, 930, 424 A.2d 825, 830 (1980). See also Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759 (1977)

124. See Redish, *supra* note 6, at 774. For a discussion of the two year statute of limitations, see generally *Carmichael v. Silbert*, ___ Ind. App. ___, ___, 422 N.E.2d 1330, 1332 (1981).

125. See *supra* note 92.

126. *Id.*

127. The New Hampshire Supreme Court found a reduced minority classification under the Medical Malpractice Act to be unconstitutional. "It extinguishes rights conferred by RSA 508:8, which provides: 'An infant or mentally incompetent person may bring a personal action within two years after such disability is removed.'" (In New Hampshire minority under the Medical Malpractice Act was eight years of age). *Carson* at 933, 424 A.2d at 833.

128. See *supra* note 111 and accompanying text.

down medical malpractice insurance costs.¹²⁹ Restricting the amount of time in which a minor can file suit is intended to enable insurance carriers to better determine the amount of losses and thus provide more reasonable insurance prices to health care providers.¹³⁰ However, studies show that the number of recoveries by minors is only a few percent of the total number of recoveries.¹³¹ The incidental number of additional claims that may arise under the Indiana minor's disability statute for tort victims does not justify the harsh penalty inflicted upon those minors, who because of their age, limited experience, and lack of knowledge, do not learn of their injury until after the statute of limitations has expired.¹³² Therefore, the separate classification of minors is not a "reasonable" means of keeping down medical malpractice costs. Under "means scrutiny" analysis the classification does not have a fair and substantial relationship to the object of the legislation and is a violation of the victim's right of equal protection guaranteed by the Fourteenth Amendment.

Similarly, the limitation on recoveries under the Indiana Medical Malpractice Act also results in a classification which should be analyzed under a "means scrutiny" approach of equal protection analysis.¹³³ The \$500,000.00 cap on recoveries separates out a small

129. The Legislative purpose of the Indiana Medical Malpractice Act is to limit the awards to injured patients in order to appease the insurance industry and guarantee future insurance to health care providers. See *supra* note 5.

130. *Carson* at 934, 424 A.2d at 834.

131. See C. Hoodenpyl, *Medical Malpractice Litigation in Indiana - a Ten Year Survey*, 20 RES GESTAE 126, 128 (1976).

132. *Carson v. Maurer*, ___ N.H. ___, 424 A.2d 825, 834 (1980). The Indiana Supreme Court, discussed the old minority disability, one year before the Malpractice Act was enacted, and stated,

It makes practical sense particularly with respect to infants who, because of their youth, cannot be expected to articulate their physical and mental condition or to realize and act timely to preserve their legal rights. It is not difficult to conceive of situations where the results of medical malpractice upon an infant could remain undiscovered for a number of years.

Chaffin V. Nicosia, ___ Ind. ___, ___, 310 N.E.2d 867, 871 (1974).

133. See *supra* note 111 and accompanying text. The concept of due process is not discussed as an individual topic of this Note. Arguments of due process violations can be found in the equal protection, right to jury trial, and access to court sections, as well as in the following discussion.

The Indiana Supreme Court addressed the constitutionality of Indiana's Medical Malpractice Act in *Johnson v. St. Vincent Hosp.*, ___ Ind. ___, 404 N.E.2d 585 (1980) including a comparison to the Price-Anderson Act. 42 U.S.C. § 2200 et. seq. (1957). The Price-Anderson Act sets a 560 million dollar ceiling on the aggregate liability of licensed private nuclear power companies and the government per nuclear incident. The limit on liability is a legislative assurance given to the nuclear power industry

group of medical malpractice victims and denies them the same opportunities for monetary recovery possessed by all other tort

that it will not be exposed to unlimited liability in case a nuclear incident occurs. This ceiling provision was motivated by the legislature's desire to encourage continued research and development by the nuclear power industry.

The Price-Anderson Act's ceiling on liability includes several statutory provisions. Each licensee is required to keep up to \$60 million of private financial protection per incident. The United States Government is responsible for keeping an additional \$500 million available for damages in excess of \$60 million. Thus, the aggregate liability, under the Act, is limited to \$560 million per single nuclear incident. In addition, the Price-Anderson Act also provides that in the event that the damages from a single nuclear incident exceeds the aggregate limitation the Congress will review the situation and take any action necessary to protect the public from the consequences.

The reasonableness of the legislature's \$560 million ceiling was later examined under both the due process and equal protection clauses of the Fifth Amendment. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978). In *Duke* the Supreme Court predicated its decision on two major presumptions. The first was the correctness of expert appraisals that the risk of a nuclear incident with damage claims in excess of \$560 million was slight. The second was that in the event of a large scale nuclear incident Congress would likely enact extraordinary relief. *Id.* A House report supported the Court's second presumption. This report asserted, "The limitation of liability serves primarily as a device for facilitating further congressional review of such a situation rather than a bar to further relief of the public." H.R. Rep. No. 833, 89th Cong. 1st Sess. 6-7 (1965). The Court recognized that the individuals that resided around nuclear power plants had a property right in receiving damages but balanced the right against the need for nuclear power and the protection provided by the two presumptions and found the Act was not a violation of the due process clauses of the Fifth Amendment.

The Indiana Medical Malpractice Act's ceiling does not include the presumptions found by the Supreme Court in the Price-Anderson Act. The malpractice fund operates in a similar fashion as the Price-Anderson Fund. Each health care provider is responsible for the first \$100,000 in damages per incident after which the fund pays the balance of damages up to the \$500,000 ceiling. However, this is the only similarity. The fund, itself, is not supported by any government money; instead, each health care provider pays an annual surcharge to finance the fund. In addition, there is not a government agency that will step in and review a patient's damages if it exceeds \$500,000. Thus, no matter what amount a patient's damages exceed the limitation, the patient is forced to pay this excess expense on his own.

The failure of the Indiana Medical Malpractice Act to provide a review for patients whose damages exceed \$500,000 prevents it from being justified by a comparison to the Price-Anderson Act. The Price-Anderson Act did not violate property owners' due process rights because of the legislative commitment to take whatever action was necessary and appropriate to protect the public from the consequences of a nuclear disaster. A malpractice victim has a property interest in his right to recover for bodily injury. However, a malpractice victim does not have the same legislative commitment to take whatever action is necessary to protect him from the consequences of a malpractice disaster. Therefore, the Indiana Malpractice Act's ceiling on liability cannot override due process and equal protection challenges in light of the *Duke Power* decision.

victims.¹³⁴ Only this group is denied the opportunity for full recovery for expenses and pain and suffering possessed by all other victims of tortfeasors.¹³⁵ The legislative purpose behind this cap was to keep down the costs of malpractice insurance and to provide adequate compensation for those with meritorious claims.¹³⁶

The cap on recoveries is not a reasonable means of meeting the objectives of the malpractice Act. The legislature has argued that this cap benefits all injured patients since it reduces medical costs and guarantees the continued availability of medical care in Indiana.¹³⁷ While few claims exceed the \$500,000.00 limitation, in extreme cases the victims medical costs alone may greatly exceed \$500,000.00¹³⁸ These unfortunate malpractice victims are denied full recovery so that all other injured patients may enjoy slightly lower medical costs. Under "means scrutiny" analysis the \$500,000.00 limitation is arbitrary and is an unreasonable means¹³⁹ by which to meet the objectives of the legislation. There is no statistical information proving that the cap

134. For the purpose of this Note, malpractice victims with claims under \$500,000 are included in the group of all other tort victims.

135. A health care tort victim with expenses over \$500,000 is injured twice. He must not only suffer at the hands of the negligent doctor, but also must pay for the cost of medical expenses in excess of \$500,000. See Note, *Malicious Prosecutions and Medical Malpractice Legislation in Indiana: A Quest For Balance*, 17 VAL U.L. REV. 877, 885 (1983).

136. See *supra* note 3.

137. Health care providers argue that the unequal treatment, of the cap on recoveries, is necessary due to the "crisis." Thus, the legislature can set such limits even if it denies some plaintiffs full compensation for their injuries. See, e.g., *Wright v. Central Du Page Hosp. Ass'n*, 63 Ill. 2d 313, 318, 347 N.E.2d 736, 741 (1976). However, the burden of keeping down health care provider's insurance falls exclusively on those unfortunate victims who need the most financial protection. See *supra* note 133 and accompanying text.

138. *Arneson v. Olson*, 270 N.W.2d 125, 135-36 (N. D. 1978). "[T]he very seriously injured malpractice victim, because of the recovery limitation, might be unable to recover even all the medical expenses he might incur, in which event he would recover nothing for any other loss suffered." *Id.* at 136.

Does the "medical malpractice crisis" justify telling a malpractice victim that he may not have full recovery of even expenses when if he had been in a "rear-end collision of a fiery Pinto" he would have received full compensation, as well as pain and suffering? See Note, *Medical Malpractice Act: Limit on Damages for Noneconomic Losses Held Unconstitutional*, 22 ATL. L. REV. 39, 40 (1979).

139. See Note, *Medical Malpractice Statute-Medical Malpractice Statute Declared Unconstitutional*, 1977 WIS. L. REV. 203, 224 (1977). The \$500,000 limitation on recoveries of the Illinois Malpractice Act is invalid on traditional equal protection grounds because there is no reasonable basis for its distinguishing medical malpractice victims with more than \$500,000 damages from those with less than \$500,000 damages. *Id.* See also *Wright v. Central Du Page Hosp. Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976). The

on recoveries is a valid solution to keep down the rising costs of malpractice insurance.¹⁴⁰ Victims with valid claims in excess of \$500,000.00 are discriminated against in an unfair and illegitimate manner and there exists, therefore, a violation of the equal protection clause under "means scrutiny" analysis.

Classifications imposed by the Indiana Medical Malpractice Act fail to meet the standards of the "means scrutiny" test. These classifications are the result of statutory limitations prescribed in the Medical Malpractice Act. Without these limitations the Act cannot operate as the legislature intended and, therefore, they are not severable from the Act.¹⁴¹ Due to these classifications, the Indiana Medical Malpractice Act is unconstitutional as a violation of the equal protection clause.

Classifications resulting from the limitations of the Indiana Medical Malpractice are a violation of the Fourteenth Amendment right of equal protection under the laws. Actual operation of the Act also results in a violation of the right to trial by jury. Although the federal constitutional right to trial by jury has not been extended to the States, the Indiana Constitution guarantees such a right.¹⁴²

PANEL DECISIONS AND THE RIGHT TO TRIAL BY JURY

The Indiana Medical Malpractice Act provides that a review panel's decision is admissible in later court hearings.¹⁴³ A plaintiff may submit his complaint to a court of law and demand a right of trial by jury once a panel decision is rendered.¹⁴⁴ At a trial, the conclusion

initial legislative judgment was a prediction and with the passage of time new information about the operation of the Act has shown that what was originally considered a rational balance is irrational. Therefore, this original legislation should be evaluated in light of this new information. See Bennet, "Mere" Rationality in Constitutional Law: *Judicial Review and Democratic Theory*, 67 CALIF. L. REV. 1049, 1065 (1979).

The insurance industry requested changes in the legislation in order to guarantee that health care providers could be provided with insurance. They argue that without such provisions they are unable to determine what the future "payouts" will be and, therefore, certain health care providers are too risky to insure. See *supra* note 5.

140. The North Dakota Supreme Court failed to find an insurance crisis and concluded that the drastic limitation on recovery of \$300,000 was a violation of Equal Protection. See *Arneson*, 270 N.W.2d at 136.

141. *Ind. Educ. Employment Relations Bd. v. Benton Community School Corp.*, 266 Ind. 491, 510, 365 N.E.2d 752, 762 (1977). Absence of a severability clause creates the presumption that legislature intends statute to be effective in its entirety or not at all. *Id.*

142. See *infra* note 145.

143. See *supra* note 70 and accompanying text.

144. See *supra* note 68 and accompanying text.

of the review panel is admissible.¹⁴⁵ Constitutional, as well as evidentiary questions¹⁴⁶ are raised by the admission of a panel decision to the jury. Conclusions of the panel that the health care provider acted within the appropriate standard of care effectively removes the fact-finding process from the jury.¹⁴⁷ Therefore, the result is a stripping away of the patient's right to a trial by jury.¹⁴⁸

A claimant who feels that the panel's decision is improper may elect that his cause of action be heard by a jury of his peers.¹⁴⁹ This jury should be composed of members of the community who are not health care providers.¹⁵⁰ As such, they must rely on the testimony of those who are more familiar with the field of medicine.¹⁵¹ The injured patient-plaintiff will carry the burden of showing that the defendant was negligent in providing care.¹⁵² After hearing all of the expert testimony, the jury must determine whether the plaintiff has met his burden.¹⁵³

145. See *supra* note 70.

146. Evidentiary issues are beyond the scope of this Note; however, the admissibility of panel decisions is essentially a rule of evidence. For further discussion see Quinn, *The Health Care Malpractice Claims Statute: Maryland's Response to the Medical Malpractice Crisis*, 10 U. BALT. L. REV. 74, 87 (1980).

147. The jury gives great weight to the panel's decision due to the number of experts on the panel. Therefore, the factfinding process of the jury is severely handicapped or totally removed. See *infra* notes 139-60 and accompanying text.

148. *Ind. Const.* art. I, § 20, guarantees that every person shall have a right to trial by jury. The right to a jury trial for personal injury (tort) was triable at common law and, therefore, is triable by a jury under the Indiana Constitution. *Tompkins v. Erie R.R. Co.*, 98 F.2d 49, 52 (2d Cir.), *cert. denied*, 305 U.S. 673 (1938).

149. *IND. CODE* § 16-9.5-1-6 (1976). A health care provider does not have the opportunity to bring an adverse opinion to a trial court. *Id.*

150. A health care provider would be dismissed for cause or through peremptory challenge from serving on most juries reviewing malpractice claims due to possible prejudice. *Brinkman v. Hovermale*, 106 Ind. App. 70, 73, 13 N.E.2d 885, 886 (1938).

151. Due to the complexities of modern day medical technology, persons not involved in the medical science field do not usually have the background to decipher the technical evidence presented it.

152. The plaintiff must prove three elements to establish a prima facie case of medical malpractice. He must first show that the physician owed him a duty. Second, that the defendant-physician breached that duty by allowing his conduct to fall below the community's standard of care. Thirdly, that the defendant's breach of duty caused compensable damages to the plaintiff. *Dolezal v. Goode*, ___ Ind. App. ___, ___, 433 N.E.2d 828, 831 (1982). The doctrine of *res ipsa loquitur* is applicable if the injury is of such a nature that it would not occur without an act of negligence. See *Carpenter v. Campbell*, 149 Ind. App. 189, 194, 271 N.E.2d 163, 165 (1971).

153. See, e.g., *Kranda v. Houser-Norborg Medical Corp.*, ___ Ind. App. ___, 419 N.E.2d 1024, *reh'g. denied*, 424 N.E.2d 1064 (1981).

The admission of a negative panel finding¹⁵⁴ creates a presumption of the defendant's innocence and, thus increases the plaintiff's burden of proof.¹⁵⁵ In order to show liability on the part of the defendant, the patient must prove that the physician's conduct fell below the community standard of care.¹⁵⁶ Admission of a finding by a panel of three experts,¹⁵⁷ that the physician's conduct fell within the appropriate standard of care, will necessarily carry great weight in the jury's decision.¹⁵⁸ Therefore, the plaintiff is required to prove not only that the defendant's conduct was below the requisite standard, but also, that the panel of experts was incorrect.

Proponents of the admissibility of the review panel findings advance three supportive assumptions. First, the panel decision is necessary to aid the jury's fact-finding process and help the jury properly weigh this evidence against other evidence presented it.¹⁵⁹ Secondly, they assume that allowing the panel decision to be admitted into evidence will add more credibility to the review process, thereby causing the litigants to take the process more seriously and to come to the panel better prepared.¹⁶⁰ Finally, proponents assume that a disappointed litigant will be more amenable to settlement knowing

154. The panel can render one or more of the four required decisions. *See supra* note 51 and accompanying text. A defendant is found liable by the panel if "defendant failed to comply with the appropriate standard of care. . . ." IND. CODE § 16-9.5-9-7 (1982).

155. The plaintiff must prove the defendant's guilt by a preponderance of the evidence. *Kiger v. Arco Auto Carriers, Inc.*, 144 Ind. App. 239, 247, 245 N.E.2d 677, 682 (1969).

156. *See supra* note 149 and accompanying text.

157. The three health care providers are the only voting members of the panel; the attorney merely sits in an advisory capacity. IND. CODE § 16-9.5-9-3 (1982).

158. In *Simon v. St. Elizabeth Medical Center*, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (1976), the Ohio Court of Common Pleas discussed the weight of arbitration decisions on the jury of medical malpractice cases:

However . . . by permitting the decision of arbitrators to be introduced into evidence, in addition to permitting the individual arbitrators to testify effectively and substantially, reduces a party's ability to prove his case, because the party must persuade a jury that the decision of the arbitrators was incorrect, a task not easily accomplished in view of the added weight which juries have traditionally accorded the testimony of experts.

Id. at 169, 355 N.E.2d at 908.

159. The Indiana Supreme Court argued that the jury will draw upon its collective experiences and good sense to try the cause and is fully capable of giving the panel opinion only the credibility it is justly entitled. *Johnson v. St. Vincent Hosp. Ass'n.* ___ Ind. ___, ___, 404 N.E.2d 585, 593 (1980).

160. *See Alexander, State Medical Malpractice Screening Panels in Federal Diversity Action*, 21 ARIZ. L. REV. 959, 971 (1979).

that the panel's finding will be admissible in court.¹⁶¹ These three assumptions must be analyzed in light of the patient's right to a trial by an impartial jury.

Opponents of the admissibility of panel findings argue that the benefits of the panel process and the jury's fact-finding process are outweighed by the effects on the plaintiff's right to a jury trial.¹⁶² Opponents assert that the jury is forced to accept the review panel's findings of liability, or lack thereof, due to the jurors lack of knowledge in the complex field of medicine.¹⁶³ Acceptance of the panel's findings effectively deprives the plaintiff of his right to have the jury make an independent finding of all facts at issue.¹⁶⁴ Therefore, the opponents argue that the admission of the panel findings is an effective denial of the patient's right to trial by jury.

The patient's right to trial by jury is to be kept "inviolable."¹⁶⁵ The right of a jury trial contains two relevant elements. First, the plaintiff's right to present his case before an impartial jury.¹⁶⁶ Second, is the jury's power to determine any and all issues of fact.¹⁶⁷ As admission of the panel's decision has a prejudicial effect on the jury, the admission violates the patient's right to a full trial by jury.¹⁶⁸ A jury relies heavily on the testimony of experts.¹⁶⁹ A decision rendered

161. *Id.* at 971.

162. See Lenore, *Mandatory Medical Malpractice Mediation panels - A Constitutional Examination*, 44 INS. COUNS. J. 416, 422 (1977).

163. Prejudice on the jury of panel decisions was appropriately discussed in *Comiskey v. Arlen*, 55 A.D.2d 304, 390 N.Y.S.2d 122 (1976).

Determinations of physician negligence virtually always involve the resolution of technical and complex issues. Couched in medical terminology and buttressed on either side by expert evidence, the burden on the petit juror to decipher and absorb such information is substantial. Enter now a recommendation with respect to liability of a panel composed of the most highly respected members of the community which has predigested the complexities and technicalities of the case. . . . one is inexorably led to the conclusion that the jurors will be passively drawn to adopt this prize panel's recommendation.

Id. at 308, 390 N.Y.S.2d at 131.

164. Lenore, *supra* note 159, at 422.

165. For a detailed discussion on the effect of the \$500,000 limitation on recovery and the plaintiff's right to trial by jury, see Note, *The Indiana Medical Malpractice Act: Legislative Surgery on Patients' Rights*, 10 VAL. U.L. REV. 303 (1976).

166. IND. CONST. Art. I, § 20.

167. Lenore, *supra* note 159, at 420.

168. A parties right to a jury trial is "inviolable" means "freedom from substantial impairment." Allowing the review panel decision to be heard by the jury impairs its ability to find the facts at issue and, thus, impairs the plaintiff's right to trial by jury.

169. See *supra* notes 155, 160 and accompanying text.

by three experts will necessarily be afforded greater weight than the testimony of an individual expert. Therefore, the admission of the review panel's decision is a violation of the patient's right to have a jury determine any and all issues of fact.

Indiana's Constitution guarantees each individual the right to a jury trial in civil cases.¹⁷⁰ Admissibility of a panel decision is a violation of the right to trial by jury. The right to a jury trial is also violated by excessive delays in completing the review panel process.

RE-EVALUATING THE CONSTITUTIONALITY OF THE MEDICAL REVIEW PROCESS

The Indiana legislature designed the review panel process for the purpose of providing a short and inexpensive summary proceeding.¹⁷¹ The entire process was structured to require a period of less than nine months from the request of a panel formation.¹⁷² At the time the legislation was drafted, there was no information available on the operation of medical malpractice review panels,¹⁷⁴ therefore, the legislature could only speculate as to its actual operation. Eight-and-one-half years have passed since enactment of the Medical Malpractice Act, and now there is extensive information available on the practical application of the review panel process. Thus, it is necessary to re-evaluate the review panel process and determine whether its actual operation denies a malpractice victim of his due process rights.

The operation of Medical Malpractice legislation is an exercise of the State's police power for the promotion of the health and welfare of the public.¹⁷⁴ Courts have upheld the operation of such legislation,

170. Although the Seventh Amendment guarantee of the right to a jury trial has not been made applicable to the states through the Fourteenth Amendment, every state but Colorado and Louisiana provides for a jury trial in civil cases in their statutes or constitutions. Note, *Medical Malpractice Mediation Panels: A Constitutional Analysis*, 46 *FORDHAM L. REV.* 322, 328 (1977).

171. See *supra* notes 36-53 and accompanying text. See also *Aldana v. Holub*, 381 So. 2d, 231, 238 (Fla. 1980).

172. See *supra* notes 36-53 and accompanying text.

173. As a result of the supposed "medical malpractice crisis," many states enacted similar legislation, protecting health care tortfeasors, in 1975. Prior to 1975, no state had enacted such legislation and no information was available on practical operation.

174. The Indiana legislature has inherent power or "police power" to enact laws, within constitutional limits, to promote health and general welfare. *Foreman v. State ex. rel. Dep't. of Natural Resources*, 180 Ind. App. 94, 100-01, 387 N.E.2d 455, 460 (1979). However, the methods or means used by the legislature must have some

as long as it is a proper exercise of the State's police power.¹⁷⁵ A legislative exercise of the State's police power will not be improper unless it operates in an arbitrary and unreasonable manner.¹⁷⁶ Under the arbitrary and unreasonable test, Indiana courts have found the review panel provisions to be a proper exercise of the State's police power.¹⁷⁷ However, these decisions have been predicated on facts exhibited in the legislative design and not on the statistics of actual complaints.¹⁷⁸

Actual applications of the review panel process have shown that the legislative design does not expedite medical malpractice claims as the legislature intended. Delays in the operation of the review panel process cause the average complaint to proceed far longer than the statutory nine month guideline. Causes of these delays can be equally attributed to "the Act, the plaintiffs' attorneys, defendants' attorneys, and appointed chairmans,"¹⁷⁹ in their attempts to comply with the panel provisions of the Act.¹⁸⁰ Due to the combination of causes the average complaint takes two years to complete.¹⁸¹ Therefore, what the legislature originally considered to be a rational means of expediting and screening malpractice claims has resulted in lengthy delays in processing malpractice complaints.

Florida's Supreme Court discussed the constitutionality of the Florida Medical Mediation Act based on the results of its actual operation. Under Florida's Act, the panel is required to have a final hearing on the merits within ten months from the date the claim is filed.¹⁸²

reasonable or rational relation to the purpose or ends sought. *Id.* at 101, 387 N.E.2d at 461.

175. *Johnson v. St. Vincent Hosp.*, ___ Ind. ___, ___, 404 N.E.2d 585, 598 (1980).

176. *Arneson v. Olson*, 270 N.W.2d 125, 133 (N. D. 1978).

177. *See supra* note 114 and accompanying text.

178. *See supra* notes 5, 170 and accompanying text.

179. *Warnick v. Cha*, No. SD 83-163, slip op. at 5 (Cir. Ind. Nov. 2, 1983). The reasons for the delays were discussed in Sakayan, *Arbitration and Screening Panels: Recent Experience and Trends*, 17 Forum 682-89 (1982).

There are several reasons for these delays. One of the major causes is the panel member selection process. The system has failed to attract enough willing panelists due to inadequate compensation. In addition, some nonpopulous states have difficulty finding specialists in the field of health care practicing within the state. There are concomittant problems of professional bias and friendship, failure of attorneys to complete discovery procedures promptly and scheduling problems when all panelists are practicing professionals.

Id. at 688.

180. *Warnick*, S.D. 83-163 at 5.

181. *Id.* at 4.

182. FLA. STAT. ANN. 786.44(3) (West Supp. 1983).

Failure of the panel to meet the ten month limitation results in the panel's lack of jurisdiction over the cause.¹⁸³ As practical result, the parties, through no fault of their own, are forced into court.¹⁸⁴ Effects of the loss of jurisdiction fall heavily on the defendant who loses the protections of the mediation panel process. In its review, the Florida Supreme Court found that application of this strict ten month limitation period is "arbitrary and capricious" and, therefore, violates the defendant's due process rights.¹⁸⁵ Florida's Supreme Court also determined that an extension of the statutory time period would be an "effective denial of one's access to the courts."¹⁸⁶ Thus, the Florida Act was held to be unconstitutional as a result of the Act's inability to operate as legislatively designed.

A similar medical malpractice evaluation was conducted by the Pennsylvania Supreme Court. In 1978, the Court declared that the Pennsylvania Health Care Service Malpractice Act was constitutional.¹⁸⁷ Two years later, the Pennsylvania Supreme Court overruled its earlier decision and found that the Pennsylvania Act, as applied, was unconstitutional.¹⁸⁸ Five years of statistical data was reviewed by the Court in this later decision.¹⁸⁹ This statistical data disclosed extensive delays which resulted from the application of the review system.¹⁹⁰ In its analysis of the statistical information, the Pennsylvania Supreme Court concluded that "[T]he delays occasioned by the arbitration system therein does in fact burden the right to a jury trial. . . ."¹⁹¹ Pennsylvania's Health Care Service Malpractice Act failed to operate as prescribed and, therefore, its deficiencies were held to constitute a violation of a patient's constitutional rights.¹⁹²

183. "If no hearing on the merits is held within 10 months of the date the claim is filed, the jurisdiction of the mediation panel on the subject matter shall terminate, and the parties may proceed in accordance with the law." *Id.*

184. *Aldana*, 381 So.2d at 236.

185. *Id.* at 238.

186. *Id.*

187. *Parker v. Children's Hosp. of Philadelphia*, 483 Pa. 106, 394 A.2d 932 (1978).

188. *Mattos v. Thompson*, 491 Pa. 385, 421 A.2d 190 (1980).

189. The statistical information considered by the Supreme Court was first presented to the Commonwealth Court. This information is included in the Supreme Court's opinion. At that time, the act had been in existence for less than five years and only 27 percent of the cases filed had been completed. The court also noted that six of the original eight cases had yet to be resolved. *Id.* at 400, 421 A.2d at 194-195.

190. As a part of its opinion the Supreme Court included parts of the statistical data it considered. *Id.* at 400, 421 A.2d at 194-195.

191. *Id.* at 401, 421 A.2d at 196.

192. The Pennsylvania court stated, "Such delays are unconscionable and irreparably rip the fabric of public confidence in the efficiency and effectiveness of our judicial system." *Id.* at 401, 421 A.2d at 196.

Indiana's Supreme Court evaluated the Indiana Medical Malpractice Act without reviewing the actual delays caused by its operation. In *Johnson v. St. Vincent's Hospital*,¹⁹³ the court found that the delays occasioned by the medical malpractice panel process are like those to be expected in any malpractice case.¹⁹⁴ In arriving at this conclusion, the Indiana Supreme Court failed to discuss the delays that had become inherent in the panel process.¹⁹⁵ Instead, the court relied on the erroneous assumption that the panel process was operating within the legislative guidelines, and, that the delays involved in the prescribed process were not unconstitutional.¹⁹⁶

Indiana's Medical Malpractice Act is burdened with the same types of unconstitutional delays as both the Florida and Pennsylvania Medical Malpractice Acts. The Florida Supreme Court found that an extension of the process far in excess of ten months is a denial of the parties' right of access to the courts.¹⁹⁷ An average complaint is in the Indiana panel review process far in excess of the ten months considered to be unconstitutional in Florida.¹⁹⁸ Pennsylvania's Supreme Court felt that the fact that six cases had remained in the process for more than four years was unconscionable, intolerable, and a denial of the patient's right to a jury trial.¹⁹⁹ At the end of 1983, there were more than eighty malpractice cases still awaiting decision, that had been pending in the Indiana review process for more than four years.²⁰⁰ The delays found to exist in Indiana are identical to those found to be unconstitutional in both Florida and Pennsylvania. Thus, the Indiana

193. ___Ind.___, 404 N.E.2d 585 (1980).

194. The Indiana Supreme Court explained that the nine month review process delay was like the "Delay in the commencement of a trial and the expense of investigating and marshalling evidence are part and parcel of the preparation of any piece of civil litigation." *Johnson*, ___Ind. at ___, 404 N.E.2d at 592.

195. The Indiana Supreme Court, in deciding the Act was constitutional, discussed only those delays involved with the actual provisions of the Medical Malpractice Act. In addition, the court stated that the legislature has great deference in enacting legislation involving the public health and welfare and, therefore, if such legislation is rational it is not unconstitutional. *Id.* at ___, 404 N.E.2d at 594.

196. *Id.* at ___, 404 N.E.2d at 591.

197. See *supra* notes 182-83 and accompanying text and charts.

198. An average complaint has been in the panel review process for 24 months. *Warnick*, SD 83-163, at 3.

199. See *supra* note 189 and accompanying text.

200. As of December 31, 1983, two cases were in the system for over 7 years. Over 80 cases have not been closed or received a panel decision in over 4 years. These figures do not take into consideration cases that took in excess of four years but were completed prior to 1983 since this information is presently not available. See *supra* note 79.

Medical Malpractice Act is unconstitutional when properly evaluated in actual practice.

Indiana's Supreme Court must re-evaluate the Indiana Medical Malpractice Act in light of the information available on the operational delays. An average complaint is now in the review process approximately twenty-four months.²⁰¹ Indiana's legislature prescribed a review system that was to be completed in nine months.²⁰² However, complaints may pend for as long as seven years²⁰³ without a review panel decision. Only half of the claims filed since 1975 had been completed as of December 31, 1983.²⁰⁴ Therefore, Indiana's Supreme Court re-evaluation should conclude that the panel review process is a denial of a patient's right to trial by jury and access to the court.

CONCLUSION

Limitations of the Indiana Medical Malpractice Act result in classifications which violate the equal protection clause of the Fourteenth Amendment. Admissibility of the panel's decision may result in a violation of the patient's right to a trial by jury. Moreover, actual application of the review panel process result in oppressive delays in violation of both the patient's right to trial by jury and access to the courts. The Indiana Supreme Court must reassess the Indiana Medical Malpractice Act and in light of the excessive delays and constitutional violations must determine that the Act is unconstitutional.

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201. See *supra* note 195.

202. See *supra* notes 36-53 and accompanying text.

203. See *supra* notes 79 and 197.

204. See *supra* notes 262-63 and accompanying text.