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MEDICAL MALPRACTICE STATUTE OF LIMITATIONS AS SPECIAL LEGISLATION

Woodward v. Burnham City Hospital
60 Ill. App. 3d 285, 377 N.E.2d 290 (1978).

Increases in medical malpractice insurance rates accompanied by the decreasing availability of coverage are the most visible symptoms of the recent medical malpractice insurance crisis.¹ This crisis affects the entire health care system by contributing to the unavailability of specialized medical care for some patients and to the rising costs of health care for everyone.² In response to the medical malpractice insurance problem, many state legislatures,³ including the Illinois General Assembly,⁴ have adopted new rules to govern the adjudication of medical malpractice claims. Such legislation is designed to reduce the number and amount of malpractice awards, thus enabling the insurance industry to better predict recoveries and to keep premiums within reasonable bounds.⁵ Constitutional issues surrounding the legislation remain unresolved, however, while insurance rates continue to increase.⁶

The Illinois General Assembly adopted a variety of special statutory provisions to deal with the medical malpractice crisis which be-

1. Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759 (1977) [hereinafter cited as Redish].

Some authorities dispute the existence of a medical malpractice crisis. See, e.g., Fuchsberg, *Myths of Medical Malpractice*, 11 TRIAL LAW Q. 49 (1976). However, most authorities treat the issue as a serious problem. See, e.g., U.S. DEP'T OF HEALTH, EDUC. & WELFARE, MEDICAL MALPRACTICE: REPORT OF THE SECRETARY'S COMM'N ON MEDICAL MALPRACTICE (1973) [hereinafter cited as HEW Report].

The malpractice problem is a function of many factors. One aspect is that the number and costs of malpractice claims and suits are rising with a concurrent increase in insurance premiums. HEW Report at 21. Also contributing to the malpractice problem is a growing national trend toward litigation-consciousness and health care consumerism. *Id.* at 25. For comprehensive treatment of the medical malpractice insurance crisis, see generally Roth, *The Medical Malpractice Insurance Crisis: Its Causes, The Effects, and Proposed Solutions*, 44 INS. COUNSEL J. 469 (1977) [hereinafter cited as Roth].

2. "To the extent that physicians are forced to avoid high-risk specialties or to relocate in areas with lower insurance rates, patients are seriously prejudiced by the resulting maldistribution of medical care." Redish, *supra* note 1, at 760.

3. See, e.g., CAL. CIV. PROC. CODE § 340.5 (West Supp. 1978); FLA. STAT. ANN. § 95.11 (4) (West Supp. 1978); IOWA CODE ANN. § 614.1 (West Supp. 1978); MD. CTS. & JUD. PROC. CODE ANN. § 5-109 (Supp. 1978); OHIO REV. CODE ANN. § 2305.11 (Page Supp. 1977). See also Comment, *Recent Medical Malpractice Legislation—A First Checkup*, 50 TUL. L. REV. 655, 660 (1976) [hereinafter cited as Comment].

4. ILL. REV. STAT. ch. 110, § 58.2-10; ch. 83, § 22.1; ch. 70, § 101; ch. 73, § 1013a (1975).

5. Redish, *supra* note 1, at 761.

6. *Id.* at 762.

came effective on November 11, 1975.⁷ The Illinois Supreme Court subsequently declared portions of the Illinois medical malpractice statute unconstitutional.⁸ In 1976, the General Assembly passed legislation to amend the invalidated statutes.⁹ The focus of the latest Illinois constitutional review in the medical malpractice area concerns one of these amendments, the 1976 Amendment to the Limitations Act.¹⁰

In *Woodward v. Burnham City Hospital*,¹¹ a panel of the Illinois Appellate Court for the Fourth District held that the section of the Limitations Act barring medical malpractice action against a physician or hospital if brought more than four years after the act causing injury is special legislation because other health care professionals are not afforded the same protection by the statute. That section of the Limitations Act was therefore held to be in violation of article IV, section 13 of the 1970 Illinois Constitution¹² which prohibits special legislation.

This case comment will examine the potential impact of *Woodward* on the medical malpractice problem and consider the effect of its holding on future legislative response. The use of statutes of limitation as a means of coping with the medical malpractice crisis also will

7. ILL. REV. STAT. ch. 110, § 58.2-.10 (provisions for medical review panels); ch. 83, § 22.1 (statute of limitation with an outside limit of five years); ch. 70, § 101 (limitation on the maximum amount recoverable for injuries from medical malpractice); ch. 73, § 1013a (prior hearing if malpractice insurance carrier refused to renew policies at mid-1975 rates) (1975).

8. *Wright v. Central DuPage Hosp. Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976) (holding medical review panels, recovery limitation and regulation of certain insurance rates unconstitutional). For a critical analysis of the *Wright* opinion, see Note, *Medical Malpractice Statute—Medical Malpractice Statute Declared Unconstitutional*, 1977 WIS. L. REV. 203. *Wright* was the first case in which a state supreme court held medical malpractice legislation to be unconstitutional. *Id.*

9. In 1976 the Illinois legislature passed two acts pertaining to medical malpractice. Public Act 79-1434 related to malpractice itself (ILL. REV. STAT. ch. 51, §§ 71, 73, 101; ch. 73, §§ 767.18, .19; ch. 83, § 22.1; ch. 110, §§ 21.1, 34, 41, 58, 65.1, 68.4; ch. 111, §§ 4406, 4433), while Public Act 79-1435 set up a new arbitration procedure in medical malpractice cases (ILL. REV. STAT. ch. 10, §§ 201-04). A summary of all the laws relating to medical malpractice passed by the Illinois General Assembly in 1976 is compiled in the *Historic and Practice Notes* following ILL. ANN. STAT. ch. 110, § 58.2 (Smith-Hurd 1976).

10. ILL. REV. STAT. ch. 83, § 22.1 (1977) states in pertinent part:

No action for damages for injury or death against any physician or hospital duly licensed under the laws of this State, whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought more than 2 years after the date on which claimant knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of the injury or death for which damages are sought in the action, whichever of such date occurs first, but in no event shall such action be brought more than 4 years after the date on which occurred the act or omission or occurrence alleged in such action to have been the cause of such injury or death

11. 60 Ill. App. 3d 285, 377 N.E.2d 290 (1978), *appeal docketed*, No. 50980 (Ill. Sup. Ct. July 21, 1978).

12. ILL. CONST. art. IV, § 13 provides: "The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable is a matter for judicial determination." Prior to 1970, the Illinois Constitution contained a special legislation clause which did not vest the judiciary with broad discretion. See ILL. CONST. of 1870 art. IV, § 22.

be examined. Finally, the court's opinion will be evaluated in light of the special legislation provisions of the Illinois Constitution and previous Illinois cases which have addressed the special legislation issue.

LEGISLATIVE SETTING OF WOODWARD AND JUDICIAL REVIEW

Statutes of Limitation as a Legislative Response to the Malpractice Crisis

The revision of statutes of limitation which are applicable to medical malpractice actions has received much legislative attention as a means of coping with the medical malpractice crisis.¹³ In light of the recent application of the "discovery rule" to this area, limitations on the time in which a malpractice action may be brought have become important in keeping insurance rates under control.¹⁴ The discovery rule provides that a statute of limitation does not begin to run at the time the alleged act of malpractice occurred but, rather, at the time the patient, exercising reasonable care, should have discovered the act of malpractice.¹⁵

In recognition of the need to protect those with meritorious claims which are not discovered until the limitations period has run, courts have begun to apply the discovery rule.¹⁶ In 1970, the Illinois Supreme Court held in *Lipsey v. Michael Reese Hospital*¹⁷ that a statute of limitation would begin to run when a plaintiff discovered or should have discovered her injury. In *Lipsey*, a lump was negligently diagnosed as benign and was undiscovered as cancerous for three years. Lipsey filed suit soon after the negligent diagnosis was discovered, but defendants argued that the action was barred because it was not filed within two years from the date of the diagnosis.¹⁸ In applying the discovery rule, the *Lipsey* court overturned *Mosby v. Michael Reese Hospital*¹⁹ and rejected the theory that the Illinois legislature did not intend the discovery rule to be applied except where a statute of limitation expressly

13. See, e.g., ARIZ. REV. STAT. § 12-564 (1977); COLO. REV. STAT. § 13-80-105 (1973); KAN. STAT. § 60-513(a)(7),(c) (1976). See also Comment, *supra* note 3, at 672.

14. Roth, *supra* note 1, at 478-79.

15. *Id.* at 478.

16. See, e.g., Dyke v. Richard, 390 Mich. 739, 213 N.W.2d 185 (1973); Yerzy v. Levine, 57 N.J. 234, 271 A.2d 425 (1970); Hays v. Hall, 488 S.W.2d 412 (Tex. 1973); Fraser v. Weeks, 76 Wash. 2d 819, 456 P.2d 351 (1969). See also Note, *The Evolution of Illinois Tort Statutes of Limitation: Where Are We Going and Why?*, 53 CHI.-KENT L. REV. 673, 682 (1977) [hereinafter cited as *Illinois Tort Statutes of Limitation*].

17. 46 Ill. 2d 32, 40, 262 N.E.2d 450, 455 (1970).

18. *Id.* at 34, 262 N.E.2d at 451. See ILL. REV. STAT. ch. 83, § 15 (1969). The traditional rule required that a cause of action would accrue upon the occurrence of the negligent act. See also *Illinois Tort Statutes of Limitation*, *supra* note 16, at 683.

19. 49 Ill. App. 2d 336, 199 N.E.2d 633 (1964).

incorporated the rule.²⁰

The proper approach to the implementation of the discovery rule was clarified by the Illinois Supreme Court in *Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc.*,²¹ where the court stated that invocation of the discovery rule was not automatic. The court, in determining whether a plaintiff ought to be allowed to invoke the rule, utilized a balancing test. The defendant's interest in being free from stale claims was balanced against the plaintiff's interest in being given an opportunity to present his case.²² While *Olesker* emphasized that the proof must not become stale with the passage of time, the primary concern of the *Olesker* court remained whether the plaintiff knew or should have known of the negligent act within the statutory period.²³

The effects of the discovery rule, even one which is not applied automatically, have included increased litigation, undetermined exposure to liability and increased insurance costs.²⁴ Because of the way most malpractice policies are written, the undetermined exposure to liability resulting from the adoption of the discovery rule has increased the cost of insurance premiums.²⁵ Malpractice insurance has traditionally been sold on an occurrence basis.²⁶ Under this type of policy, health care providers are protected against claims in the future from incidents which occur during the effective policy year.²⁷ Rate determination depends, for the most part, upon the degree of certainty with which the insurance companies can compute total potential losses for a policy year.²⁸ Since an extension of the limitations period cuts down on the certainty of the loss determining process, a longer statute of limitation creates a longer period of risk for the insurance company.²⁹

20. 46 Ill. 2d at 40, 262 N.E.2d at 454-55.

21. 61 Ill. 2d 129, 334 N.E.2d 160 (1975). In *Olesker* plaintiff filed suit charging that defendant falsely reported plaintiff's financial condition to a third party, thus causing injury to plaintiff's reputation. Plaintiff also contended that discovery of the alleged defamation occurred subsequent to the one year statute pertaining to defamation.

22. *Id.* at 133, 334 N.E.2d at 162 (citing *Rozny v. Marnul*, 43 Ill. 2d 54, 250 N.E.2d 656 (1969)).

23. The *Olesker* court applied the discovery rule, holding that the plaintiff's cause of action accrued at the time it knew or should have known of the existence of the allegedly defamatory report. The court indicated a presumption in favor of the discovery rule when it stated that the defendant must make a showing of increased problems of proof or lack of diligence on the part of the plaintiff before the discovery rule would not be applied in a particular case. 61 Ill. 2d at 136-37, 334 N.E.2d at 164. See Scott, *For Whom the Time Tolls—Time of Discovery and the Statute of Limitations*, 64 ILL. B.J. 326, 330 (1976) [hereinafter cited as Scott].

24. Scott, *supra* note 23, at 332.

25. *Id.*

26. Redish, *supra* note 1, at 765.

27. *Id.*

28. *Id.*

29. *Id.*; conversation held with William Storie, Assistant Vice President and account executive, Alexander and Alexander, Inc. (October 1978).

In an attempt to mitigate the effects of the discovery rule, some insurance companies have started to write a new type of policy which insures the practitioner on a year to year basis.³⁰ In order for the physician to be protected, a liability policy must be in force when the claim is made against him.³¹ However, this "claims-made" type of policy imposes severe hardship on a person like a retired practitioner.³² Under the discovery rule, a claim may be filed whenever the alleged injury is discovered; therefore, high premiums remain in force for the physician who is no longer practicing. Claims-made policies usually exclude claims based on incidents which occurred prior to the effective date of the policy.³³ Most carriers oppose claims-made coverage unless the entire system is converted to that type of policy³⁴ because of administrative problems in a dual insurance system and the expense a physician would incur if he had to carry two policies to be fully covered for all possible malpractice claims against him.³⁵ Because of these considerations, most policies remain the occurrence type.³⁶ Decreasing insurance risk and lowering premiums can be accomplished, therefore, through shortening the time limitations in which a malpractice action can be brought.

In response to the malpractice crisis and the effect of the application of the discovery rule to malpractice insurance costs, the Illinois General Assembly imposed a new statute of limitation on any kind of action arising out of patient care against any state-licensed physician or hospital.³⁷ The present statute³⁸ reflects a common approach taken by statutes of limitation in this area.³⁹ A two-year prescriptive period begins to run upon discovery of the injury. Superimposed upon this, however, is a preemptive period of four years from the date of the in-

30. See HEW Report, *supra* note 1, at 508.

31. Roth, *supra* note 1, at 479.

32. Scott, *supra* note 23, at 332.

33. HEW Report, *supra* note 1, at 508.

34. *Id.*

35. *Id.*

36. *Id.*

37. ILL. REV. STAT. ch. 83, § 22.1 (1976). See REPORT AND RECOMMENDATION OF THE MEDICAL INJURY REPARATIONS COMMISSION at 11 (June 1976) [hereinafter cited as 1976 Report] which states: "[I]t is the findings of this Commission that the medical malpractice insurance problem is now most serious and requires the immediate and continuing attention of the Governor and the General Assembly."

38. ILL. REV. STAT. ch. 83, § 22.1 (1976). The 1975 and 1976 statutes have identical paragraphs on the doctor/hospital limitations, with the exception that the five-year period of the 1975 statute was changed to a four-year period in 1976. See note 9 *supra*.

39. See, e.g., COLO. REV. STAT. § 13-80-105 (1973); KAN. STAT. § 60-513 (1976). See also *Illinois Tort Statutes of Limitation*, *supra* note 16, and text accompanying notes 145-50 *infra*.

jury. Upon expiration of the four-year preemptive period, the suit is barred, regardless of when the injury is discovered.

The Special Legislation Clause and Judicial Review

The 1970 Illinois Constitution provides that there shall be no special or local laws "when a general law is or can be made applicable"⁴⁰ and makes such determination a matter for the judiciary.⁴¹ Although the special legislation clause expressly invites a high degree of judicial activism,⁴² the Illinois Supreme Court has determined that it requires no change in the definition of when a law is general or when it is special.⁴³ A law is still considered to be general when it includes all persons, classes and property similarly situated.⁴⁴ Consequently, the essential constitutional inquiry with regard to special legislation is whether a general law can be made applicable.⁴⁵ The Illinois Supreme Court has developed a standard of review which is applied to the specific facts of a case to determine if the statute is invalid special legislation. Violations of the special legislation provision of the Illinois Constitution are generally judged by the same standard employed under the equal protection clause of the fourteenth amendment to the United States Constitution,⁴⁶ although the standards are not identical.⁴⁷

The test used to determine whether a law is general or special has

40. ILL. CONST. art. IV, § 13. For full text of section 13, see note 12 *supra*.

41. The special legislation clause provides, in pertinent part: "Whether a general law is or can be made applicable is a matter for judicial determination." ILL. CONST. art. IV, § 13.

42. See *Friedman & Rochester, Ltd. v. Walsh*, 67 Ill. 2d 413, 422, 367 N.E.2d 1325, 1329 (1977); *Grace v. Howlett*, 51 Ill. 2d 478, 494, 283 N.E.2d 474, 479 (1972); *Bridgewater v. Hotz*, 51 Ill. 2d 103, 110, 281 N.E.2d 317, 321 (1972). See also *Whalen & Wolff, Constitutional Law: The Prudence of Judicial Restraint Under the New Illinois Constitution*, 22 DEPAUL L. REV. 63, 77-79 (1972) [hereinafter cited as *Whalen & Wolff*].

43. *Friedman & Rochester, Ltd. v. Walsh*, 67 Ill. 2d 413, 422, 367 N.E.2d 1325, 1329 (1977); *Grace v. Howlett*, 51 Ill. 2d 478, 494, 283 N.E.2d 474, 482 (1972) (Underwood, C.J., dissenting); *Bridgewater v. Hotz*, 51 Ill. 2d 103, 110, 281 N.E.2d 317, 321 (1972). See also *Whalen & Wolff, supra* note 42, at 78.

44. *Bridgewater v. Hotz*, 51 Ill. 2d 103, 111, 281 N.E.2d 317, 322 (1972).

45. *Grace v. Howlett*, 51 Ill. 2d 478, 487, 283 N.E.2d 474, 479 (1972).

46. See *Friedman & Rochester, Ltd. v. Walsh*, 67 Ill. 2d 413, 422, 367 N.E.2d 1325, 1329 (1977); *McRoberts v. Adams*, 60 Ill. 2d 458, 463, 328 N.E.2d 318, 324 (1975).

The United States Supreme Court in *McGowan v. Maryland*, 366 U.S. 420 (1961), explained the equal protection standard as follows:

The constitutional safeguard [of equal protection] is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any statement of facts reasonably may be conceived to justify it.

Id. at 425-26.

47. *Friedman & Rochester, Ltd. v. Walsh*, 67 Ill. 2d 413, 422, 367 N.E.2d 1325, 1329 (1977); *Grace v. Howlett*, 51 Ill. 2d 478, 487, 283 N.E.2d 474, 479 (1972).

not changed with the passage of the 1970 Constitution.⁴⁸ The legislature has always been able and continues to be able to create laws containing classifications of a general nature because "uniformity of treatment of all persons is neither practical nor desirable."⁴⁹ In order for these laws to pass constitutional muster, the Illinois Supreme Court has historically used a test which requires that (1) the basis for the classification must not be unreasonable or arbitrary; (2) the classification must bear a reasonable relation to the purpose to be accomplished by the act; and (3) the classification must operate equally upon all who occupy a like position to those included within the class.⁵⁰

However, there has always been a presumption that the legislature acted conscientiously, with all reasonable doubts resolved in favor of upholding the validity of the statute.⁵¹ Furthermore, the burden of demonstrating the unreasonableness of the statute was upon the person attacking the classification.⁵²

Skinner v. Anderson,⁵³ a case found to be indistinguishable by the *Woodward* court,⁵⁴ illustrates the standard of review developed under the special legislation provision of the 1870 Constitution.⁵⁵ In *Skinner*, the Illinois Supreme Court was confronted with determining the constitutional validity⁵⁶ of a statute which required that a suit arising out of a defective condition in an improvement to real estate be brought against the architect or contractor within four years after performance.⁵⁷ The

48. *Friedman & Rochester, Ltd. v. Walsh*, 67 Ill. 2d 413, 422, 367 N.E.2d 1325, 1329 (1977); *Bridgewater v. Hotz*, 51 Ill. 2d 103, 110, 281 N.E.2d 317, 321 (1972).

49. *Illinois Coal Operators Ass'n v. Pollution Control Bd.*, 59 Ill. 2d 305, 311, 319 N.E.2d 782, 785 (1974) (citing *Grasse v. Dealers Transport Co.*, 412 Ill. 179, 193, 106 N.E.2d 124, 132 (1952)).

50. *People ex rel. Vermilion Co. Conserv. Dist. v. Lenover*, 43 Ill. 2d 209, 218, 251 N.E.2d 175, 179 (1969); *Begich v. Industrial Comm'n*, 42 Ill. 2d 32, 35, 245 N.E.2d 457, 459 (1969); *People ex rel. DuPage County v. Smith*, 21 Ill. 2d 572, 578, 173 N.E.2d 485, 489 (1961).

51. *McRoberts v. Adams*, 60 Ill. 2d 458, 463, 328 N.E.2d 318, 324 (1975); *Delaney v. Badame*, 49 Ill. 2d 168, 171, 274 N.E.2d 353, 354 (1971).

52. *Friedman & Rochester, Ltd. v. Walsh*, 67 Ill. 2d 413, 422-23, 367 N.E.2d 1325, 1329 (1977); *Wright v. Central DuPage Hosp. Ass'n*, 63 Ill. 2d 313, 333, 347 N.E.2d 736, 745 (1976) (Underwood, J., concurring in part and dissenting in part); *Davis v. Commonwealth Edison Co.*, 61 Ill. 2d 494, 498, 336 N.E.2d 881, 883 (1975); *County of Champaign v. Adams*, 59 Ill. App. 3d 62, 64, 375 N.E.2d 184, 186 (1978).

53. 38 Ill. 2d 455, 231 N.E.2d 588 (1967).

54. 60 Ill. App. 3d at 287, 377 N.E.2d at 292.

55. Although the court did not explicitly set out the three-part test for special legislation, the requisite elements of the test are present. 38 Ill. 2d at 459-61, 231 N.E.2d at 590-92. See generally Comment, 45 CHI.-KENT L. REV. 115 (1968).

56. The *Skinner* court determined the constitutionality of the statute of limitations under article IV, section 22 of the Illinois Constitution of 1870, which states in pertinent part:

The general assembly shall not pass local or special laws in any of the following enumerated cases:] Granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever.

57. ILL. REV. STAT. ch. 83, § 24f (1965).

trial court found for the architect, but the supreme court reversed and remanded, holding that the act was a violation of the special legislation provision of the Illinois Constitution.⁵⁸

The *Skinner* court required that the statutory classification be based on reasonable differences between the class favored by the legislation and the class not so favored.⁵⁹ The court found no rational basis for singling out architects and contractors by granting them immunity from suit after four years. The court reasoned that since many other tradesmen and professionals were involved in the construction of Skinner's home, they should have been treated in the same manner⁶⁰ because their possible negligence might result in injury more than four years after the house was completed.⁶¹

In addition, the court concluded that statutory classification must be reasonably related to the purpose of the legislation in order to satisfy constitutional inquiry.⁶² The court determined that the legislative purpose of the statute was the prevention of stale claims.⁶³ Since stale claims could still be brought against other professions involved in the construction industry, the *Skinner* court found that the statute immunizing architects and contractors bore no reasonable relation to the legislative purpose.⁶⁴

The final element of the test used by the *Skinner* court was that the classification must affect in the same manner all persons in like circumstances.⁶⁵ The fact that the statute benefited all architects and construction contractors was significant only if the benefits conferred upon them were not denied to others similarly situated.⁶⁶ Since the court had already determined that there was no rational basis for the classification,⁶⁷ the section of the Limitations Act involved did not grant the benefit of immunity to others situated similarly to the architect.⁶⁸

The *Skinner* court's analysis led to the conclusion that the statute involved was unconstitutional.⁶⁹ However, the supreme court did not consider whether the same conclusion would be reached on different

58. 38 Ill. 2d at 459, 231 N.E.2d at 590.

59. *Id.* at 460-61, 231 N.E.2d at 590-91.

60. *Id.*, 231 N.E.2d at 590-91.

61. *Id.*, 231 N.E.2d at 591.

62. *Id.*, 231 N.E.2d at 591.

63. *Id.* at 459, 231 N.E.2d at 590.

64. *Id.* at 461, 231 N.E.2d at 591.

65. *Id.*, 231 N.E.2d at 591.

66. *Id.*, 231 N.E.2d at 591.

67. See text accompanying note 60 *supra*.

68. 38 Ill. 2d at 461, 231 N.E.2d at 591.

69. *Id.* at 459, 231 N.E.2d at 590.

facts.⁷⁰ The *Skinner* decision sets forth the standard of review generally followed by the Illinois Supreme Court in subsequent determinations of the constitutionality of statutes under article IV, section 13.⁷¹

*Bridgewater v. Hotz*⁷² was the first case in which the Illinois Supreme Court decided the constitutionality of a law on the basis of the special legislation provision of the 1970 Constitution. The court applied the three-part test for special legislation which had been used in *Skinner*. First, a legislative classification is constitutional if there is a reasonable basis for that classification.⁷³ In addition, the class must also bear a reasonable and proper relation to the purposes of the act and the evil it seeks to remedy.⁷⁴ Finally, the law must operate upon all who occupy a like position to those included within the class in order to be constitutional.⁷⁵ According to the *Bridgewater* court, "[t]he principal change effected by section 13 is that it specifically rejects . . . a long line of decisions . . . that whether a general law can be made applicable is for the legislature to determine."⁷⁶ The court concluded that although the scope of judicial review was enlarged, section 13 required no change in the definition of when a law is general or special.⁷⁷

With a few exceptions, this three-part test has been applied in all cases which involved allegedly special legislation.⁷⁸ One of the excep-

70. See 38 Ill. 2d at 461, 231 N.E.2d at 590-91.

71. The *Skinner* court stated: "Of course, section 22 of article IV does not prohibit legislative classification. It does, however, require that the classification be reasonably related to the legislative purpose." *Id.* at 460, 231 N.E.2d at 591.

72. 51 Ill. 2d 103, 281 N.E.2d 317 (1972). In *Bridgewater*, the Illinois Supreme Court held that statutory provisions for February primaries and April elections applicable to counties within the class created by the County Board Act are not violative of article IV, section 13 of the 1970 Illinois Constitution. *Id.* at 111-12, 281 N.E.2d at 322-23. The statute was constitutional despite the contention that the effect of the statute was to create two classes of counties and to provide less opportunity for voter registration in one of those classes. *Id.* at 111, 281 N.E.2d at 322.

73. *Id.*, 281 N.E.2d at 322.

74. *Id.*, 281 N.E.2d at 322.

75. *Id.*, 281 N.E.2d at 322.

76. *Id.* at 110, 281 N.E.2d at 321.

77. *Id.*, 281 N.E.2d at 321.

78. See *Friedman & Rochester, Ltd. v. Walsh*, 67 Ill. 2d 413, 422-23, 367 N.E.2d 1325, 1329 (1977) (provision of Pension Code not arbitrary and did not constitute special legislation merely because private pensioners do not enjoy same immunity conferred upon public annuitants and pensioners); *Davis v. Commonwealth Edison Co.*, 61 Ill. 2d 494, 497-98, 336 N.E.2d 881, 883 (1975) (agreement to indemnify for liability under Structural Works Act not special legislation, but found void on other grounds); *McRoberts v. Adams*, 60 Ill. 2d 458, 462-64, 328 N.E.2d 321, 323-24 (1975) (classification created by statute not requiring liability coverage to occupants of rented vehicles not clearly unreasonable and thus not unconstitutional); *Illinois Coal Operators Ass'n v. Pollution Control Bd.*, 59 Ill. 2d 305, 311-13, 319 N.E.2d 782, 785 (1974) (sound pollution regulation exempting sounds emitted by construction equipment and not exempting sounds emitted by mining equipment not special legislation); *Youhas v. Ice*, 56 Ill. 2d 497, 500-02, 309 N.E.2d 6, 8-9 (1974) (refund of Illinois retailers' occupation taxes paid on certain federal excise taxes not unconstitutional as special legislation); *People ex rel. City of Salem v. McMackin*, 53 Ill. 2d 347, 363-66, 291 N.E.2d 807, 817 (1972) (Industrial Project Revenue Bond Act is not special legislation

tions was *Grace v. Howlett*,⁷⁹ which held unconstitutional as special legislation a section of the automobile no-fault liability statute which discriminated with regard to limits on recovery amounts between those injured by private vehicles and those injured by commercial vehicles.⁸⁰ Finding that the legislature cannot enact special legislation simply because "reform may take one step at a time,"⁸¹ the court based its determination of statutory unreasonableness on the differences in treatment effected by the statute.⁸² In his dissenting opinion, Chief Justice Underwood criticized the court's decision, reminding the court that a statute which results in some inequality is not necessarily unconstitutional.⁸³ In order to be constitutional, a statutory classification need only be based on some real difference in circumstance, bear-

even though its application is limited to industrial or manufacturing plants); *Bridgewater v. Hotz*, 51 Ill. 2d 105, 111-12, 281 N.E.2d 317, 321 (1972) (statutory provisions for primaries and elections applicable to class of counties held constitutional); *County of Champaign v. Adams*, 59 Ill. App. 3d 62, 64, 375 N.E.2d 184, 186 (1978) (statute authorizing county having population of 80,000 or more to issue and sell bonds and levy taxes for purposes of constructing a county jail and sheriff's residence not unreasonable or irrational).

79. 51 Ill. 2d 478, 283 N.E.2d 474 (1972).

80. *Id.* at 487-88, 283 N.E.2d at 479-80.

81. *Id.* Cf. *Illinois Coal Operators Ass'n v. Pollution Control Bd.*, 59 Ill. 2d 305, 319 N.E.2d 782 (1974), where the Illinois Supreme Court remarked:

[S]o far as legislative classification is concerned, it has been recognized that evils in the same field may be of different dimensions and reform may take place one step at a time. The legislature may address itself to one stage of a problem and not take action at the same time as to other phases.

Id. at 312-13, 319 N.E.2d at 786 (citing *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955)).

82. 51 Ill. 2d at 487, 283 N.E.2d at 479. In *Grace*, the Illinois Supreme Court did not use a three-part test to evaluate the legislation. The test used was whether a general law, rather than a special law, could be made applicable. *Id.* The *Grace* test has been applied by the court in only two cases. In *People ex rel. East Side Levee and Sanitary Dist. v. Madison County Levee and Sanitary Dist.*, 54 Ill. 2d 442, 298 N.E.2d 177 (1973), the court held that an act which applied only to two county sanitary districts with a certain assessed valuation on a given date was special legislation. 54 Ill. 2d at 447, 298 N.E.2d at 180. The court stated that the constitutional test under article IV, section 13 of the 1970 Illinois Constitution was whether a general law could be made applicable. The court, however, also stated that the briefs cited no reasons and none were apparent to it to justify the discriminatory statutory scheme. 54 Ill. 2d at 447, 298 N.E.2d at 180. This language seems to indicate that the court did implicitly apply a standard similar to that found in the three-part test. Furthermore, the opinion was written by Chief Justice Underwood, whose vociferous dissent in *Grace* criticized the court for only considering differences in treatment effected by the statute when invalidating the statutory scheme. *Grace v. Howlett*, 51 Ill. 2d 478, 496, 283 N.E.2d 474, 483 (1972) (Underwood, C.J., dissenting). See text accompanying notes 83-86 *infra*. Perhaps the opinion should be read that "whether a general law can be made applicable" is a shorthand form of the usual three-part test, although that has never been expressly stated by the court.

The *Grace* test was also applied in *Wright v. Central DuPage Hosp. Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976), where the court declared § 401a of the Insurance Code unconstitutional. 63 Ill. 2d at 331, 347 N.E.2d at 744. The section regulated medical malpractice insurance rates on policies that were in existence on a given date, a situation factually similar to *East Side Levee*, where the act applied only to sanitary districts with a certain valuation on a given date. See text accompanying notes 87-92 *infra*.

83. *Id.* at 496, 283 N.E.2d at 484 (Underwood, C.J., dissenting).

ing a reasonable relation to the statutory purpose.⁸⁴ According to the chief justice, the legislature could properly conclude that their statutory scheme would make insurance more readily available to the presently uninsured.⁸⁵ Whether or not this was a wise choice or the best means to achieve the desired result was not a proper subject of judicial inquiry.⁸⁶

Another case where the Illinois Supreme Court did not expressly apply the three-part test was *Wright v. Central DuPage Hospital Association*.⁸⁷ The court held that a \$500,000 limitation on recovery in medical malpractice actions was a special law in violation of article IV, section 13 of the Illinois Constitution.⁸⁸ Relying principally upon *Grace v. Howlett*,⁸⁹ the court stated, without analysis, that the legislative classification was unreasonable and arbitrary.⁹⁰ In his dissenting opinion, Justice Underwood considered the same three-part test set forth in his opinion in *Grace*⁹¹ and concluded that the statutory limitation on recovery was a valid exercise of legislative discretion.⁹²

Both *Grace* and *Wright* are exceptions to the more analytical approach taken in *Skinner, Bridgewater* and subsequent cases dealing with special legislation review.⁹³ Therefore, the *Grace-Wright* approach should not be relied upon. The latest holding by the Illinois Supreme Court on the subject of special legislation, in *Friedman & Rochester, Ltd. v. Walsh*,⁹⁴ has reaffirmed the principle that legislation is constitutional unless it can be demonstrated that the legislature acted unreasonably and arbitrarily in establishing the statutory scheme.⁹⁵ In addition, the law must operate uniformly throughout the state and on all persons in like conditions.⁹⁶ A continuing task faced by the courts in implementing the special legislation clause of the Illinois Constitution is, therefore, a determination of the reasonableness of the classification and its relation to legislative purpose.⁹⁷ This was the problem

84. *Id.* at 495, 283 N.E.2d at 485.

85. *Id.* at 498, 283 N.E.2d at 485.

86. *Id.* at 494, 283 N.E.2d at 482-84. See also *Bridgewater v. Hotz*, 51 Ill. 2d 103, 111, 281 N.E.2d 317, 322 (1972).

87. 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

88. *Id.* at 330, 347 N.E.2d at 743.

89. 51 Ill. 2d 478, 283 N.E.2d 474 (1972).

90. 63 Ill. 2d at 330-31, 347 N.E.2d at 743.

91. *Id.* at 333-35, 347 N.E.2d at 745-46 (Underwood, J., concurring in part and dissenting in part).

92. *Id.* at 335, 347 N.E.2d at 746.

93. See cases collected at note 78 *supra*.

94. 67 Ill. 2d 413, 367 N.E.2d 1325 (1977).

95. *Id.* at 423, 367 N.E.2d at 1329.

96. *Id.* at 422, 367 N.E.2d at 1329.

97. *Whalen & Wolff, supra* note 42, at 79.

faced by the *Woodward* court.

WOODWARD V. BURNHAM CITY HOSPITAL

Statement of the Case

Charles C. Woodward entered Burnham City Hospital on November 27, 1965, for a muscle biopsy.⁹⁸ Defendant George Green, a staff physician at the hospital, allegedly made an erroneous diagnosis at that time. As a result, both of Woodward's legs ultimately had to be amputated.⁹⁹ The alleged misdiagnosis was first discovered in February, 1976, following an examination of Woodward's tissue samples at another facility. Woodward brought a negligence action against Burnham City Hospital, the attending physician and the pathologist. This claim was barred by a direct application of section 22.1 of the Limitations Act because the action was brought more than four years after the occurrence of the allegedly negligent diagnosis.¹⁰⁰ Charles Woodward died on February 20, 1977. An amended complaint was filed by Woodward's widow, as administratrix of her deceased husband's estate and as an individual, in which she realleged the negligent acts cited in the original complaint. It was further alleged that Charles Woodward died as a result of the negligent acts. In response to defendants' motion to dismiss for failure to file within the statutory period, plaintiff challenged the constitutionality of section 22.1 on the ground that it was special legislation. The trial court allowed the defendants' motion to dismiss, finding that section 22.1 of the Limitations Act was constitutional and that plaintiff had not complied with its requirement that her action be brought within four years from the date of the allegedly negligent diagnosis.

The appellate court reversed, holding that section 22.1 constitutes special legislation in violation of article IV, section 13 of the Illinois Constitution.¹⁰¹ The court concluded that the four-year statute of limitations granted immunity to hospitals and physicians but denied such immunity to other members of the health care professions, resulting in "unfair, unjust and arbitrary"¹⁰² legislation.

In holding section 22.1 of the Limitations Act unconstitutional, the *Woodward* court reasoned that granting immunity from suit to hospi-

98. *Woodward v. Burnham City Hosp.*, 60 Ill. App. 3d 285, 286, 377 N.E.2d 290, 291 (1978), appeal docketed, No. 50980 (Ill. Sup. Ct. July 21, 1978).

99. The complaint also charged defendant Bobowski, staff pathologist at the hospital, with erroneous diagnosis. *Id.*, 377 N.E.2d at 291.

100. *Id.* at 287, 377 N.E.2d at 291.

101. *Id.* at 286, 377 N.E.2d at 291.

102. *Id.* at 288, 377 N.E.2d at 292.

tals and physicians, while denying similar immunity to other members of the health care professions, was a special privilege.¹⁰³ According to the court, immunizing doctors and hospitals from suit after four years was as invalid as the statutory immunization of architects and contractors in *Skinner v. Anderson*.¹⁰⁴ The court illustrated the unfairness of the statute with the following example. A nurse administering a drug to a patient upon a doctor's orders would be afforded no protection under section 22.1 if the patient had an adverse reaction, while the prescribing physician would be immune from suit after four years.¹⁰⁵

Analysis: The Legislative Purpose Ignored

At first glance, the court's reasoning seems persuasive. Certainly a classification including only some members of the health care professions while excluding others appears to be arbitrary and therefore invalid special legislation. While embracing the rationale of *Skinner*, however, the *Woodward* court failed to apply carefully the three-step analysis undertaken by *Skinner*¹⁰⁶ and by most Illinois Supreme Court decisions after the passage of the 1970 Constitution.¹⁰⁷

The *Woodward* court, relying on an analogy to the *Skinner* case,¹⁰⁸ found that the classification of physicians and hospitals for the purposes of section 22.1 was arbitrary. Superficially, the relation of doctors and hospitals to the health care professions is similar to the relation of architects and contractors to the construction industry. In a medical malpractice context, however, a classification including only physicians and hospitals may not be unreasonable.¹⁰⁹ The medical malpractice crisis has primarily affected physicians and hospitals¹¹⁰ and, to a lesser degree, other autonomous health care providers.¹¹¹ The *Woodward* court failed to distinguish between the position of doctors and hospitals in a medical malpractice context and the position of architects and contractors in *Skinner* where no particularly compelling reason¹¹² for spe-

103. *Id.*, 377 N.E.2d at 292.

104. 38 Ill. 2d 455, 231 N.E.2d 588 (1967). See text accompanying notes 53-71 *supra* for a discussion of the *Skinner* decision.

105. 60 Ill. App. 3d at 286, 377 N.E.2d at 292. See note 123 *infra*.

106. 38 Ill. 2d at 459-61, 231 N.E.2d at 591-92.

107. See cases collected at note 78 *supra*.

108. 60 Ill. App. 3d at 287-88, 377 N.E.2d at 292.

109. See *Wright v. Central DuPage Hosp. Ass'n*, 63 Ill. 2d 313, 334, 347 N.E.2d 736, 746 (1976) (Underwood, J., concurring in part and dissenting in part).

110. HEW Report, *supra* note 1, at 644, 649. See also discussion within note 123 *infra*; 1976 Report, *supra* note 37, at 29.

111. HEW Report, *supra* note 1, at 644, 649.

112. See 38 Ill. 2d at 459, 231 N.E.2d at 590. The sole legislative purpose of ILL. REV. STAT. ch. 83, § 15 (1969) advanced by the defendant was the prevention of stale claims.

cial treatment was alleged. A differentiation is not arbitrary if any state of facts can reasonably be conceived that would sustain it.¹¹³ In light of the above considerations, the *Woodward* court should have discussed the reasons why no set of facts was reasonable enough to sustain the classification.

If a classification can reasonably serve the legislative purpose, that class becomes distinguishable from other similar classes and loses its arbitrary character. If the *Woodward* court had inquired into the legislative purpose, the reasonable relation¹¹⁴ standard may have pointed to a different result. *Skinner* might have become, in fact, distinguishable from *Woodward*. A reasonable basis for the legislature's election not to cover all health care professionals under the limitation statute may have emerged.¹¹⁵ The presumption that the legislature acts conscientiously in creating statutory classifications is still viable under the 1970 Constitution.¹¹⁶ The burden of rebutting this presumption is upon the person attacking the classification.¹¹⁷ Since the court did not explicitly consider legislative purpose in making its determination, the court's constitutional analysis of the statute was incomplete.

A discussion of the relationship of the statute to its purpose would have been both beneficial and necessary to a legislature charged with dealing with the medical malpractice problem in the future. The enactment of medical malpractice legislation was the legislature's response to a situation which was brought to its attention by the media¹¹⁸ and by

113. See *Davis v. Commonwealth Edison Co.*, 61 Ill. 2d 494, 497, 336 N.E.2d 881, 883 (1975).

114. See text accompanying note 73 *supra*.

115. In 1975, the legislature reduced the medical malpractice statute of limitations to two years from the date of discovery or five years from the date of occurrence, whichever is shorter. In 1976, the legislature further reduced the limitations period to two years from the date of discovery or four years from the date of occurrence. This was an attempt to reduce the "long tail" on medical malpractice cases. See 1976 Report, *supra* note 37, at 36. The legislature felt that this reduction would directly shield the public against the effects of rapidly increasing medical malpractice insurance rates. Ill. Gen. Ass., 79th Sess., H.B. 3957, second reading in the Senate at 114, June 11, 1976. The increase in malpractice problems for allied health care professionals has not been nearly as great as that experienced by doctors and hospitals. See HEW Report, *supra* note 1, at 644-52. It is not surprising, therefore, that the legislature did not include all health care professionals in the statute. Justice Trapp, in his dissent in *Woodward*, sets forth the argument that the legislature was well aware of the discovery rule as applied to the two-year statute of limitations and enacted legislation which met the judicial requirements of *Lipsey* and *Skinner*. 60 Ill. App. 3d at 292, 377 N.E.2d at 295 (Trapp, J., dissenting). The legislature had provided a rational classification between those persons who are licensed to treat with drugs and surgery and those who are not. *Id.* at 291, 377 N.E.2d at 294.

116. *McRoberts v. Adams*, 60 Ill. 2d 458, 463, 328 N.E.2d 318, 324 (1975) (citing *Delaney v. Badame*, 49 Ill. 2d 168, 171, 274 N.E.2d 353, 354 (1971)).

117. *Friedman & Rochester, Ltd. v. Walsh*, 67 Ill. 2d 413, 422-23, 367 N.E.2d 1325, 1329 (1977) (citing *Davis v. Commonwealth Edison Co.*, 61 Ill. 2d 494, 498, 336 N.E.2d 881, 883 (1975) and *People v. Palkes*, 52 Ill. 2d 472, 477, 288 N.E.2d 469, 472 (1972)).

118. See generally HEW Report, *supra* note 1, at 653-57.

the physicians themselves.¹¹⁹ The legislature found that a four-year limitation applicable to physicians and hospitals would reduce their exposure to legal liability, stabilize insurance costs and further the public health, welfare and safety through lower health care costs.¹²⁰ The *Woodward* court failed to demonstrate that the legislature acted unreasonably and arbitrarily in establishing the statutory scheme¹²¹ and, thus, left the legislature without guidance to determine the constitutional validity of future medical malpractice statutes.

To have completed the three-part analysis on the constitutionality of section 22.1, the *Woodward* court would have had to determine whether all the health care professionals occupied a position similar to that of the doctors and hospitals included in the statute.¹²² This analysis cannot be made simply by referring to the invalidity of the class of architects and contractors in *Skinner*. That class was not experiencing problems in the construction industry which resulted in a situation similar to the medical malpractice insurance problem.¹²³ A nurse administering a drug to a patient upon doctor's orders (the *Woodward* court's example) would not, in a liability context, necessarily be in the same

119. See generally Ill. Gen. Ass., 79th Sess., H.B. 3957, third reading in the House at 16, June 11, 1976.

120. See note 115 *supra*.

121. See, e.g., *Friedman & Rochester, Ltd. v. Walsh*, 67 Ill. 2d 413, 367 N.E.2d 1325 (1977). In *Friedman* the Illinois Supreme Court thoroughly considered possible legislative purposes in determining whether the legislature acted reasonably in granting immunity from garnishment orders to pensions and annuities paid pursuant to the Fireman's Annuity and Benefit Fund. *Id.* at 419-20, 367 N.E.2d at 1327-28. For example, the legislature could have felt that the public funds involved should go entirely to the beneficiary and not to his creditors. In addition, it could have considered differences between public and private employees concerning social security benefits. *Id.*, 367 N.E.2d at 1328. The court also analyzed plaintiff's arguments that the classification was unreasonable and found no merit in them. First, the plaintiff argued that since municipal park districts and the State were not immune from the Wage Deduction Act, neither should the public pension fund be granted immunity from garnishment. Because the immunity granted by the Pension Code was statutory, the court found that the cases in support of plaintiff's contention were not applicable as the immunity there was judicially created. *Id.* at 420-21, 367 N.E.2d at 1328. The plaintiff also contended that since the legislature failed to exempt the pension fund for policemen from municipalities with a population of 500,000 or less from the garnishment process, the provisions granting immunity to the seventeen other separate pension funds were invalid. *Id.* at 421, 367 N.E.2d at 1328. The court stated that reform can be accomplished one step at a time, and the mere fact that one fund was not granted immunity against creditors did not invalidate the immunity as to the other seventeen. *Id.* at 421-22, 367 N.E.2d at 1329. In short, the court did not make its determination of reasonableness of the statutory classification until it had thoroughly examined both the legislative purpose and plaintiff's contentions of unreasonableness.

122. See text accompanying note 75 *supra*.

123. To justify the special immunity given to architects and contractors under section 29 of the Limitations Act, the defendant in *Skinner* asserted that the purpose of the act was "to require the necessary litigation to be brought within a time when the circumstances can still be proven, when investigation is still possible, when facts are still assessable, when proofs are not lost, when memories are still fresh." 38 Ill. 2d at 459, 231 N.E.2d at 590. The defendant did not mention any other reason or problem which distinguished architects and contractors from other members of the construction industry.

position as that of the doctor who ordered the medication because a nurse is prohibited from prescribing medicine and is not subjected to claims arising out of such actions.¹²⁴ As long as there is some reasonable basis for the classification, the statute remains valid.¹²⁵ If the *Woodward* court had considered the legislative purpose for enacting section 22.1 in light of the medical malpractice problem, perhaps the distinction between doctors and hospitals and the rest of the health care professions would have become clear.

In addition to reliance on *Skinner*, the *Woodward* court concluded that its holding was in accord with *Wright v. Central DuPage Hospital Association*,¹²⁶ the first case to test the constitutional validity of malpractice legislation. The *Woodward* court reasoned that granting immunity to hospitals and physicians while denying immunity to other members of the health care professions was as arbitrary as the \$500,000 recovery limitation in *Wright*. However, merely stating that a legislative provision is arbitrary¹²⁷ is not the same as completing the proper three-part inquiry into the constitutionality of the statute. In his dissenting opinion in *Wright*, Justice Underwood pointed out the lack of

124. Professional negligence of nurses has not been called malpractice by the Illinois courts. See *Foster v. Englewood Hosp. Ass'n*, 19 Ill. App. 3d 1055, 313 N.E.2d 255 (1974). Whether nurses are covered by medical malpractice statutes of limitation is a question that has not been answered by the Illinois courts. Other jurisdictions which have considered the question are practically unanimous in holding that a statute of limitations for medical malpractice is not available as a defense to a nurse in an action for professional negligence. Annot., 8 A.L.R. 3d 1336 (1964). In *Richardson v. Doe*, 176 Ohio St. 370, 199 N.E.2d 878 (1964), the leading case on the subject, the court found that there was no compelling reason for a nurse to be given the protection of the shorter statute of limitations applicable to physicians. A nurse is not in the same position as a physician who is required to exercise independent judgment on life and death matters. A nurse's primary function is to observe and record symptoms and reactions, not to diagnose them. A nurse is prohibited from diagnosing illness and prescribing medicine and is not subjected to the claims arising out of such actions. *Id.* at 373, 199 N.E.2d at 880. The *Richardson* court therefore held that lack of due care by a nurse is ordinary negligence and not malpractice. *Id.*, 199 N.E.2d at 880. The test for inclusion in a malpractice statute of limitation seems to depend on the extent to which a health practitioner approaches the independent judgment and special functions of a physician. See also *Kambas v. St. Joseph's Mercy Hosp. of Detroit*, 389 Mich. 249, 205 N.W.2d 431 (1973).

Nurses or other health practitioners employed by a doctor or hospital rarely will be sole defendants in actions for damages arising out of injury. Because they are employed and supervised, malpractice claims arising out of their alleged negligence often fall under the theory of *respondeat superior*. HEW Report, *supra* note 1, at 649. A sizeable portion of the malpractice suits and claims against hospitals stem from the alleged negligence of supervised health care personnel. *Id.* The hospital liable under *respondeat superior* stands in the same position as that of the agent in a statute of limitation context. 176 Ohio St. at 372-74, 199 N.E.2d at 880. Whether the four-year outside limit applicable to physicians and hospitals under ILL. REV. STAT. ch. 83, § 22.1 (1976) applies when *respondeat superior* is invoked is a question which remains unanswered in Illinois.

125. *McRoberts v. Adams*, 60 Ill. 2d 458, 463, 328 N.E.2d 318, 324 (1975).

126. 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

127. *Id.* at 330, 347 N.E.2d at 743.

analysis by the majority on the special legislation issue.¹²⁸ The criticism which can be made about the *Wright* opinion is similar to that previously made with regard to *Woodward*.¹²⁹ The *Woodward* and *Wright* decisions are in agreement insofar as they both found statutory classifications to be arbitrary. The *Wright* decision was, however, a poor precedential choice for the *Woodward* court to follow because of its lack of analysis on the special legislation issue.

A Preferable Alternative to the Woodward Approach

In *Anderson v. Wagner*¹³⁰ another panel of the Illinois Appellate Court for the Fourth District held that section 22.1 of the Limitations Act did not violate the constitutional prohibition against special legislation. *Anderson* involved a medical malpractice claim for damages caused by the birth of a child afflicted by birth defects which allegedly resulted from Mrs. Anderson's contraction of rubella during the early stages of her pregnancy. Plaintiffs filed their complaint on July 23, 1977, on a cause of action which had accrued on May 21, 1973.¹³¹ The court held that the trial court properly entered an order of dismissal for failure to file a timely complaint. In so holding, the court rejected arguments that the four-year limitation statute violated the special legislation provision of the Illinois Constitution.¹³²

Addressing the special legislation issue,¹³³ the *Anderson* court considered the three-part test enunciated by the Illinois Supreme Court.¹³⁴ It found that prohibition against special legislation does not mean that a law must affect every person in the state in a similar manner. Rather, legislation must operate uniformly throughout the state in all localities and on all persons in like circumstances and conditions.¹³⁵ The *Anderson* court found that in light of the presumption of statutory validity, the plaintiffs had not satisfied their burden of presenting evidence which showed that section 22.1 was not minimally rational.¹³⁶

128. *Id.* at 333-34, 347 N.E.2d at 745-46 (Underwood, J., concurring in part and dissenting in part).

129. See discussion in text accompanying notes 108-24 *supra*.

130. 61 Ill. App. 3d 822, 378 N.E.2d 805 (1978), *appeal docketed*, No. 50880 (Ill. Sup. Ct. June 29, 1978).

131. There was some dispute as to whether the 1975 or 1976 version of section 22.1 controlled. The court held that the 1976 limitation (four years) applied retroactively because the plaintiffs had a reasonable time in which to file a complaint after the amendment's effective date. *Id.* at 825, 378 N.E.2d at 808.

132. *Id.* at 832, 378 N.E.2d at 812.

133. The court was also called upon to determine equal protection and due process claims. *Id.* at 826, 378 N.E.2d at 808.

134. *Id.* at 828-30, 378 N.E.2d at 809-10.

135. *Id.* at 828, 378 N.E.2d at 809.

136. *Id.* at 828-29, 378 N.E.2d at 810.

The *Anderson* court explained that the legislature was in a better position than a court to determine whether all health care professionals were in like circumstances.¹³⁷

The court also determined that the classification had a reasonable relationship to the purposes of the act.¹³⁸ The court found that by enacting section 22.1, the legislature responded to the crisis caused by the spiraling medical malpractice insurance rates and the increase in malpractice litigation against physicians and hospitals.¹³⁹ If the legislature had found a substantial difference between doctors and hospitals and the rest of the health care professions upon which to base a rational classification, then further constitutional inquiry was not necessary.¹⁴⁰

The difference between *Woodward* and *Anderson* lies in their respective analytical approaches. Unlike *Anderson*, the court in *Woodward* did not use the analysis found in *Skinner* and subsequent decisions.¹⁴¹ The two panels also differed in how far they would go to carry out the judicial review mandated by the special legislation clause of the Illinois Constitution. The Supreme Court of Illinois has stated that the enlarged power of judicial review granted by article IV, section 13 does not change the definition of when a law is to be considered special legislation.¹⁴² The three-part test still provides the definition, even though the judiciary has an express grant of statutory review under the 1970 Constitution. *Anderson* took the proper approach with its application of well-defined standards of review to its analysis. Further attempts by the legislature to enact statutory provisions dealing with medical malpractice will benefit from the *Anderson* approach. If the legislature is aware of the tests used to determine whether a law is special legislation, and if those tests are used in a consistent manner, the special nature of future legislation can be gauged with more accuracy.

THE PATH AHEAD

An overview of the Illinois malpractice situation today shows that claims involving doctors and hospitals still comprise the largest amount of total malpractice indemnity paid.¹⁴³ Doctors are licensed to treat

137. *Id.* at 829, 378 N.E.2d at 810.

138. *Id.* at 830, 378 N.E.2d at 811.

139. *Id.* at 828, 378 N.E.2d at 810.

140. *Id.*, 378 N.E.2d at 810.

141. See text accompanying notes 53-97 and 103-05 *supra*.

142. *Bridgewater v. Hotz*, 51 Ill. 2d 103, 110, 281 N.E.2d 317, 321 (1972).

143. During 1978 in Illinois, all large malpractice claims which were awarded (those which exceeded \$50,000 indemnity paid per defendant) had been filed against physicians and hospitals. Nationwide, claims in which more than \$50,000 was paid (usually limited to physicians and hospi-

illness by prescribing medicine and performing surgery; the other health care professions are not allowed to perform this type of treatment.¹⁴⁴ Ultimately, consumers pay a higher price for medical services when malpractice insurance rates continue to rise.¹⁴⁵ These considerations are enough on which to base legislation. The Illinois legislature may have had considerations such as these in mind when it drafted section 22.1.¹⁴⁶

On the other hand, nurses and other health professionals are moving rapidly into the malpractice picture. They are being advised to have their own defenses and their own insurance policies.¹⁴⁷ However, it is the legislature's duty, and not the courts', to evaluate the various proposed solutions to the malpractice crisis.¹⁴⁸ If the legislature perceives a reasonable difference among the various health professions, it is not within the power of the judiciary to determine whether the legislative course chosen was the wisest.¹⁴⁹ Therefore, the analysis of the courts should be restricted to a consideration of the legislation as it stands; a determination of the best possible legislative solution is not required.

tals) represent only four percent of the total number of claims filed but represent sixty-four percent of total indemnity paid. 2 NAIC MALPRACTICE CLAIMS no. 1, at 145 (Dec. 1978).

144. *Woodward v. Burnham City Hosp.*, 60 Ill. App. 3d at 291, 377 N.E.2d at 294 (Trapp, J., dissenting).

145. See HEW Report, *supra* note 1, at 12-13.

146. See, e.g., *Anderson v. Wagner*, 61 Ill. App. 3d 822, 378 N.E.2d 805 (1978), *appeal docketed*, No. 50880 (Ill. Sup. Ct. June 29, 1978). In that case the court stated:

We do not believe that the only "minimally rational" legislative purpose for enacting a statute of limitation can be the purpose of giving repose to stale claims It is our belief that the legislature could properly respond to the medical malpractice "crisis" in this state by enacting an absolute 4-year limitation period to protect physicians and hospitals.

Id. at 830, 378 N.E.2d at 811.

147. It cannot be doubted that malpractice claims against health care professionals (other than doctors and hospitals) are on the rise. See *generally* Note, *A Revolution in White—New Approaches in Treating Nurses as Professionals*, 30 VAND. L. REV. 839 (1977); HEW Report, *supra* note 1, at 644-52. Some ways of alleviating high malpractice insurance rates for doctors and hospitals can transfer both the cost and the risk to other health care professionals. For example, some hospitals are being advised to use self-insurance trusts to cover their malpractice liability. Hospitals set aside a part of their assets in a trust to cover potential malpractice losses without any participation of a primary insurer. Many of these self-insurance trust instruments contain clauses which provide that other valid and collectible malpractice insurance will be disbursed before tapping the trust funds. While this relieves the self-insured hospital of some of the liability for malpractice claims, it can have adverse effects on hospital personnel. An insured nurse, for example, who is involved in several malpractice claims (with the hospital involved through *respondeat superior*), may be dropped by the insurance company which disburses under the nurse's policy. Lack of malpractice insurance could be financially disastrous to the nurse, whose position is little better than if he had never taken malpractice insurance in the first place. Conversation held with William Storie, Assistant Vice President and account executive, Alexander and Alexander, Inc. (October 1978).

148. *Anderson v. Wagner*, 61 Ill. App. 3d 822, 829, 378 N.E.2d 805, 810 (1978), *appeal docketed*, No. 50880 (Ill. Sup. Ct. June 29, 1978).

149. *Grace v. Howlett*, 51 Ill. 2d 478, 494, 283 N.E.2d 474, 482-83 (1972) (Underwood, C.J., dissenting); *Bridgewater v. Hotz*, 51 Ill. 2d 103, 111, 281 N.E.2d 317, 322 (1972).

Woodward is the second invalidation of Illinois legislation attempting to deal with the malpractice problem.¹⁵⁰ If the Illinois Supreme Court affirms *Woodward*, the legislature can enact a new statute of limitations. But to the extent that the courts do not properly analyze the reasons behind the legislative purpose when reviewing statutes, the future legislation is all the more vulnerable to the same type of attack directed at the *Woodward* statute. A consistent standard of judicial review can contribute to the enactment of an effective legislative solution to the malpractice problem in Illinois.

CONCLUSION

In *Woodward v. Burnham City Hospital* a panel of the Illinois Appellate Court for the Fourth District held that section 22.1 of the Limitations Act was special legislation and in violation of article IV, section 13 of the 1970 Illinois Constitution. The statute barred medical malpractice actions against physicians and hospitals if brought more than four years after the alleged negligent act. The special legislation clause of the constitution invites a high degree of judicial activism within well-defined standards of review. The *Woodward* court chose to ignore the established standards when the court did not take into account the statute's relationship to the legislative purpose, a relevant and necessary constitutional inquiry. When the special legislation clause is invoked without reference to the purpose behind the statute, the legislature is given no clue as to what is and what is not a reasonable statutory classification. If the *Woodward* statute was unreasonable, the court's basis for that decision should have been clearly explained. When the Supreme Court of Illinois faces this latest medical malpractice challenge, the court should thoroughly discuss the issues within the framework of the standards of review previously applied in special legislation inquiry.

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150. The first case to invalidate Illinois legislation dealing with the malpractice problem was *Wright v. Central DuPage Hosp. Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976). See text accompanying notes 87-90 *supra*.