Maurer School of Law: Indiana University
Digital Repository @ Maurer Law

Indiana Law Journal

Volume 51 | Issue 1 Article 12

Fall 1975

A Constitutional Perspective on the Indiana Medical Malpractice Act

Cathryn V. Deal
Indiana University School of Law

A Constitutional Perspective on the Indiana Medical Malpractice Act

In the spring of 1975 the Indiana legislature enacted a comprehensive malpractice compensation act[1] in response to the "malpractice crisis,"[2] the symptoms of which include escalating damage awards, rapidly rising premiums on malpractice insurance, and increasing public concern that the quality of medical care is being harmed by the traditional tort litigation process.[3]

---

[1] IND. CODE § 16-9.5-1-1 to -9-10 (Burns Supp. 1975) [hereinafter referred to as the Malpractice Act or the Act].

[2] *See generally Introduction: The Indiana Act in Context*, 51 IND. L.J. 91 (1975), *supra*.

[3] *See* Cast, *Indiana's Medical Liability Problem*, 68 J. OF IND. ST. MED. ASS'N 21, 21–23 (1975); President's Page, *id.* at 34; Bloomington Daily Herald-Telephone, Jan. 13, 1975, at 1; *id.*, Jan. 14, 1975, at 1.

However, some authorities indicate that the problem is not the result of the fault system, but rather the result of the medical profession's failure to police its own ranks. *See, e.g.*, Walkup & Kelly, *Hospital Liability: Changing Patterns of Responsibility*, 8 U. SAN FRAN. L. REV. 247, 260 (1973).

Strong impetus for a change in the Indiana law arose in the fall of 1974 when the state's two largest malpractice insurers, Medical Protective Company and St. Paul Fire and Marine Insurance Company, refused to renew existing policies of physicians in high-risk categories, such as neurosurgery, obstetrics, and anesthesiology. At the same time, those companies refused to issue liability policies to new practitioners in the state. The consequences of these actions were immediately apparent. Physicians, in many cases, were unable to obtain insurance elsewhere, and this in turn resulted in the near-suspension of all but emergency surgery at several hospitals. Simultanously, the premiums for available malpractice insurance were reaching new heights. Bloomington Daily Herald-Telephone, Jan. 13, 1975, at 1; *id.*, Jan. 14, 1975, at 1; Fort Wayne News-Sentinel, Nov. 14, 1974, at 1B.

Alarmed by these events, the Indiana State Medical Association, at its annual meeting in October 1974, appointed a special committee to study the malpractice insurance dilemma and make recommendations for solution. The committee's recommendation, approved by the Association's Board of Trustees, was corrective legislation. Subsequently, three Indianapolis attorneys were employed by the Association to draft a "Patients' Compensation Act." See H.R. 1460, 99th Ind. Gen. Assembly (1975).

The primary provision of the initial bill involved substitution of a physician-layman-attorney arbitration board for the traditional jury trial of liability and damage issues. Moreover, the measure contained a scheduled limitation of compensatory damages to a ceiling of $125,000, exclusive of costs and attorney fees. In addition, the bill reduced the statute of limitations for minors, established a sliding scale for attorneys' contingent fees, and required health care providers who wished to obtain the bill's benefits to file proof of financial responsibility of at least $125,000.

Variations on the Patients' Compensation Act were also introduced during the 1975 session of the legislature. One proposal retained the traditional tort liability approach to malpractice, but provided that awards over $200,000 would be paid from a patients' compensation fund, established by a compulsory $500 per year assessment on each physician in the state. A second proposal would have amended the Patients' Compensation Act by requiring malpractice insurers in the state to set rates based solely on claim experience among Indiana health care providers.

The Malpractice Act makes several significant changes in the tort-based system of malpractice compensation.[4] The Act:

1) limits the total amount of a plaintiff's recovery to a $500,000 maximum;[5]

2) limits the liability of each health care provider to $100,000;[6]

3) provides that any amount due from a judgment or settlement in excess of the total liability of all liable health care providers shall be payable from a patients' compensation fund, in an amount to be determined by "the court" in which the action is pending, or if no action is pending, in the circuit or superior court of Marion County;[7]

4) re-enacts the two-year statute of limitations for malpractice and makes it applicable regardless of legal disability, with the exception that malpractice victims younger than six will have until the age of eight to bring suit;[8]

5) establishes a "patients' compensation fund" to pay any amount due for a judgment or settlement which is in excess of the total liability of all health care providers;[9]

While the bill was pending in the Indiana Senate, the Medical Malpractice Committee of the Indiana Bar Association issued a report and conclusions based upon its own investigation of the problem. *See* REPORT AND RECOMMENDATION OF THE MEDICAL MALPRACTICE INSURANCE COMMITTEE 8 (1975) [on file with the INDIANA LAW JOURNAL]. The committee recommended retaining the jury system for determination of liability and pain and suffering damages, but proposed that other damages be determined by a judge. The committee agreed with the sponsors of the Patients' Compensation Act that a ceiling should be set on damages, but recommended that a plaintiff whose experience showed that an award for maintenance and future expenses was inadequate be allowed to reapply to the court for additional funds.

[4] *See* U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE, Appendix at 217–23 (1973), for an analysis of the traditional tort litigation process, and James, *Damages in Accident Cases*, 41 CORNELL L.Q. 582, 599–605 (1956), for a discussion of damages traditionally awardable in personal injury actions.

[5] IND. CODE § 16-9.5-2-2(a) (Burns Supp. 1975).

[6] IND. CODE § 16-9.5-2-2(b) (Burns Supp. 1975).

The term "health care providers" is defined in the Act:

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

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

Under the Act, for example, plaintiff who recovered a $500,000 verdict against a physician and a hospital could recover at most $100,000 of that sum from the physician and $100,000 from the hospital. The remaining $300,000 would be paid by the patients' compensation fund. *See* note 7 *infra* and text accompanying.

[7] IND. CODE §§ 16-9.5-2-2(c), 16-9.5-4-3 (Burns Supp. 1975).

[8] IND. CODE § 16-9.5-3-1 to -2 (Burns Supp. 1975).

[9] IND. CODE § 16-9.5-2-2(c) (Burns Supp. 1975). The fund is to be financed by an annual surcharge of not more than 10 percent of each health care provider's insurance premium. *See* IND. CODE § 16-9.5-4-1(b) (Burns Supp. 1975).

6) requires a plaintiff to submit his claim to a "medical review panel" prior to commencement of a court action;[10]

7) provides that any member of the review panel may be required to testify at the behest of either party;[11]

8) limits to 15 percent an attorney's share of any recovery from the patients' compensation fund;[12] and

9) initiates a state-run insurance plan for otherwise uninsurable health care providers.[13]

The effect of these provisions on the volume of malpractice litigation and the magnitude of damage awards cannot presently be ascertained. Some provisions of the Malpractice Act, however, may be subject to challenge on constitutional grounds. The statute may violate due process,[14] the right to jury trial,[15] and equal protection.[16]

Under the due process clause,[17] legislation must address a legitimate state objective, and it is clear that the Act does so. However, courts have sometimes inquired whether legislation altering common law

---

[10] IND. CODE § 16-9.5-9-1 to -10 (Burns Supp. 1975). The panel is obligated to render an opinion as to the following questions:

(1) Whether the evidence supports the conclusion that the defendant or defendants failed to comply with the appropriate standard of care as charged in the complaint;

(2) Whether the conduct complained of was or was not a factor of the resultant damages, and if so, whether the plaintiff suffered any disability or permanent impairment and the extent of such; and

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

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

[11] IND. CODE § 16-9.5-9-9 (Burns Supp. 1975).

[12] IND. CODE § 16-9.5-5-1(a) (Burns Supp. 1975). Statutory limits on attorneys' fees have been upheld as constitutional exercises of the state's police power. *See, e.g.*, Yeiser v. Dysart, 267 U.S. 540 (1925); Buckler v. Hilt, 209 Ind. 541, 200 N.E. 219 (1936) (workmen's compensation laws).

[13] IND. CODE § 16-9.5-8-1 to -8 (Burns Supp. 1975).

In addition, the Act:

1) requires that a contract by a health care provider which guarantees specific results from medical treatment be evidenced by a writing before suit can be brought on such a contract. IND. CODE § 16-9.5-1-4 (Burns Supp. 1975).

2) requires that every claim settled or adjudicated to final judgment against any health care provider be reported to the state commission of insurance and to the health care provider's board of professional registration and examination. IND. CODE § 16-9.5-6-1 to -2 (Burns Supp. 1975).

3) creates a "Medical Malpractice Study Commission" to execute a comprehensive analysis of the entire malpractice problem and report to the legislative council and the governor by December 31, 1976. Pub. L. No. 146, § 2 [1975] 1 Ind. Acts 854, 867.

4) provides for severability of the provisions of the Act so that the invalidity of one portion will not affect other unconnected portions. Pub. L. No. 146, § 4 [1975] 1 Ind. Acts 854, 869.

[14] *See* text accompanying note 31 *infra.*

[15] *See* text accompanying note 62 *infra.*

[16] *See* text accompanying note 106 *infra.*

[17] U.S. CONST. amend. xiv; IND. CONST. art. 1, § 12.

rights provides the plaintiff with a "reasonable substitute" for those rights. Under the standards which the courts have developed, the Malpractice Act does not provide a "reasonable substitute" for pre-existent rights. On the other hand, it is not clear that a "reasonable substitute" is required by the due process clause.

The Act redistributes from jury to judge the power to measure damages recoverable from the patients' compensation fund.[18] There is evidence that the assessment of damages was a fundamental element of the common law jury trial. The Act is therefore open to challenge on the grounds that it denies the plaintiff's constitutional right to jury trial.[19]

Finally, the Malpractice Act may be challenged on equal protection grounds.[20] The Act establishes two classifications which may be arbitrary. First, its provisions apply to those injured by malpractice but not to those otherwise injured. Second, its damage limit may deny full recovery to malpractice victims who have suffered extensive objectively identifiable damages, as well as to victims who claim extensive pain and suffering damages. The first classification may be too narrow in sweep, the second too broad.

Comparison to "No-Fault" and Workmen's Compensation Acts

Throughout this note the Malpractice Act will be compared to workmen's compensation laws and to "no-fault" automobile reparation statutes. These major legislative inroads upon the tort litigation process have been the subject of intense constitutional scrutiny.

Most workmen's compensation laws place some ceiling on damage awards. Some workmen's compensation acts set a maximum limit on total recovery,[21] while others establish a schedule of payments limiting the recovery for each of several types of injury.[22] Unlike most workmen's compensation acts, which at least allow an injured individual to recover in full for all medical expenses,[23] the Malpractice Act limits the total recovery regardless of the type of damage suffered.[24] Moreover,

---

[18] *See* IND. CODE §§ 16-9.5-2-2(c), 16-9.5-4-3 (Burns Supp. 1975).

[19] U.S. CONST. amend. vii; IND. CONST. art. 1, § 12.

[20] U.S. CONST. amend. xiv; IND. CONST. art. 1, § 23.

[21] *See, e.g.*, 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 58.00-.11 (1975).

[22] *See, e.g.*, IND. CODE § 22-3-3-22 (Burns 1974).

[23] For a general discussion of the new cause of action created by the workmen's compensation statutes, and its basis in an obligation owed the worker by industry, see B.F. SMALL, WORKMEN'S COMPENSATION LAWS OF INDIANA § 1.1 (1950). *Cf.* note 77 *infra.*

[24] Large damage awards have been rare in Indiana, and as of 1975 no award has ever exceeded $500,000. The largest single recovery handed down in an Indiana malpractice suit was $435,000 in 1973. Bloomington Daily Herald-Telephone, Jan. 14, 1975, at 1. How-

while workmen's compensation laws modify the underlying common law tort action, and discard negligence,[25] the plaintiff under the Malpractice Act must prove his case under the common law.

The Malpractice Act, except in the limited instance of a written contract to cure, requires proof of negligence, as do "no-fault" automobile reparation statutes.[26] While the Act sets an absolute ceiling on damage awards,[27] "no-fault" statutes preclude suit unless the damages incurred reach a certain threshold,[28] and sometimes limit pain and suffering awards to a percentage of reasonable medical expenses.[29] Unlike the Malpractice Act, "no-fault" laws guarantee that an injured plaintiff will recover all medical expenses. Although a plaintiff may not sue for personal injury damages below a threshold figure, under "no-fault" he must maintain insurance covering his medical expenses as a substitute for the recovery of damages, and may then sue for medical expenses which exceed the required policy limits.[30]

It is apparent that the Malpractice Act shares some of the characteristics of "no-fault" statutes and workmen's compensation acts. However, some features of the Act are unique. This note will consider whether certain provisions violate rights which are constitutionally protected.

DUE PROCESS

The Malpractice Act provides that "the total amount recoverable for any injury or death of a patient may not exceed five hundred thousand dollars [$500,000]."[31] Since a plaintiff's common law right to damages for malpractice is limited only by a requirement that the com-

---

ever, if Indiana award figures continue their upward trend, the $500,000 ceiling may soon be met with a constitutional challenge.

[25] *See* 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 61.00 (1975).

[26] Hereinafter references to "malpractice" actions will presume that such actions are brought under a negligence theory. The Act severely limits contractual malpractice to written agreements. IND. CODE § 16-9.5-1-4 (Burns Supp. 1975). *See generally* Note, *Express Contracts to Cure: The Nature of Contractual Malpractice*, 50 IND. L.J. 361 (1975).

[27] IND. CODE § 16-9.5-2-2(a) (Burns Supp. 1975).

Some wrongful death statutes also set a ceiling on damages. However, these statutes were an expansion of rights under the common law; most created a new cause of action. A damage limit in these statutes is not an abrogation of, but rather a supplement to, the common law. *See, e.g.*, IND CODE § 34-1-1-2 (Burns 1973).

[28] *Cf.* Lasky v. State Farm Ins. Co., 296 So. 2d 9 (Fla. 1974); Kluger v. White, 281 So. 2d 1 (Fla. 1973); Grace v. Howlett, 51 Ill. 2d 478, 283 N.E.2d 474 (1972); Manzanares v. Bell, 214 Kan. 589, 522 P.2d 1291 (1974); Pinnick v. Cleary, 36 Mass. 1, 271 N.E.2d 592 (1971).

[29] *See, e.g.*, Grace v. Howlett, 51 Ill. 2d 478, 283 N.E.2d 474 (1972).

[30] *See* Pinnick v. Cleary, 360 Mass. 1, 271 N.E.2d 592 (1971).

[31] IND. CODE § 16-9.5-2-2(a) (Burns Supp. 1975).

pensation be reasonable,[32] the Malpractice Act abridges the common law right to reasonable compensation to the extent that such compensation exceeds $500,000.[33] Although the abrogation of common law rights is generally permissible,[34] a statute may not displace common law rights in violation of state or federal due process standards.[35]

Where workmen's compensation and "no-fault" statutes have been challenged on due process grounds, the courts have demanded that the legislation be rationally related to a legitimate legislative purpose.[36] That much is well settled. However, the courts have sometimes applied a stricter standard: whether a reasonable substitute has been provided for the common law rights which have been abridged.[37] Only one recent decision[38] has held that a "reasonable substitute" for common law rights is constitutionally required. However, the "reasonable substitute" test has so insistently survived in dictum that it may yet prove to have constitutional vitality.

---

[32] *See, e.g.*, Illinois Cent. R.R. v. Cheek, 152 Ind. 663, 678, 53 N.E. 641, 646 (1899); Collins v. Clayton & Lambert Mfg. Co., 299 F.2d 362, 365 (6th Cir. 1962).

[33] In finding that an Act of Congress which immunized federal officers from civil damages for false imprisonment was a violation of the due process clause of the fifth amendment, the Indiana Supreme Court held that:

> The right to damages, to be recovered in a civil action, for false imprisonment, is a chose in action—is property—and passes to one's representatives at death, by the law of *Indiana*.

Griffin v. Wilcox, 21 Ind. 370, 373 (1863) (emphasis in original).

[34] *See* Munn v. Illinois, 94 U.S. 113, 134 (1876) (statute regulating grain warehouses). *See also* McKinster v. Sager, 163 Ind. 671, 685, 72 N.E. 854, 859 (1904), in which the court held that "the grant of legislative power implies a right to change the common law, particularly with reference to administrative and remedial processes . . . ." *Cf.* Cudahy Packing Co. v. Parramore, 263 U.S. 418 (1923) (concerning a workmen's compensation statute) in which the Supreme Court stated:

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

Id. at 422. *But cf.* The Kentucky State Journal Co. v. Workmen's Compensation Board, 161 Ky. 562, 170 S.W. 1166 (1914) in which the Supreme Court of Kentucky held invalid the Kentucky workmen's compensation law because it violated a provision of the Kentucky constitution denying the legislature the power to limit the amount to be recovered for personal injury or property damage.

[35] In Manley v. State, 196 Ind. 529, 149 N.E. 51 (1925) the Indiana Supreme Court held:

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

Id. at 532, 149 N.E. at 52.

[36] *See* text accompanying note 39 *infra*.

[37] *See* text accompanying note 44 *infra*.

[38] Montgomery v. Daniels, 81 Misc. 2d 373, 367 N.Y.S.2d 419 (Sup. Ct. 1975), *rev'd*, No. 359 (Ct. App., N.Y., Nov. 25, 1975), discussed in text accompanying note 48 *infra*.

Minimum Rationality Test

The United States Supreme Court has stated that legislation abridging the common law does not violate the due process clause if the legislation is related to a permissible state objective.[39] Under this test, if a set of facts could exist which would justify the legislative action, these facts must be presumed to have existed when the statute was enacted.[40] This standard, which asks merely for minimal rationality, is designed to allow the greatest possible discretion to the legislature.[41]

The most probable objective of the legislature in enacting the Malpractice Act was to prevent the loss of health care manpower which might be caused by the unavailability and expense of malpractice insurance. This is a goal which the legislature unquestionably may pursue through its broad power to protect the public health.[42] The statute bears at least a rational relation to guaranteeing the availability of malpractice insurance coverage, albeit at the expense of the injured patient. A reduced payout by insurance companies will enable the companies to make coverage available to a greater number of health care providers, and at lower rates. Limiting damage awards reduces the actuarial risk which in turn may lead to lower rates. Of course, the possibility exists, since insurance company rates are set nationally, that large judgments elsewhere will keep Indiana insurance premiums high. Under the minimal rationality test, however, the wisdom of the legislature is not open to question. The Indiana Malpractice Act seems rationally related to attaining its objective.

Reasonable Substitute Test

Once it has been found that a statute survives the minimal rationality test, that is often the end of the matter.[43] However, many courts,

---

[39] Silver v. Silver, 280 U.S. 117, 122 (1929).

[40] United States v. Carolene Products Co., 304 U.S. 144, 154 (1938). *See also* Munn v. Illinois, 94 U.S. 113, 132 (1876).

[41] *Cf., e.g.,* Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966); Ferguson v. Skrupa, 372 U.S. 726 (1963).

[42] *See* Parks v. State, 159 Ind. 211, 64 N.E. 862 (1902); State *ex rel.* Burroughs v. Webster, 150 Ind. 607, 50 N.E. 750 (1898); State *ex rel.* Walker v. Green, 112 Ind. 462, 14 N.E. 352 (1887); Eastman v. State, 109 Ind. 278, 10 N.E. 97 (1886).

[43] In considering a due process challenge to the Workmen's Compensation Act, the Indiana Supreme Court did not expressly apply any test. The Court concluded merely that certain of its provisions under attack were "not unreasonable and . . . well within the legislative power." Warren v. Indiana Telephone Co., 217 Ind. 93, 103, 26 N.E.2d 399, 403 (1940). No reference to a "reasonable substitute" appears in the opinion.

The court in *Warren,* however, assumed that the workmen's compensation system was an "elective" provision, which an employee could choose to avoid. *Id.* at 102–03, 26 N.E.2d at 402–03. It is unclear whether the court would have applied some variant of the "reasonable substitute" test had the act been mandatory.

faced with due process challenges to workmen's compensation and "no-fault" automobile liability acts, have considered whether these statutes have provided a reasonable substitute for the plaintiff's abridged common law rights. In a leading case, *New York Central Railroad v. White*,[44] the New York workmen's compensation law was challenged under the due process clause as an interference with an employee's right to compensation commensurate with the damage sustained. The Supreme Court noted that

> . . . it perhaps may be doubted whether the State could abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead. No such question is here presented, and we intimate no opinion on it. The statute under consideration sets aside one body of rules only to establish another system in its place. If the employee is no longer able to recover as much as before in the case of being injured through the employer's negligence, he is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of damages.[45]

Therefore, the Supreme Court held that the New York law was a reasonable substitute for the rights abridged. This standard demands a *quid pro quo*—in exchange for the benefits created by statute the plaintiff forsakes some benefits which he possessed at common law.

Although the *White* dictum arose in the context of workmen's compensation, a system which supercedes the common law action in its entirety,[46] some courts have sought a "reasonable substitute" in "no-fault," where the common law action is only partially abridged.[47] Recently, in striking down the New York no-fault statute on a number of

---

The provision of the workmen's compensation act which made it mandatory in the case of coal mines was analyzed by the United States Supreme Court in Lower Vein Coal Co. v. Industrial Bd., 255 U.S. 144 (1921), where the Court held that neither the fourteenth amendment nor §§ 21 or 23 of the Indiana bill of rights (just compensation and equal privileges) were violated by the act. The *Warren* court indicated that this was a correct interpretation of the Indiana constitution. 217 Ind. 93 at 103, 26 N.E.2d at 403. However, in *Lower Vein Coal*, the employer, not an employee, had challenged the act. It is unlikely that the employer would raise, or could raise, an attack on a statute on the theory that no "reasonable substitute" had been provided for an employee's rights. Indeed, in no case involving workmen's compensation has the Supreme Court of Indiana been called upon to decide whether the act provides a "reasonable substitute" for a plaintiff's common law rights. *See also* note 61 *infra*.

[44] 243 U.S. 188 (1916).

[45] *Id.* at 201. The force of this dictum was undermined in Arizona Employers' Liability Cases, 250 U.S. 400 (1919), in which the Court held that whether the workmen's compensation act was a "proper substitute" for common law rights was for the "people" to determine. The law was not so arbitrary, unreasonable, or unjust as to render it void. *Id.* at 427.

[46] *See* note 77 *infra* and text accompanying.

[47] *See* note 78 *infra* and text accompanying.

grounds, a trial court cited *White* for the proposition that "A substitute for an established body of law which is abolished must be adequate."[48] The court concluded that the statute was not a new system of benefits but rather a bar to suit in tort with nothing in return for the plaintiff.

Other courts reviewing no-fault laws have found benefits for the plaintiff.[49] In *Pinnick v. Cleary*,[50] the Massachusetts Supreme Court upheld that state's no-fault plan as minimally rational, and then determined that the statute provided "an adequate and reasonable substitute for pre-existing rights."[51] However, the court intimated "no opinion as to whether, and if so in what circumstances, the application of this test is constitutionally required."[52] In finding a "reasonable substitute" under the no-fault law, the court stressed the benefits the plaintiff received in return for his partial loss of recovery. Several courts have noted that under no-fault systems the plaintiff receives a guarantee of some amount of recovery for his losses, as well as a more prompt and less costly procedure for obtaining that recovery.[53]

However, under the Malpractice Act, a patient's recovery is not guaranteed as it is under "no-fault" and workmen's compensation laws. The patient must still prove causation and negligence in court, and he is still subject to the traditional defenses of contributory negligence[54] and assumption of risk.[55] Nor is the patient assured a prompt recovery; his claim faces the time-consuming additional hurdle posed by the Medi-

---

[48] Montgomery v. Daniels, 81 Misc. 2d 373, ——, 367 N.Y.S.2d 419, 425 (Sup. Ct. 1975). The trial court's decision in this case was reversed on direct appeal to the New York Court of Appeals. Montgomery v. Daniels, No. 359 (Ct. App., N.Y., Nov. 25, 1975). In speaking of the "reasonable substitute" test, the court held that, since the "no-fault" law was a reasonable substitute, there was no need to reach the constitutional question framed by plaintiff. In passing, however, the court doubted the vitality of the test itself, which it believed had been undermined by subsequent decisions of the United States Supreme Court.

[49] *See, e.g.*, Lasky v. State Farm Ins. Co., 296 So. 2d 9 (Fla. 1974); Manzanares v. Bell, 214 Kan. 589, 522 P.2d 1291 (1974).

[50] 360 Mass. 1, 271 N.E.2d 592 (1971).

[51] *Id.* at ——, 271 N.E.2d at 602.

[52] *Id.* at ——, 271 N.E.2d at 605 n.16.

[53] *See, e.g.*, Lasky v. State Farm Ins. Co., 296 So. 2d 9, 15 (Fla. 1974); Manzanares v. Bell, 214 Kan. 589, 599, 522 P.2d 1291, 1301 (1974); Pinnick v. Cleary, 360 Mass. 1, ——, 271, N.E.2d 592, 605–07 (1971); Opinion of the Justices, 113 N.H. 205, 212, 304 A.2d 881, 886 (1973).

[54] Contributory negligence is conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 416 (4th ed. 1971).

[55] A plaintiff who has assumed the risk has, in advance

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

Id. at 440.

cal Review Panel.[56] While the availability of the panel's findings as evidence in a subsequent trial might eliminate the need for extensive expert testimony, it is more likely that the party opposing the panel's findings will feel a need to present additional experts to blunt the impact of the panel's report, resulting in delays and increased cost of a suit. Likewise, the Medical Review Panel procedures and the need for a court certification of awards from the patients' compensation fund[57] seem likely to increase the potential cost of a suit. Compared to the no-fault laws and workmen's compensation, then, the plaintiff under the Malpractice Act gains relatively little.

On the other hand, some plaintiffs under the Act will be deprived of a great deal. Under no-fault, the "threshold" limitations on suit deny recovery only for injury which is minor. The Malpractice Act, however, denies recovery at the opposite end of the spectrum. The $500,000 damage limitation[58] will operate to deny compensation only in those cases where the injury reaches the most catastrophic proportions—where the damages exceed $500,000. Thus the individual most severely injured will lose the most under the Malpractice Act.

One plausible benefit created for a plaintiff by the Malpractice Act is the assurance of an expert witness' testimony on his behalf, should the Medical Review Panel find in his favor. Any member of the Panel is required to appear and testify in a trial if called by one of the parties.[59] Although the plaintiff must, as before, bear the cost of the witness' appearance, he is at least guaranteed a physician's testimony.

One might also contend that, under the Malpractice Act, patient-plaintiffs receive a benefit in that medical care will be more readily available. The limitation on damage awards could increase the availability of malpractice insurance, thereby eliminating a factor in the reduction of medical manpower. Similarly, it might be argued that the patient-plaintiff receives a benefit in terms of lower personal medical costs, since lower awards will induce lower insurance premiums to physicians, the savings on which would be passed along to the plaintiff in the form of lower medical fees. But these benefits inure to all members of society, not merely to malpractice victims, while it is only malpractice victims who are forced to bear the costs incident to the benefits.

---

[56] *See* IND. CODE § 16-9.5-9-1 to -10 (Burns Supp. 1975).

[57] IND. CODE § 16-9.5-4-3 (Burns Supp. 1975).

[58] IND. CODE § 16-9.5-2-2(a) (Burns Supp. 1975).

[59] IND. CODE § 16-9.5-9-9 (Burns Supp. 1975).

Summary

The Malpractice Act is at least rationally related to the important legislative goal of ensuring medical care to the people of Indiana. Therefore, under the standard generally applied, the Act's limitation on damages does not violate due process.[60] Some courts have inquired further whether a statute abridging the common law has supplied a "reasonable substitute" for the rights abridged. Under the criteria developed in these decisions, the Malpractice Act fails to provide such a substitute. However, it is unclear whether the reasonable substitute test, which has persisted in dictum, is constitutionally required. Thus it remains to be seen whether the courts would invalidate a law because it fails to provide a reasonable substitute for abridged common law rights.[61]

---

[60] The statute of limitations may also come under attack on constitutional grounds. The Act provides that no malpractice action may be brought unless filed within two years from the date of the act complained of, and this section is made applicable to all persons regardless of minority or other legal disability. An exception is made for a victim under the age of six, who may bring suit anytime prior to his eighth birthday. IND. CODE § 16-9.5-3-1 (Burns Supp. 1975). This section of the Act was apparently intended to overcome the decision of the Indiana Supreme Court in Chaffin v. Nicosia, —— Ind. ——, 310 N.E.2d 867 (1974).

In *Chaffin*, a malpractice action alleging negligent injury at birth was filed one day before the plaintiff's twenty-third birthday, in reliance upon the Indiana legal disability statute, IND. CODE § 34-1-2-5 (Burns 1973), which permits a minor claimant to bring suit any time within two years after reaching majority. The defendant contended that the action was barred by the broad language of the two-year statute for medical malpractice, IND. CODE § 34-4-19-1 (Burns 1973), which was said to implicitly repeal the legal disability statute in malpractice cases.

The supreme court construed the legal disability statute as applying in malpractice, and allowed the plaintiff to proceed. The malpractice statute, said the court, "must not be allowed to produce an absurd result, which the legislature, as a reasonably minded body, could not have possibly intended . . . ." —— Ind. at ——, 310 N.E.2d at 870. The court noted that to read the malpractice statute

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

Id.

This strong language indicates that the Malpractice Act's statute of limitations may face a constitutional attack to the extent that it may work an inequity. The statute, like its predecessor, is absolute on its face in the sense that no "discoverability" exception is provided. However, the courts have sometimes construed the statute to relieve its harshness. *See* Note, *Malpractice and the Statute of Limitations*, 32 IND. L.J. 528 (1957). To the extent that the statute as amended cannot be similarly glossed, *Chaffin* indicates that in the case of a minor at least, substantial questions will be raised under the Indiana constitution.

[61] This may turn on little more than the vitality of substantive due process in Indiana. Indiana cases indicate that there are substantive rights which are protected by article 1, § 12 of the Indiana constitution. In Pennington v. Stewart, 212 Ind. 553, 10 N.E.2d 619 (1937), the supreme court held that abolition of the civil action for alienation of affection was not a violation of the state constitution. The court's premise was that liability for alienation is incident to the marital relation, which is wholly under legislative control. The right to one's wife's affections was accordingly not "property" within the meaning of the

RIGHT TO JURY TRIAL

The section of the Malpractice Act providing that a judge will determine the damages to be awarded from the patients' compensation fund[62] may constitute a violation of both the state[63] and federal[64] guarantees of trial by jury.[65] Although the seventh amendment to the United States Constitution does not guarantee jury trial in civil actions in the state courts,[66] it will control malpractice litigation in the federal courts.[67]

---

constitution. One writer, however, views this case as meaning that it is within the police power to control marriage, despite an infringement on a property right. Twomley, *The Indiana Bill of Rights*, 20 IND. L.J. 211, 232 (1945). More broadly, the author views the fact that the court has not held that the article 1, § 12 guarantee is merely procedural as a strong indication that the section assures certain substantive rights. *Id.* at 231–32.

Until fairly recently, the Indiana courts upheld a doctrine of "natural rights" emanating from article 1, § 1 of the state constitution. *See* Dept. of Financial Inst. v. General Finance Corp., 227 Ind. 373, 86 N.E.2d 444 (1949); Paulsen, *"Natural Rights"—A Constitutional Doctrine in Indiana*, 25 IND. L.J. 123 (1950); Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950). Whether this constitutional provision maintains vitality is open to doubt. The last time the Indiana Supreme Court used article 1, § 1 to declare a government policy unconstitutional was 1956. Dept. of Ins. v. Motor Ins. Corp., 236 Ind. 1, 138 N.E.2d 157 (1956).

[62] IND. CODE § 16-9.5-4-3 (Burns Supp. 1975).

[63] IND. CONST. art. 1, § 20. "In all civil cases, the right of trial by jury shall remain inviolate."

[64] U.S. CONST. amend. VII provides:

> Trial by jury in civil cases.—In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

[65] The discussion of the jury trial implications of the Malpractice Act in this section does not touch upon those provisions of the Act which limit the total damages recoverable for injury. *See* IND. CODE § 16-9.5-2-2(a) (Burns Supp. 1975).

Damage limitations and damage thresholds have been challenged as a violation of the right to jury trial in some actions. *See* text accompanying note 79 *infra*. Such a challenge, however, does not seem to be firmly grounded. A jury trial issue is properly presented where there are triable issues of fact and these issues are submitted to a trier of fact other than the jury, or are re-examined inconsistently with the common law. Where some element of damages, or some amount of damages above or below a certain figure may not be recovered as a matter of legislative enactment, no triable issue of fact exists as to those damages. Accordingly, no question of the right to jury trial is raised. A challenge to the constitutionality of a damage limitation more properly raises questions of due process, *see* text accompanying note 31 *supra*, or of equal protection, *see* text accompanying note 106 *infra*. *See* Manzanares v. Bell, 214 Kan. 589, 522 P.2d 1291 (1974), and text accompanying note 81 *infra*.

[66] *See, e.g.*, Fay v. New York, 332 U.S. 261 (1947); Pearson v. Yewdall, 95 U.S. 294 (1877); Walker v. Sauvinet, 92 U.S. 90 (1875); Edwards v. Elliott, 88 U.S. (21 Wall.) 532 (1874).

[67] The seventh amendment will apply directly when a malpractice action under Indiana law is filed in federal district court under diversity jurisdiction.

In Byrd v. Blue Ridge Rural Elec. Cooperative, Inc., 356 U.S. 525 (1958), the defendant in an action for personal injuries contended that plaintiff was his employee under the state workmen's compensation act, which limited his recovery to the terms of that act. The Supreme Court held that, regardless of the contrary state practice, the question whether the plaintiff was a statutory employee was a question for the jury. State law could not alter the "essential character or function of a federal court." *Id.* at 539. Simler v. Conner, 372 U.S. 221 (1963), firmly established that, state practice to the contrary notwithstanding,

The Act requires that pursuant to a judgment or settlement, a claim against the patients' compensation fund be filed with the court in which the action is pending, or, if none is pending, with the circuit or superior court of Marion County.[68] The court in which the petition is filed may then hear evidence on what damages, if any, should be awarded from the fund, and the "*court* shall determine the amount for which the fund is liable."[69] The use of the term "court" in this context is apparently intended to lodge in the presiding judge the power to set awards from the fund.[70]

The extent of the judge's powers under this section is not clearly defined. The provision could be interpreted to give the judge no more than his usual power to evaluate the reasonableness of the jury award.[71] Yet this would render the provision superfluous, especially where a

---

the seventh amendment mandates a trial by jury of the legal issues in a diversity case.

The seventh amendment has been construed to mean that the right to jury trial, as found in the English courts in 1791, the date of the amendment's adoption, must be preserved in federal court. *See, e.g.,* Ross v. Bernhard, 396 U.S. 531 (1970); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Dimick v. Schiedt, 293 U.S. 474 (1935); Scott, *Trial by Jury and the Reform of Civil Practice,* 31 HARV. L. REV. 669 (1918); Wolfram, *The Constitutional History of the Seventh Amendment,* 57 MINN. L. REV. 639, 640–42 (1973). Although it has been suggested that this "static" approach to the right is not mandated by the seventh amendment, and perhaps should be discarded, the matter is well settled in the Supreme Court. *See* Wolfram, *supra,* at 747.

In the federal courts a malpractice action would almost certainly be one "at law" for jury trial purposes. In Ransom v. Staso Milling Co., 2 F.R.D. 128 (D. Vt. 1941), Judge Leamy stated that

> where the gist of the action is for money damages, which at common law would fall within a well recognized form of action, such as an action of tort for damage to property, or person, the case is for the jury if demand for jury is made.

Id. at 131. In United States v. Yellow Cab Co., 340 U.S. 543, 555 (1951), the Supreme Court indicated that the seventh amendment "preserves to private individuals the right to trial by jury on [tort claims against private parties] in a federal court." It remains to be seen, however, whether the federal right to jury trial includes the right to have damages assessed by the jury. *See generally* note 86 *infra* & text accompanying.

One commentator has pointed out that the information available on jury trial at common law is far from complete. Henderson, *The Background of the Seventh Amendment,* 80 HARV. L. REV. 289, 290 (1966). However, constitutional doubts attend remittitur in the federal courts, despite the fact that the plaintiff may refuse, and elect a new trial on damages. *See* 6A J.W. MOORE, MOORE'S FEDERAL PRACTICE ¶ 59.05[3] (1959). The Indiana Act's procedure—insofar as it gives the judge discretion to recompute the amount of recovery from the patients' compensation fund—cannot fail to raise doubts at least as serious as those raised by remittitur.

[68] IND. CODE § 16–9.5–4–3(1) (Burns Supp. 1975).

[69] IND. CODE § 16–9.5–4–3(5) (Burns Supp. 1975) (emphasis added).

[70] The Act specifies that any legal term or term of art, otherwise undefined in the Act, should have "such meaning as is consistent with the common law." IND. CODE § 16–9.5–1–3 (Burns Supp. 1975). The term "court" has sometimes been interpreted to include both judge and jury. However, it has also been considered synonymous with "judge" when used in a statute. BLACK'S LAW DICTIONARY 425 (4th ed. 1968). Although the term "court" is therefore somewhat ambiguous in itself, interpreting it to mean "the judge" seems most logical under the Act. *See* text accompanying note 72 *infra.*

[71] *Cf., e.g.,* C. MCCORMICK, HANDBOOK OF THE LAW OF DAMAGES §§ 18, 19 (1935).

judgment has already been obtained in a prior action. Moreover, a judge who merely examines the reasonableness of a jury verdict ordinarily is not empowered to hear additional evidence, as provided by the Act.[72] The statute most likely intends that the judge recompute the damages, thereby effectively depriving the jury of the power to award damages. This may constitute a violation of the plaintiff's constitutional right to jury trial, if it can first be established that a claim against the fund gives rise to a right to jury trial under the Indiana constitution.[73]

---

[72] *See* IND. CODE § 16-9.5-4-3(5) (Burns Supp. 1975).

[73] The textual discussion assumes that there is a constitutional right to jury trial enforceable against the patients' compensation fund. This assumption, however, cannot easily be verified.

The Indiana courts may adopt the position that since the fund did not exist before 1852, the time of the adoption of the state constitution, there is no constitutional right to jury trial enforceable against the fund. *Cf.* Millers Nat. Ins. Co. v. American State Bank, 206 Ind. 511, 190 N.E. 433 (1934); Crown Point v. Newcomer, 204 Ind. 589, 185 N.E. 440 (1933); Allen v. Anderson, 57 Ind. 388 (1877), which set out the test for constitutionally mandated jury trial. If a claim against the fund is a "special statutory" proceeding, no constitutional right to jury trial attaches. *See* Indianapolis v. Schmid, 251 Ind. 147, 240 N.E.2d 66 (1968). However, this line of analysis may be undermined by the *Deckard* case, discussed at length below.

Another approach would be to ask whether the action is analogous to a suit which at common law would have been triable to a jury. The broad and difficult consideration here may be whether a claim against the patients' compensation fund is a claim against the state. If the claim is against the state, an argument that there is a right to jury trial is considerably weakened. Generally, suits against the state were unheard of prior to the adoption of the Indiana constitution in 1852. Contract damage claims against the state were first statutorily authorized in 1889 by what is now IND. CODE § 34-4-16-1 (Burns 1973). Therefore, the right to jury trial against the state might not be constitutionally mandated. On the other hand, if the patients' compensation fund were regarded as the functional equivalent of a private insurer, it is likely that a judgment against the insured in a jury trial would be conclusive against the fund, which would not be entitled to a redetermination of damages if that would impinge upon the jury's province. See generally 20 J.A. APPLEMAN, INSURANCE LAW AND PRACTICE § 11521 (1962).

It is not entirely clear whether a claim against the patients' compensation fund is a claim against the state. An analogy might be drawn to state workmen's compensation funds, which have been described as trust funds for the benefit of the employees. *See* 7A J.A. APPLEMAN, INSURANCE LAW AND PRACTICE § 4592 (1962). Some courts have held that such funds are not private corporations. *See, e.g.*, Yedor v. Ocean Acc. & Guarantee Corp., 85 Cal. App. 2d 698, 194 P.2d 95 (1948) (for venue purposes); Texas Employers Ins. Ass'n v. Russell, 127 Tex. 230, 91 S.W.2d 317 (1936). They have been described by other courts as agents of the state. *See, e.g.*, Gilmore v. State Compensation Ins. Fund, 23 Cal. App. 2d 325, 73 P.2d 640 (1937); State Ins. Fund v. Boyland, 125 N.Y.S.2d 169, 282 App. Div. 516 (1953), *aff'd*, 309 N.Y. 1009, 133 N.E.2d 457 (1956); Monroe Logging Co. v. Dep't of Labor and Indus., 21 Wash. 2d 800, 153 P.2d 511 (1944); State *ex rel.* Christensen v. Nugget Coal Co., 60 Wyo. 51, 144 P.2d 944 (1944). However, some courts, faced with suits against workmen's compensation funds, have held that these are not suits against the state for purposes of sovereign immunity. Burum v. State Compensation Ins. Fund., 30 Cal. 2d 575, 184 P.2d 505 (1947); State v. Padgett, 54 N.D. 211, 209 N.W. 388 (1926). Workmen's compensation funds have also been described as "special" as opposed to "public" funds. *See, e.g.*, Senske v. Fairmont & Waseca Canning Co., 232 Minn. 350, 45 N.W.2d 640 (1951); State *ex rel.* Stearns v. Olson, 43 N.D. 619, 175 N.W. 714 (1919). Although the patients' compensation fund resembles a workmen's compensation fund in many respects, mere analogy cannot resolve the question of whether a claim against the fund is a claim against the state.

Workmen's compensation and "no-fault" automobile statutes have often been challenged as denying the right to jury trial. The courts have generally sustained such statutes against constitutional attack, articulating two grounds for decision. First, it has been held that if a statute abolishes the original cause of action, there is nothing to be tried to a

---

Doctrines developed in the area of sovereign immunity also yield uncertainty. As regards municipal corporations, the "proprietary-governmental" distinction was once a major test to determine which state activities would be subject to tort liability. *See, e.g.*, Fuller & Casner, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437 (1941). Governmental immunity was said to be "an attribute of governmental functions exercised solely for the public at large and not for the private benefit of the municipality," with the corollary that

> when monetary returns are an important factor in the establishment of a function, the governmental unit is liable as a proprietor, because it acts for its own benefit and not for the public at large. Some courts justify the exception partly on the ground that there should be liability for torts committed during the exercise of activities formerly performed by private persons or corporations, but the historical facts are that most of the functions now regarded as governmental began as private enterprises.

Id. at 442. It has often been suggested that the most legitimate policy underlying governmental immunity is the need to prevent a depletion of the treasury which would impair governmental functions. *See, e.g.*, Note, *The Tort Liability of the State of Indiana: Perkins v. State*, 46 IND. L.J. 544, 549–50 (1971). In the case of the patients' compensation fund, which is maintained separately from the general fund of the state, *see* IND. CODE § 16–9.5–4–1(a) (Burns Supp. 1975), this policy concern seems irrelevant. In any event, sovereign immunity from tort liability was grounded in policies very different from those underlying the patients' compensation fund.

In summary, it is not possible to state with assurance whether a claim against the patients' compensation fund is a claim against the state of Indiana for purposes of the right to jury trial. One Indiana case, however, indicates broadly that in an action for damages for personal injury there may be a constitutional right to jury trial enforceable even against historically immune governmental entities. In City of Terre Haute v. Deckard, 243 Ind. 289, 183 N.E.2d 815 (1962), the plaintiff brought an action for damages caused when a city police car struck plaintiff's car from behind. Trial was to a jury, which awarded damages to plaintiff. Several weeks later, defendant moved for remittitur. The court rejected defendant's argument.

First, without alluding to the immunity of the city, Judge Landis noted that Art. 1, § 20 of the Indiana constitution provides that the right of jury trial, in "all civil cases," must remain inviolate. The court held that the suit against the city "was an action in tort for damages and was, therefore, a civil cause in which the parties were entitled to a trial by jury." *Id.* at 293, 83 N.E.2d at 817. The court later reaffirmed its conclusion that plaintiff's right to jury trial was based, not in statute, but upon the state constitution. *Id.* at 296, 183 N.E.2d at 818.

The *Deckard* case arose under the Law of March 6, 1945, ch. 197 § 1 [1945] (repealed 1974), which imposed limited liability for damages caused by the negligent operation of a motor vehicle by a member of either a city police or fire department. This statute was first enacted in 1945. Although the cause of action therefore arose under a statute enacted long after the adoption of the Indiana constitution, the supreme court found a constitutional right to jury trial.

Deckard may indicate that the Indiana Supreme Court accepts the view of the federal courts with regard to actions created by statute—that if common law rights and remedies analogous to the statutory action were tried to a jury, jury trial is preserved by the federal constitution. *See, e.g.*, Pernell v. Southall Realty Co., 416 U.S. 363 (1974). If this is so, an action to recover damages from the patients' compensation fund may be a "civil action" within the meaning of article 1, § 20 of the Indiana constitution. At the very least, *Deckard* casts considerable doubt upon an argument that a suit against the state, since it was not a recognized common law action, carries no constitutional right to a jury determination of triable issues.

jury, and therefore the right is not violated. Second, it has been said that the assessment of damages is not a fundamental element of the right to jury trial.[74]

The Abolished Cause of Action

It is well settled that the legislature may alter the common law by adding or removing causes of action.[75] Once the legislature has abolished a cause of action to which jury trial was incident, nothing remains for a jury to try. Legislation of this sort does not abolish the right to jury trial, merely the cause of action which gave rise to it.[76]

In the case of workmen's compensation, the cause of action has clearly been abolished. The entire right to remedial relief is newly created, and the determination of injury and compensation is lodged with an arbitration panel.[77]

"No-fault" statutes, on the other hand, do not entirely abolish the cause of action. Below the damage threshold, there is no cause of action—plaintiff must look to his own insurance coverage. The cause of

[74] In State v. Clausen, 65 Wash. 156, 210, 117 P. 1101, 1119 (1911), the court also applied the "reasonably just substitute" test to the state workmen's compensation law and in doing so concluded that the statute was valid even though it abrogated the right to jury trial. The court concluded that certainty of recovery was a reasonable substitute for plaintiff's right to jury assessment of damages. The application of the reasonable substitute test, which is a due process test, in this context seems more confusing than helpful, however.

[75] *See* note 34 *supra* & text accompanying.

[76] *See, e.g.*, Mountain Timber Co. v. Washington, 243 U.S. 219, 235 (1916); Lasky v. State Farm Ins. Co., 196 So. 2d 9, 22 (Fla. 1974); Warren v. Indiana Telephone Co., 217 Ind. 93, 102, 26 N.E.2d 399, 403 (1940); Opinion of the Justices, 113 N.H. 205, 210, 304 A.2d 881, 885 (1973). *See also* Pinnick v. Cleary, 360 Mass. 1, 271 N.E.2d 592 (1971), in which the Massachusetts Supreme Court, without discussion, held that the state's no-fault statute did not violate the right to jury trial.

[77] The Indiana Supreme Court has taken the view that workmen's compensation is the creation of a new system, attendant upon the employer-employee contractual relation. This new remedy displaces any rights held under the common law, and no jury trial issue remains. Warren v. Indiana Telephone Co., 217 Ind. 93, 102 N.E.2d 399 (1940).

One noted commentator on the Indiana Workmen's Compensation Act has described its novel provisions in this way:

> [A]s experience in the administration of Workmen's Compensation matters lengthens, it is becoming increasingly apparent that the theory of compensation exists entirely apart from tort or from contract. As long as liability can be imposed upon an innocent employer without negligence on his part, and with negligence, or assumption of risk, or the act of a fellow-servant being disregarded completely on the employee's side, there is little resemblance to anything heretofore known in tort law. The contract theory is scarcely more plausible. . . . Thus it would seem that the theory of Workmen's Compensation rests entirely upon the status, or the relationship which a workman bears to the work he is doing.

B.F. SMALL, WORKMEN'S COMPENSATION LAW OF INDIANA § 1.1 (1950).

It has also been said that "compensation laws constitute a statutory departure from, or as commonly stated are in derogation of the common law, they are not supplemental, cumulative, amendatory or declaratory of the common law, but wholly substitutional of it." 1 W.R. SCHNEIDER, SCHNEIDER'S WORKMEN'S COMPENSATION § 6 (1941). *See also* Federal Cement & Tile Co. v. Pruitt, 128 Ind. 126, 146 N.E.2d 557 (1957).

action survives once a certain threshold of damages is reached, however, and plaintiff's right to jury trial is preserved.[78] Jury trial challenges have been made to the damage threshold in "no-fault" nonetheless. Although one court has viewed the threshold as an abrogation of the right to jury trial,[79] most courts have concluded that the threshold operates only to remove the cause of action, leaving nothing to be tried by a jury.[80] The Kansas Supreme Court took this view in *Manzanares v. Bell,*[81] in which the court turned aside a challenge to the state "no-fault" law. The court indicated that the jury trial attack on the threshold was misplaced.[82] The attack on the threshold was more properly based on the due process clause, as a challenge to the entire "no-fault" system.[83]

The Malpractice Act, on the other hand, in no sense abolishes the cause of action for malpractice. Liability is still based in the common law actions of contract or tort.[84] Although an absolute ceiling is placed on damages,[85] liability and recovery up to that limit are triable issues. Since these issues remain, it cannot be said that nothing remains that might be tried by the jury.

The Assessment of Damages as an Element of Jury Trial

Statutes challenged as abridging the common law right to a jury assessment of damages have sometimes been defended on the ground that the assessment of damages is not fundamental to the right of jury trial. In *Pierre v. Eastern Air Lines,*[86] the court considered a challenge to the Warsaw Convention's ceiling on damages for injuries sustained in international airline flight. The court reasoned that

> [a]t common law the assessment of damages in a default, in tort and in contract, was not considered a function of the jury and stood upon a different footing from the trial of issues of fact. The measuring of

---

[78] *Cf.* Lasky v. State Farm Ins. Co., 296 So. 2d 9 (Fla. 1974); Pinnick v. Cleary, 360 Mass. 1, 271 N.E.2d 592 (1974).

[79] Montgomery v. Daniels, 81 Misc. 2d 373, 367 N.Y.S.2d 419 (Sup. Ct. 1975), *rev'd,* No. 359 (Ct. App., N.Y., Nov. 25, 1975).

[80] *See* Lasky v. State Farm Ins. Co., 296 So. 2d 9 (Fla. 1974).

[81] 214 Kan. 589, 522 P.2d 1291 (1974).

[82] *Id.* at 616, 522 P.2d at 1312.

[83] *Id.*

[84] *Cf.* IND. CODE § 16-9.5-1-1(h) (Burns Supp. 1975):

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

[85] IND. CODE § 16-9.5-2-2(a) (Burns Supp. 1975).

[86] 152 F. Supp. 486, 488-89 (D.N.J. 1957).

> damages by a jury, therefore, would seem to be a matter of practice rather than of right.[87]

Similarly, in a decision regarding a "no-fault" statute, a member of the Illinois Supreme Court thought that, since at common law an assessment of damages was usually performed by a sheriff upon a writ of inquiry of damages or, in its discretion, by the court itself,[88] jury assessment of damages was a matter of practice and not of right.

In federal court the seventh amendment right to jury trial reflects the right as it existed at common law in 1791.[89] Similarly, state constitutional guarantees of jury trial have been interpreted in light of the common law at the time of the adoption of each state constitution.[90] The scope of the modern right to jury trial is to a large extent, therefore, molded by the history of the English common law.

Clearly, the jury has always been limited in awarding damages. By the early fourteen hundreds, judges began modifying the jury award where it was entirely unreasonable.[91] This procedure was later abandoned in favor of the practice of granting a new trial.[92] The charge or instruction on the damage issue was a feature of jury trial from the first.[93]

---

[87] *Id.* at 488.

The jury trial challenge in *Pierre* seems to have been entirely misplaced. An absolute limit on recovery is more in the nature of a partial abolition of the cause of action than an abridgment of jury trial. *See generally* note 65 *supra.*

[88] O'Brien v. Brown, 403 Ill. 183, 193, 85 N.E.2d 685, 691 (1949). *See also* Povlich v. Glodich, 311 Ill. 149, 142 N.E. 467 (1924). *But see* BLACK'S LAW DICTIONARY 1786 (4th ed. 1968), which defines a writ of inquiry as "[a] writ which issues after the plaintiff in an action has obtained a judgment by default . . . ." *See also* McGowin v. Dickson, 182 Ala. 161, 62 So. 685 (1913); Lennon v. Rawitzer, 57 Conn. 583, 19 A. 334 (1889).

[89] *See, e.g.,* Baltimore & Carolina Line v. Redman, 295 U.S. 654, 657 (1934); Dimick v. Schiedt, 293 U.S. 474 (1934); Pierre v. Eastern Air Lines, 152 F. Supp. 486 (D.N.J. 1957).

Ironically, England no longer uses jury trial for civil cases except in slander, libel, and a few other instances. *See* Defense Research Institute, The Civil Jury System (monograph) (1974), quoting address by Chief Justice Burger, testimonial dinner for Pennsylvania Supreme Court Chief Justice Bell, Nov. 14, 1970.

[90] *See, e.g.,* People v. One 1941 Chevrolet Coupe, 37 Cal. 2d 283, 287, 231 P.2d 832, 835 (1951); Grace v. Howlett, 51 Ill. 2d 478, 508–09, 283 N.E.2d 474, 490 (1972) (dissenting opinion). In Warren v. Indiana Telephone Co., 217 Ind. 93, 26 N.E.2d 399 (1940), the Indiana Supreme Court held that:

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

Id. at 102, 26 N.E.2d at 403. *See also* Dean v. State Board of Medical Registration & Examination, 233 Ind. 32, 116 N.E.2d 503 (1954), which construes article 1, § 20 of the Indiana constitution to guarantee jury trial in those actions which were triable by a jury prior to June 18, 1852, the date on which the constitution took effect.

[91] C. MCCORMICK, HANDBOOK OF THE LAW OF DAMAGES 26 (1935).

[92] *Id.*

[93] *Id.* at 24–28.

It is also true, as the *Pierre*[94] case indicates, that in a default action at common law, damages could be assessed either by a judge or by the jury.[95] The *Pierre* case, however, overlooks the exceptional nature of the default action at common law in drawing a conclusion that damages are not essential to the right of jury trial.[96] The weight of authority indicates that, default actions to one side, the assessment of damages is fundamental.[97] Although subject to limitations by the judge, the jury has assessed damages since the creation of the damage remedy.[98] For instance, in 1763 the Court of Common Pleas refused to grant a new trial for excessive damages in a personal injury case,[99] noting that

> the court ought never to grant a new trial in an action founded upon a personal tort, unless the damages are such as do at the first blush appear to be quite outrageous. Because the damages, which do entirely depend upon the circumstances of the particular case, must in every such action be ideal and speculative, and the jury are the persons in whom the power of ascertaining damages in all cases is by the constitution vested.[100]

The Indiana Supreme Court, in an action for personal injury damages, has stated that a "determination of the extent of the injury complained of, and the proper compensation therefor, were peculiarly within the province and power of the trial jury . . . ."[101] This implies that jury

---

[94] Pierre v. Eastern Air Lines, 152 F. Supp. 486 (D.N.J. 1957).

[95] *See* Beardmore v. Carrington, 2 Wils. K.B. 244, 248, 95 Eng. Rep. 790, 792 (1764); Bruce v. Rawlins, 3 Wils. K.B. 61, 62, 95 Eng. Rep. 934 (1770); 5 J.W. MOORE, MOORE'S FEDERAL PRACTICE ¶ 38.19[3] (2d ed. 1975).

[96] Indeed, the federal court practice of denying the right to jury trial in a default action is regarded as exceptional. *Cf.* 5 J.W. MOORE, MOORE'S FEDERAL PRACTICE ¶ 38.19[3] (2d ed. 1975).

[97] *See, e.g.*, McClean, *Juries and the Assessment of Damages*, 4 SOL. Q. 1, 2 (1965):

> The first limitations of any sort [upon English jury trial of damages] were contained in the Common Law Procedure Act of 1854; before then, there was no alternative to jury trial. In that Act, trial by judge alone was provided for account, and could be used in other cases if all the parties consented. But there was nothing in the nature of a direction that it should be used.

While a new trial would generally be granted in the case of excessive damages at common law, *see* W. FORSYTH, HISTORY OF TRIAL BY JURY 156–58 (1875), there was a limit to this. "Juries may baffle the court by persisting in the same opinion, and in such cases it has been the practice for the latter ultimately to give way." *Id.* at 158.

See also cases collected in note 101 *infra*.

[98] C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 24 (1935).

[99] Beardmore v. Lord Halifax, Common Pleas (1763), quoted in J.H. BEALE, A COLLECTION OF CASES ON THE MEASURE OF DAMAGES 7 (2d ed. 1909).

[100] *Id.* at 7. *See also* Lord Townsend v. Hughes, 2 Mod. 150, 86 Eng. Rep. 994 (1677), quoted in J.H. BEALE, A COLLECTION OF CASES ON THE MEASURE OF DAMAGES 2 (3d ed. 1928).

[101] Cleveland, Cin., Chi., & St. L.R.R. v. Hadley, 170 Ind. 204, 216, 82 N.E. 1025, 1030 (1907). In City of Terre Haute v. Deckard, 243 Ind. 289, 183 N.E.2d 815 (1962), the Indiana Supreme Court held that the trial court had properly rejected evidence offered by defendant in mitigation of plaintiff's damages, where the evidence was first offered

assessment of damages was one of those common law rights which did survive intact the passage of the Indiana constitution.

Moreover, it is well settled that the right to a jury trial extends to issues of "fact."[102] The Malpractice Act leaves the liability issue to the jury, but the award of damages beyond $100,000 is ultimately left to the judge.[103] It has been held that "[c]ompensatory damage traditionally is an issue of fact . . . ."[104] In a medical malpractice action the extent of a plaintiff's injuries is often a matter of dispute. It therefore appears that, insofar as the Act transfers from the jury to the judge the power over damages, the right to jury trial may be violated.[105]

---

weeks after jury trial had ended. Since this personal injury action was a "civil action" within the jury trial provision, the court held that:

> Any effort to raise this defense long after the trial of the case was improper and invaded appellee's right to have this issue of his case submitted to the jury, contrary to Art. 1, § 20 . . . of the Indiana Constitution.

Id. at 296, 183 N.E.2d at 818. This buttresses a conclusion that in Indiana the determination of damages, at least for personal injury, is an element of the right to jury trial. *See also* Lombard v. Cory, 95 Idaho 868, 522 P.2d 581 (1974); Osterfoss v. Illinois Cent. R.R., —— Iowa ——, 215 N.W.2d 233 (1974); Isaacson v. Husson College, —— Me. ——, 332 A.2d 757 (1975); Cicale v. Becker, 42 App. Div. 2d 663, 345 N.Y.S.2d 235 (1973); Raisovich v. Giddings, 214 Va. 485, 201 S.E.2d 606 (1974); Vaughan v. Magee, 218 F. 630, 631 (3d Cir. 1914).

[102] *See, e.g.,* Shearer v. Porter, 155 F.2d 77, 81 (8th Cir. 1946); Pierre v. Eastern Air Lines, 152 F. Supp. 486, 488 (D.N.J. 1957); Novak v. Chicago & Calumet Dist. Transit Co., 235 Ind. 489, 135 N.E.2d 1 (1956).

[103] *See* IND. CODE § 16-9.5-4-3(5) (Burns Supp. 1975).

[104] Shearer v. Porter, 155 F.2d 77, 81 (8th Cir. 1946) (damage for violation of Office of Price Administration regulation). *See also* Sanguinetti v. Moore Dry Dock Co., 36 Cal. 2d 812, 228 P.2d 557 (1951); Croco v. Oregon Short-Line R.R., 18 Utah 311, 54 P. 985 (1898); Kalven, *The Jury, the Law, and the Personal Injury Damage Award,* 19 OHIO ST. L.J. 158, 161 (1958); C. MCCORMICK, HANDBOOK OF THE LAW OF DAMAGES 24 (1935).

[105] See, however, note 73 *supra* & text accompanying.

Another consideration, not constitutional in origin but closely related to the question of the role of the jury under the Act, is the validity of the "Medical Review Panel" procedure. The Act provides that no action against any health care provider may be commenced before the complaint has been presented to a medical review panel and an opinion rendered by the panel. *See* IND. CODE § 16-9.5-9-1 to -10 (Burns Supp. 1975). The opinion rendered may be introduced into evidence at any subsequent trial, and at first blush would seem to violate the traditional rule of evidence which forbids expert witnesses from stating their conclusions on the "ultimate facts in issue" in the case. Ultimate facts have variously been defined as "facts upon which the plaintiff's right of recovery or the defendant's right to defeat a recovery necessarily depends." Gerue v. Industrial Comm'n, 205 Wis. 68, 70, 236 N.W. 528, 529 (1931). They are alternatively defined as those facts which are fundamental and usually determinative of an entire case. Maeder Steel Prod. Co. v. Zanello, 109 Ore. 562, 220 P. 155 (1923). A substantial number of courts heretofore have forbidden witnesses to give their opinions upon the ultimate facts in issue. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 27 (2d ed. E. Cleary 1972). Upon closer analysis, however, it appears that there is little problem with the use of the panel's opinion.

Statements of opinion upon ultimate issues are sometimes said to "usurp the function" or "invade the province" of the jury. These expressions do not mean a literal abrogation of a constitutionally guaranteed jury function, but merely suggest the danger that the jury might forego independent analysis of the facts and substitute instead the opinion of the

EQUAL PROTECTION

The Malpractice Act creates two classifications which may violate the fourteenth amendment equal protection clause, as well as the special privileges clause of the Indiana constitution. First, the provisions of the Malpractice Act apply to victims of malpractice but not to victims of other torts. This classification may be too narrow. Second, the damage ceiling of the Malpractice Act limits recovery by malpractice victims who have suffered extensive physical disability as well as by victims who have extensive pain and suffering damages. This classification may be overbroad.

Whether these classifications deny equal protection may depend upon the degree of judicial scrutiny applied to the Malpractice Act. If a fundamental right were infringed, the statute would be subject to strict scrutiny to determine whether it was necessary to a compelling

---

expert. C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 27 (2d ed. E. Cleary 1972). The Act expressly prohibits any replacement of the jury's deliberations by those of the panel. The panel's opinion "shall be admissible as evidence in any action subsequently brought by the claimant in a court of law, but such expert opinion shall not be conclusive . . . ." IND. CODE § 16-9.5-9-9 (Burns Supp. 1975).

The panel's opinion comes very close to being an impermissible expression of general belief as to how the case should be decided. It parallels the heretofore forbidden opinion on ultimate facts. However, this traditional ban is being relaxed in many jurisdictions. MCCORMICK, *supra*, at 27. The rationale for allowing an expert's opinion on ultimate issues lies in the expert's ability to contribute inferences which the jury would not be able to draw. The complex analysis of medical evidence would seem to be one such area.

Ordinarily the factual basis for the expert's opinion must be clearly expressed. MCCORMICK, *supra*, at 31. For this reason, and for the reason that in evidentiary matters the more concrete description is preferred to the more abstract one, *id.* at 23, it is suggested that the written opinion of the panel include a concise statement of the basis for the conclusion reached. Such a statement is not expressly required by the statute. Nor would it be essential to a clear understanding of the panel's conclusions, since the panel members are accessible to parties for presentation in a trial. *See* IND. CODE § 16-9.5-9-6 to -9 (Burns Supp. 1975). However, a statement would provide a more succinct, possibly time-saving method of providing the trier of fact with tools for evaluation of the panel's conclusions.

One commendable aspect of the Act is the statutorily-mandated phrasing of the panel's opinion. For example, the panel does not determine "negligence" but rather determines whether the evidence "supports the conclusion that defendant or defendants failed to comply with the appropriate standard of care . . . ." IND. CODE § 16-9.5-9-7(a) (Burns Supp. 1975). Thus the panel is rendering only an opinion on facts, avoiding possible confusion of the jury caused by opinions phrased in legal language. *See* McCormick, *Some Observations Upon the Opinion Rule and Expert Testimony*, 23 TEX. L. REV. 109, 119-21 (1945).

An interesting question of a constitutional nature is whether a hearing by the Medical Review Panel would be required prior to a diversity suit in federal court. Failure of the federal courts to require panel review might encourage "forum-shopping." However, requiring a hearing would subject an out-of-state plaintiff to scrutiny by a panel composed entirely of the defendant's Indiana colleagues. For further analysis of state procedures in federal courts, see C. WRIGHT, LAW OF FEDERAL COURTS 241-47 (2d ed. 1970); 1A, Part 2, J.W. MOORE, MOORE'S FEDERAL PRACTICE ¶ 0.317[6] (1974); Markham v. City of Newport News, 184 F. Supp. 659 (E.D. Va. 1960).

state interest.[106] Attempts to characterize the right to sue for personal injuries as a "vested property right"[107] have failed, as have attempts to find a fundamental "right of personal security and bodily integrity."[108]

Accordingly, the statute is subject only to the less stringent equal protection test: whether the classification bears a rational relation to a permissible state objective.[109] In this regard the focus adopted by the court is often important. If the court focuses upon the class of health care providers, the reasoning of the Indiana Supreme Court in *Chaffin v. Nicosia*[110] might well be conclusive. In *Chaffin,* the court considered whether a two-year statute of limitations, applied only to malpractice, created a "special privilege" in violation of the Indiana constitution.[111] The court concluded that it did not, since:

> If the situation, conditions, and circumstances of the persons included within the class to which the law is made to apply so differ from those of others not so included as to indicate the necessity of propriety of making the law applicable only to those included within its terms, and if the law is so framed as to apply to all to whom the reason applies and to exclude all whom the reason excludes, it will be deemed a general law. Such an act does not conflict with either [the fourteenth amendment to the federal constitution or article 1, § 23 of the constitution of Indiana].[112]

---

[106] Pinnick v. Cleary, 360 Mass. 1, ——, 271 N.E.2d 592, 601 (1973). If some fundamental constitutional right is infringed, the state must show a compelling governmental interest to justify its action, and show as well that the means chosen to effect that interest do not sweep unnecessarily broadly. *See, e.g.,* Griswold v. Connecticut, 381 U.S. 479, 485 (1965); Skinner v. Oklahoma, 316 U.S. 527, 541 (1942).

[107] *See* Pinnick v. Cleary, 360 Mass. 1, 271 N.E.2d 592 (1971).

[108] *Id.*

[109] *See, e.g.,* McGowan v. Maryland, 366 U.S. 420, 425–26 (1961); Manzanares v. Bell, 214 Kan. 589, 609, 522 P.2d 1291, 1307–08 (1974); Pinnick v. Cleary, 360 Mass. 1, 271 N.E.2d 592 (1971). *Cf.* Indianapolis Traction & Terminal Co. v. Kinney, 171 Ind. 612, 85 N.E. 954 (1909); Indianapolis Union Ry. v. Houlihan, 157 Ind. 494, 60 N.E. 943 (1901).

[110] —— Ind. ——, 310 N.E.2d 867 (1974).

[111] IND. CONST. art. 1, § 23.

An equal protection attack was leveled against the Illinois no-fault automobile law in Grace v. Howlett, 51 Ill.2d 478, 283 N.E.2d 474 (1972). The unreported trial court decision may be found at 8 (1) TRIAL 10 (1972). The Illinois statute set a ceiling on damages for pain and suffering by limiting them to a set percentage of reasonable medical expenses. The Illinois Supreme Court held the statute unconstitutional on the basis that the law granted a special privilege to drivers of private passenger automobiles in violation of a provision of the Illinois constitution. The court criticized the statute not on the basis that vehicles per se constituted an impermissible special class, but on the basis that private passenger vehicles were insufficiently different from other conveyances to justify special legislative treatment. The court noted that there was no reason why the recovery of a person injured by private passenger cars should differ from that of a person injured by other types of vehicles. Because the Indiana statute includes all health care providers within its scope, all persons injured by medical malpractice are equally subject to the Act's provision. Under this characterization the Act avoids the pitfalls of the Illinois law.

[112] —— Ind. at ——, 310 N.E.2d at 869.

If the classification created by the Malpractice Act is characterized as one between medical tortfeasors and other tortfeasors, the Act appears to meet this test. Medical injury litigation affects a critical and unique segment of society. Medical services are a necessity and health care providers are difficult to replace. Without some protection from suit, health care providers may be tempted to avoid new but risky treatments, to practice "defensive medicine," or not to render services at all.[113] In order to encourage adequate medical care for the public, the legislature may take special measures to protect the medical profession.

However, some courts have focused instead upon classifications of tort victims for purposes of equal protection analysis. In *Brown v. Merlo,*[114] the court refused to recognize as valid a distinction between the victim who happens to be a guest in an automobile and the victim who is a paying passenger in an automobile. A similar victim-oriented approach to equal protection was taken by a New York State trial court which recently invalidated that state's "no-fault" automobile statute. In *Montgomery v. Daniels,*[115] the court held that the classification created by the statute was arbitrary and unreasonable, since:

> There is further no rational reason why an individual who is injured in tort other than an automobile may have access to the courts and a person sustaining the same injury and effects in an accident involving an automobile be barred therefrom, if the "serious injury" test requirement (the "threshold" requirement) is not met. This is true even where the injuries sustained in each instance are identical, thereby assigning a higher value to pain incurred from a fall on a "sidewalk highway" than pain suffered in a motor vehicle accident.[116]

From this victim-oriented perspective, the case for the constitutionality of the Malpractice Act is weakened, since extensive damages incurred by a malpractice victim are not easily distinguishable from those incurred by victims of other torts. On the other hand, when one considers the important public interest in maintaining the state health care delivery system, and the threat which extensive damage litigation represents, the Malpractice Act's special application to one group of tort victims seems at least rational.

However, one classification created by the Malpractice Act raises special equal protection concerns. The Act denies recovery to individ-

---

[113] *See* Carpenter v. Campbell, 149 Ind. App. 189, 271 N.E.2d 163 (1971).

[114] 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

[115] 81 Misc. 2d 373, 367 N.Y.S.2d 419 (Sup. Ct. 1975), *rev'd,* No. 359 (Ct. App., N.Y., Nov. 25, 1975).

[116] *Id.* at ——, 367 N.Y.S.2d at 425.

uals whose damages, whether objectively identifiable or only subjectively identifiable, exceed $500,000.[117] Failure to distinguish between objectively identifiable medical costs on the one hand, and subjective injury such as pain and suffering on the other hand, may render the damage limitation overbroad.

Pain and suffering claims are less susceptible of objective proof than are other damage claims and, correspondingly, more susceptible to exaggeration.[118] Where legislation has as its chief aim the reduction of the size of personal injury awards, it is possible that this aim might be accomplished by a limitation only on pain and suffering damages and not on objective damages as well. Were this true, a limit on both sorts of damages might sweep too broadly. That there may be a significant distinction between objective and subjective damages for equal protection purposes is supported by some cases considering "no-fault" statutes whose "threshold" provisions limit only the recovery of pain and suffering damages. In *Manzanares v. Bell,*[119] the Kansas Supreme Court observed that:

> One of the obvious purposes of the Legislature in limiting recovery under the threshold provision was clearly to eliminate minor claims for pain and suffering. The Legislature could reasonably have thought that the number of such cases . . . was largely connected with exaggerated claims for pain and suffering in instances of relatively minor injury.[120]

The court held that the legislature could have concluded that the evils spawned by automobile pain and suffering litigation outweighed the benefits derived in compensating victims who had, under the circumstances, suffered "no monetary loss."[121]

If the elimination of fraudulent recoveries were a legislative aim, an absolute limit on recovery might sweep too broadly for this purpose. Challenges to automobile "guest" statutes—which generally prohibit recovery for accident injuries by a guest in the defendant's automobile unless the guest can prove a degree of misconduct greater than ordinary negligence[122]—offer some guidance in this regard. The California Supreme Court recently struck down that state's guest statute as a violation of the equal protection guarantees of the California and federal

---

[117] IND. CODE § 16-9.5-2-2(a) (Burns Supp. 1975).
[118] D. LOUISELL & H. WILLIAMS, MEDICAL MALPRACTICE ¶ 553 (1974).
[119] 214 Kan. 589, 522 P.2d 1291 (1974).
[120] *Id.* at 610, 522 P.2d at 1309.
[121] *Id.* at 611, 522 P.2d at 1309.
[122] *See* Keasling v. Thompson, —— Iowa ——, ——, 217 N.W.2d 687, 690 (1974).

constitutions.[123] The court observed that a principal reason for the guest statute was the protection of insurers against fraudulent lawsuits arising out of collusion between host and guest.[124] However, the court found that the California guest statute was a classic case of an "impermissibly overinclusive classification scheme," one which "reaches out beyond the individuals tainted with the mischief at which a statute is directed, and imposes its burden on innocent individuals who do not share the condemning characteristics."[125]

Assuming that the elimination of exaggerated claims and recoveries was one purpose behind the Malpractice Act,[126] the Act's damage limitations may be similarly overinclusive. Although their claims may be far less susceptible to exaggeration than claims for pain and suffering, individuals with objectively identifiable economic losses may be denied recovery beyond certain limits. To group together victims in this way, without reference to the type of recovery sought, may fail "to exclude all whom the reason excludes"[127] and may deny some malpractice victims the equal protection of the laws.[128]

CONCLUSION

Certain provisions of the Indiana Medical Malpractice Act may be constitutionally objectionable. The Act's application to only a limited class of tortfeasors and victims does not violate equal protection since this classification is rationally related to the protection of the public health. However, the damage limitation and the provisions governing claims against the patients' compensation fund may be unconstitutional.

In strictly limiting the damages recoverable for malpractice, the Act provides no "reasonable substitute" for the abrogated common law right to recovery. Simply put, under the criteria developed in due process challenges to "no-fault" and workmen's compensation statutes, the Act does not otherwise reimburse plaintiffs for the damages they are denied. However, it is not clear that due process in fact requires a "reasonable substitute" for common law rights.

In denying recovery of damages in the most catastrophic circumstances, whether the damages are objectively identifiable or not, the Act

---

[123] Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).
[124] *Id.* at 873, 506 P.2d at 225, 106 Cal. Rptr. at 401.
[125] *Id.* at 876, 506 P.2d at 227, 106 Cal. Rptr. at 403.
[126] *See* Eleventh Draft of H.R. 1460 [on file with the INDIANA LAW JOURNAL].
[127] Chaffin v. Nicosia, —— Ind. ——, ——, 310 N.E.2d 867, 869 (1974).
[128] However, to apply the damage ceiling only to pain and suffering would still raise a due process question. *See* text accompanying note 31 *supra*.

may be too sweeping in effect. If the goal of the legislation was to eliminate artificially high damage recoveries, a limitation on pain and suffering damages might have sufficed. Damages which are objectively identifiable do not lend themselves to fraudulent claims, and perhaps should have been excepted from the damage limitation.

Finally, the constitutional right to jury trial may be violated by the provision that a judge will determine the damages to be recovered from the patients' compensation fund. It is unclear whether a claim against a state-created fund gives rise to a jury trial under the Indiana constitution.[129] However, assuming that the constitutional right attaches in the first place, the extent of damage poses a triable question of fact which, subject only to a standard of reasonableness, was within the province of the common law jury. To allow a judge to recompute the damages may therefore be to invade the province of the jury.

However, constitutional doctrine plainly does not resolve the question of the Act's validity. Although doctrine exists which would permit a court to strike down certain provisions, this result is not compelled. In a case where the Act is thought to produce an unusually harsh result, on the other hand, constitutional weapons are available.

CATHRYN V. DEAL

---

[129] *See* note 73 *supra.*

INDIANA LAW JOURNAL

Volume 51
School of Law
Indiana University