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# SYMPOSIUM

## INDIANA'S MEDICAL MALPRACTICE REFORM REVISITED: A LIMITED CONSTITUTIONAL CHALLENGE

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In May 1998, the Indiana Supreme Court heard arguments in four cases challenging the constitutionality of the two-year occurrence-based statute of limitations[1] in Indiana's renowned Medical Malpractice Reform Act.[2] The Indiana Supreme Court has consolidated four cases raising this challenge.[3]

In the leading case, *Martin v. Richey*,[4] Judge Riley for the Indiana Court of Appeals ruled that the occurrence-based two-year statute of limitations violated the equal privileges and immunities clause of the Indiana Constitution[5] in that malpractice tort claimants are treated differently than other tort claimants and also malpractice tort claimants that fail to discover their injury within two years of its occurrence are treated differently than other malpractice claimants.[6] Following *Collins v. Day*,[7] the court ruled that, while the statutory distinction between malpractice claimants and other tort claimants was "reasonably related to the goal of maintaining sufficient medical treatment and controlling malpractice insurance costs,"[8] all malpractice claimants were not equally affected

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1. IND. CODE § 27-12-7-1 (1993).

2. *Id.* §§ 27-12-1-1 to -18-2.

3. Martin v. Richey, 674 N.E.2d 1015 (Ind. Ct. App. 1997); Johnson v. Gupta, 682 N.E.2d 827 (Ind. Ct. App. 1997); Harris v. Raymond, 680 N.E.2d 551 (Ind. Ct. App. 1997); Jordan v. Read, 677 N.E.2d 640 (Ind. Ct. App. 1997) (Unpublished Memorandum Decision).

4. 674 N.E.2d at 1015.

5. IND. CONST. art. I, § 23.

6. 674 N.E.2d at 1019-23.

7. 644 N.E.2d 72 (Ind. 1994). In this case, the supreme court abandoned the traditional Fourteenth Amendment scrutiny and gave independent significance to the Equal Protection Clause in Indiana's Constitution. The supreme court established two requirements for statutes granting unequal privileges or immunities to different classes of people. First, the disparate treatment accorded by the legislature must be reasonably related to the inherent characteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated. *Id.* at 80, *quoted in Martin*, 674 N.E.2d at 1022.

8. 674 N.E.2d at 1022.

by the classification and that the "statute as it stands completely forecloses the opportunity to be heard to potentially a very large percentage of those plaintiffs within the class."[9] The court of appeals also ruled that the "open courts" clause of the Indiana Constitution[10] was also violated.[11] In so ruling, the court of appeals was guided by decisions of Texas courts construing a similar occurrence-based statute of limitations for malpractice claims[12] in light of a similar "open courts" clause in the Texas Constitution[13] as well as a thorough review of the constitutional debates over the "open courts" clause in Indiana's 1851 Constitution.[14]

In the three other decisions before the Indiana Supreme Court, the court of appeals affirmed the trial court judgments and upheld the constitutionality of the two-year occurrence-based statute of limitations provision of Indiana's Medical Malpractice Act.[15] The basis of the court of appeals decision was articulated by Judge Staton in *Johnson v. Gupta*.[16] In his opinion, Judge Staton reiterated the right of the legislature to limit a cause of action in tort and stated further that the legislature "made the policy decision that, to ensure the availability of malpractice insurance for Indiana doctors, and, in turn, medical services for Indiana residents, a more stringent statute of limitations was necessary."[17] In so ruling, Judge Staton relied on the Indiana Supreme Court's decision in *Johnson v. St. Vincent Hospital, Inc.*[18] which initially upheld the constitutionality of the occurrence-based statute of limitations and other provisions of Indiana's Medical Malpractice Act. Giving deference to the legislature's balancing of the competing interests, Judge Staton for the court of appeals also rejected the claim of a violation of the Indiana Constitution's Equal Privileges and Immunities Clause, stating that "[t]his disparate treatment is a response to the reduction in health care services available to Indiana residents and the financial uncertainties in the health care industry."[19]

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9. *Id.*

10. IND. CONST. art I, § 12.

11. 674 N.E.2d at 1023-26.

12. TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (West 1997).

13. TEX. CONST. art. I, § 13.

14. 674 N.E.2d at 1023-26.

15. Johnson v. Gupta, 682 N.E.2d 823 (Ind. Ct. App. 1997); Harris v. Raymond, 680 N.E.2d 551 (Ind. Ct. App. 1997); Jordan v. Read, 677 N.E.2d 640 (Ind. Ct. App. 1997) (Unpublished Memorandum Decision).

16. 682 N.E.2d at 823.

17. *Id.* at 830.

18. 404 N.E.2d 585 (Ind. 1980); *see also* Cha v. Warnick, 476 N.E.2d 109 (Ind. 1985); Toth v. Lenk, 330 N.E.2d 336 (Ind. 1975); Ledbetter v. Hunter, 652 N.E.2d 543 (Ind. Ct. App. 1995); Carmichael v. Silbert, 422 N.E.2d 1330 (Ind. Ct. App. 1981).

19. 682 N.E.2d at 830.

## I. INDIANA'S MEDICAL MALPRACTICE ACT

In the early 1970's, Indiana, with the rest of the nation, experienced a crisis in the cost and availability of medical malpractice insurance for health care providers.[20] As did other states, Indiana experienced sharp increases in the size and frequency of medical malpractice claims.[21] Consequently, the availability of medical malpractice insurance for physicians and hospitals decreased sharply in the mid-1970s.[22]

The key characteristics of claims affecting the availability and affordability of medical malpractice insurance are frequency and severity (i.e., size) of claims. Increases in claim frequency and severity did much to trigger the two malpractice crises of the 1970s and 1980s.[23] Indiana's trends in frequency and severity of claims from 1975 through 1988 were similar to national trends.[24] Not surprisingly, most legislated tort and insurance reforms are aimed at controlling the frequency and severity of claims.

In January 1975, Governor Otis R. Bowen, called for reform of the common law tort system for medical malpractice.[25] On April 17, 1975, the Indiana General Assembly enacted the Indiana Medical Malpractice Act (the "Act").[26] The Act's purpose was to provide health care professionals and institutions with affordable medical malpractice insurance and thus assure the continued

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20. *See* Eleanor D. Kinney et al., *Indiana's Medical Malpractice Act: Results of a Three Year Study*, 24 IND. L. REV. 1275, 1276-77 (1991); Otis Bowen, *Medical Malpractice Law in Indiana*, 11 J. LEGIS. 15 (1984); *see also* Patricia Danzon, *The Frequency and Severity of Medical Malpractice Claims: New Evidence*, 49 L. & CONTEMP. PROB. 57 (1986); Frank A. Sloan, *State Responses to the Malpractice Insurance "Crisis" of the 1970s: An Empirical Assessment*, 9 J. HEALTH POL., POL'Y & L. 629 (1985).

21. Frequency of claims filed against physicians between 1970 and 1975 increased 42% and the average damage award increased from $12,993 in 1970 to $34,297 in 1975. Malpractice insurance premiums rose 410% for physicians between 1970 and 1975. INDIANA MED. MALPRACTICE STUDY COMM'N, FINAL REPORT OF THE MEDICAL MALPRACTICE STUDY COMM'N 5-6 (1976) [hereinafter FINAL REPORT OF THE MEDICAL MALPRACTICE STUDY COMM'N].

22. FINAL REPORT OF THE MEDICAL MALPRACTICE STUDY COMM'N, *supra* note 21.

23. *See generally* Eleanor D. Kinney, *Malpractice Reform in the 1990s: Past Disappointments, Future Success?*, 20 J. HEALTH POL., POL'Y & L. 99 (1991); Randall R. Bovbjerg, *Legislation on Medical Malpractice: Further Developments and a Preliminary Report Card*, 22 U.C. DAVIS L. REV. 499 (1989).

24. U.S. GAO, MEDICAL MALPRACTICE: CASE STUDY ON INDIANA (1986) [hereinafter U.S. GAO, CASE STUDY ON INDIANA]; U.S. GAO, SIX CASE STUDIES SHOW CLAIMS AND INSURANCE COSTS STILL RISE DESPITE REFORMS (1986); Geoffrey Segar, *Background of, Preparation of, and Passage of the Indiana Medical Malpractice Act, in* HOOSIER HOSPITAL ECONOMICS & PUBLIC POLICY: A COLLECTION OF HISTORICAL ESSAYS 69 (Ind. Hosp. Ass'n ed., 1995).

25. GOVERNOR OTIS R. BOWEN, MESSAGE TO THE GENERAL ASSEMBLY, STATE OF INDIANA, JOURNAL OF THE HOUSE 31-36 (Jan. 9, 1975).

26. Act of Apr. 17, 1975, Pub. L. No. 146-1975, 1975 Ind. Acts 854 (codified as amended at IND. CODE §§ 27-12-1-1 to -18-2 (1993)); *see* Segar, *supra* note 24, at 69-72.

availability of health care services in the state.[27]

Indiana's malpractice reforms were among the first comprehensive malpractice reforms in the nation and have been consistently maintained since 1975.[28] The have withstood several constitutional challenges. Indiana's reforms have also gained national attention.[29] Several states have adopted reforms patterned after Indiana.[30]

The Act contains three major reforms: (1) a comprehensive cap on damages,[31] (2) mandated medical review before trial,[32] and (3) a state-run Patient Compensation Fund to pay large claims.[33] Eligible health care providers, exhaustively defined in the statute,[34] participate voluntarily by proving financial responsibility, i.e., a specified level of primary malpractice insurance coverage, and by paying a surcharge on that primary coverage to finance the Patient Compensation Fund.[35]

Indiana's medical malpractice reform legislation, like most malpractice reforms that state legislatures have adopted in recent years, seeks to limit the frequency and severity of malpractice claims—the two factors that influence the cost of malpractice liability insurance for providers.[36] For example, Indiana's cap on damages is designed to control the size of claims and, in particular, the occurrence of unpredictable catastrophic claims. Other Indiana reform designed to limit claim size are the limitation on recoveries from collateral sources and

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27. H.R. 1460, 99th Gen. Assembly, 1st Sess. § 1(a)-(j) (1975); *see* Johnson v. St. Vincent's Hosp., 404 N.E.2d 585 (Ind. 1980).

28. *See* Kinney et al., *supra* note 20, at 1276; Catherine Schick Hurlbut, Note, *Constitutionality of the Indiana Medical Malpractice Act: Re-Evaluated*, 19 VAL. U. L. REV. 493, 494 (1985); James Kemper et al., *Reform Revisited: A Review of the Indiana Medical Malpractice Act Ten Years Later*, 19 IND. L. REV. 1129, 1131 (1986).

29. For example, in 1987, the United States Department of Health and Human Services, under the guidance of then Secretary Otis Bowen, recommended that states adopt malpractice reforms patterned after Indiana's. *See* DEP'T OF HEALTH & HUMAN SERVICES, REPORT ON THE TASK FORCE ON MEDICAL LIABILITY AND MALPRACTICE (1987); DEP'T OF HEALTH & HUMAN SERVICES, DESCRIPTION OF MODEL HEALTH CARE PROVIDER LIABILITY REFORM ACT (1987).

30. *See, e.g.*, KAN. STAT. ANN. § 60.3407 (Supp. 1989); KAN. STAT. ANN. § 65.490 (1985); LA. REV. STAT. ANN. § 40.1299.47 (Supp. 1990); NEB. REV. STAT. § 44-1840 & 40.1299.42 (Supp. 1990); *see* Bovbjerg, *supra* note 23, at 521-31.

31. Through 1989, the cap was $500,000. IND. CODE § 16-9.5-2-2 (repealed 1993). The legislature raised the cap to $750,000 for claims filed after January 1, 1990, presumably to address perceived inequities in the system for large claimants. Act of May 2, 1989, Pub. L. No. 189-1989, 1989 Ind. Acts 1538 (codified as amended at IND. CODE § 16-9.5-2-2(a) (1990)). In 1998, the legislature raised the cap to $1.25 million effective July 1, 1999. Act of March 13, 1998, Pub. L. No. 111-1998, 1998 Ind. Acts 390 (to be codified at IND. CODE § 27-12-14-3).

32. *See* IND. CODE §§ 27-12-8-1 to -10-26 (1993).

33. *Id.* §§ 27-12-6-1 to -7.

34. *Id.* § 27-12-2-14.

35. *Id.* § 27-12-5-3.

36. *See* Kinney, *supra* note 23, at 101-02. *See generally* Bovbjerg, *supra* note 23.

allowing third party payers to recover from awards.[37] Several reforms, such as the Medical Review panel, are designed to limit the frequency of claims. The two-year occurrence-based statute of limitations is also designed to reduce claim frequency. Some tentative evidence suggests that it is effective in doing so.[38]

## II. TIME FOR A REASSESSMENT?

The adoption of tort reform in any field, including malpractice, involves a balancing of interests among injured claimants, tortfeasors and the insurers that effectively finance the tort claim awards and settlements of tortfeasors. If the balance is struck too far in favor of tortfeasors and their insurers, tort claimants have reduced access to fair compensation for their injuries. If the balance is struck too far in favor of tort claimants, the ability of tortfeasors and their insurers to finance tort claim awards and settlements is compromised.

Clearly, the Indiana legislature was concerned that the balance was struck too far in favor of malpractice claimants when it enacted its malpractice reforms in 1975.[39] Significant evidence also suggests that the legislature may have been right in this conclusion. Specifically, shortly after enactment, medical malpractice premiums in Indiana dropped and insurance became readily obtainable again, and Indiana has enjoyed relatively low malpractice premiums since.[40] Perhaps more importantly, Indiana enjoyed stability in the affordability and availability of malpractice insurance during the mid-1980s when other states experienced a "crisis" in this area.[41] Furthermore, Indiana's health care providers and insurers are highly satisfied with the system.[42]

In addition, important evidence from an evaluation of Indiana's Medical Malpractice Act in the 1980s,[43] indicates that Indiana's reforms were unexpectedly quite generous to claimants. In assessing the operation of Indiana's cap, comparisons with Ohio and Michigan are instructive. Unlike Indiana, at the time Michigan and Ohio had adopted malpractice reforms only sporadically and had never implemented a damage cap; with respect to other, more general tort

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37. IND. CODE § 31-4-36-1 (1993).

38. *See* Randall R. Bovbjerg & Joel M. Schumm, *Judicial Policy and Quantitative Research: Indiana's Statute of Limitations for Medical Practitioners*, 31 IND. L. REV. 1051 (1998).

39. *See* Kinney et al., *supra* note 20, at 1276-77.

40. *See* U.S. GAO, CASE STUDY ON INDIANA, *supra* note 24.

41. U.S. GAO, CASE STUDY ON INDIANA, *supra* note 24; U.S. GAO, MEDICAL MALPRACTICE INSURANCE COSTS INCREASED BUT VARIED AMONG PHYSICIANS AND HOSPITALS (1986).

42. U.S. GAO, CASE STUDY ON INDIANA, *supra* note 24.

43. William P. Gronfein & Eleanor D. Kinney, *Controlling Large Medical Malpractice Claims: The Unexpected Impact of Damage Caps*, 16 J. HEALTH POL. POL'Y & L. 441 (1991).

Data on Michigan and Ohio claims were all large (>$100,000) claims filed with the Medical Protective Company, Fort Wayne, Indiana, between 1977 through 1988. For the relevant period, the Medical Protective Company had about one-third of the market in Michigan and Ohio. *Id.* at 445.

reforms, all three states were similar.[44] Nevertheless, between 1995 and 1988, the amount of compensation going to claimants with large malpractice payments in Indiana was, on average, substantially higher than in Michigan and Ohio: Indiana's mean large claim (>$100,000) severity between 1975 and 1988 was $404,832; Michigan's was $290,022 and Ohio's, $303,220.[45] The median payment for large claims (>$100,000) was $435,283 for Indiana, $180,000 for Michigan and $200,000 for Ohio.[46] Further, 27.9% of cases paid from Indiana's Patient Compensation Fund received the maximum allowable payment of $500,000 while only 13% of Michigan and Ohio claims were paid at this level or above.[47]

It should be emphasized that there has been no empirical study of the Act since 1990 to confirm whether Indiana's system still operates in this fashion. One subsequent study, which compared Indiana with Illinois, found that, despite Indiana's reforms, Indiana and Illinois had similar patterns of health care expenditure inflation suggesting that Indiana's reforms have not affected health system costs.[48] In an analysis of Indiana data, Randall Bovbjerg found no difference in patterns of health care expenditures and rates of physicians per population in Indiana before and after the Act.[49]

Nevertheless, there do remain issues about Indiana's Medical Malpractice Act with respect to claimants. For example, there is evidence that malpractice claimants with capped damage awards often receive unjustly small compensation after third party payers receive payment from the award for their expenditures on the claimant's behalf.[50] There have been instances where claimants have received very little from a large recovery because third parties as well as the plaintiff's attorney have been paid first.[51] The operation of these rights of third parties in a capped system indeed raises fundamental questions of fairness as Indiana's actual experience demonstrates.

Some anecdotal reports raise concerns as well.[52] Pulitzer Prize-winning articles in June 1990 reported consumer concerns about whether the Act promotes the interests of providers and insurers over those of claimants.[53] In

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44. *Id.* at 443-44.

45. *Id.* at 447 (Table 2).

46. *Id.*

47. *Id.* at 447-48.

48. David Morrison, *In Search of Savings: Caps on Jury Verdicts are Not a Solution to Health Care Cost Crisis*, 7 LOY. CONSUMER L. REP. 141 (1995).

49. Randall R. Bovbjerg, *Lessons for Tort Reform from Indiana*, 16 J. HEALTH POL. POL'Y & L. 465 (1991).

50. *See* Kinney et al., *supra* note 20, at 1300-01.

51. *Id.* at 1301.

52. *See, e.g.*, Isabel Wilkerson, *Indiana Law at Center of Malpractice Debate*, N.Y. TIMES, Aug. 20, 1990, at A13.

53. *See* Joseph T. Hallinan & Susan M. Headden, *A Case of Neglect: Medical Malpractice in Indiana*, INDIANAPOLIS STAR, Jun. 24, 1990, at 1; Joseph T. Headden & Susan M. Hallinan, *State Failing to Crack Down on Malpractice*, INDIANAPOLIS STAR, Jun. 25, 1990, at 1; Joseph T.

1995, a lobbyist for the Insurance Institute of Indiana reported a harrowing story of his own experience trying to recover adequate damages for catastrophic injury from malpractice in the face of Indiana's cap.[54] A sociological study involving interviews of claimants found considerable dissatisfaction with the Act among many claimants.[55]

One area of great concern has been the fairness of the two-year, occurrence-based statute of limitations for injured parties who discover the injury after the statute has tolled as well as for minors.[56] Indeed, when the court of appeals issued its opinion in *Martin v. Richey*, an editorial in the *Indianapolis News* called for a reform of the Act's statute of limitations.[57]

This small symposium commemorates the occasion when the Indiana Supreme Court is called on to decide whether the two-year occurrence-based statute of limitations for medical malpractice claims violates Indiana's Constitution. Two types of information should inform the court's decision. First are legal argument and precedent. Second is empirical information about the operation of the legal rule that indicates it appropriateness as a policy matter.

The Brief of Amicus Curiae Indiana Trial Lawyers Association[58] presents the arguments that the malpractice limitations period violates the Indiana Constitution and justifies the overturning of a substantial body of Indiana case law to the contrary. The second brief, Brief of Amicus Curiae Indiana State Medical Association,[59] presents the arguments and precedents in support of the current limitations provision. These briefs are reproduced in this Symposium as Appendixes. Further, an Article by Randall R. Bovbjerg and Joel M. Schumm reviews the empirical evidence on medical malpractice focusing on Indiana and more especially, on the impact of short occurrence-based statutes of limitations on the frequency of claims and the cost and availability of medical liability insurance.[60]

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Hallinan & Susan M. Headden, *Malpractice Laws Stacked against Victims: Doctors, Insurance Companies Reap Biggest Benefits*, INDIANAPOLIS STAR, Jun. 26, 1990, at 1.

54. Frank Cornelius, *Crushed by my Own Reform*, N.Y. TIMES, Oct. 7, 1994, at A31; *see also* Eileen Ambrose, *Terminally Ill Man Fights Against Malpractice Law He Helped Pass: Cap on Damages is a Bad Idea, He Says*, INDIANAPOLIS NEWS, Mar. 1, 1995, at A1.

55. William Gronfein & Eleanor Kinney, *Bringing the Patient Back In: The Rhetoric of Victimization and Medical Malpractice*, 6 PERSP. ON SOC. PROBS. 47 (1994).

56. *See* Scott A. DeVries, Note, *Medical Malpractice Acts' Statutes of Limitation* as *They Apply to Minors: Are They Proper?*, 28 IND. L. REV. 413 (1995).

57. Editorial, *Surgery for Malpractice Law*, INDIANAPOLIS NEWS, Aug. 23, 1997, at A4; *see also* Gregory Weaver, *State's Malpractice Laws Coming under Siege: Recent Appeals Rulings Have Given Strength to Lawsuits, but Fate of the Law May Lie with the State Supreme Court*, INDIANAPOLIS STAR, Aug. 17, 1997, at A1.

58. Brief of Amicus Curiae Indiana Trail Lawyers Association (in opposition to transfer), Martin v. Richey, 674 N.E.2d 1015 (Ind. Ct. App. 1997), *reprinted in Appendix 1*, 31 IND. L. REV. 1089 (1998).

59. Brief of Amicus Curiae Indiana State Medical Association (in support of transfer), Martin v. Richey, 674 N.E.2d 1015 (Ind. Ct. App. 1997), *reprinted in Appendix 2*, 31 IND. L. REV. 10959(1998).

60. *See* Bovbjerg & Schumm, *supra* note 38.