Indiana inheritance tax. In rejecting the State's interpretations, the court of appeals preserved the expectations of the practicing bar and public— expectations that followed from years of accepted interpretations—and disavowed the piecemeal alteration of the statutory inheritance tax scheme.

XVIII. Torts

*James J. Brennan**

A. Tort v. Contract

In *Strong v. Commercial Carpet Co.*,[1] the Third District Court of Appeals, in an analysis premised upon the modern rules of pleading,[2] held that a plaintiff who brings an action predicated on both breach of contract and negligence is not required to elect his remedy and is entitled to seek recovery on both theories. The court prefaced its holding with a helpful discussion of when a claim will be actionable in both tort and contract. Following the traditional distinction between misfeasance and nonfeasance,[3] the court stated that the total nonperformance of a promise is actionable only as a breach of contract, while the misperformance of a promise is actionable in tort as well as contract.[4] Although the line between misfeasance and nonfeasance is often difficult to draw,[5] the court concluded that the distinction provides a valid means of determining when a breach of contract can be characterized as a tort. While an action in tort generally is preferable because of the availability of greater damages,[6] *Strong* should be

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[1]322 N.E.2d 387 (Ind. Ct. App. 1975).

[2]The court relied exclusively on IND. R. TR. P. 8 (E) (2), which permits a plantiff to seek relief on alternate theories of recovery.

[3]Dean Prosser concludes "that there will be liability in tort for misperformance of a contract whenever there would be liability for gratuitous performance without the contract . . . ." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 92, at 617 (4th ed. 1971) [hereinafter cited as PROSSER]. A leading case in this area is Flint & Walling Mfg. Co. v. Beckett, 167 Ind. 491, 79 N.E. 503 (1906).

[4]322 N.E.2d at 390.

[5]*See* PROSSER § 92, at 618.

[6]Contract damages are limited by the well-known rule of Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854), that only those damages that were in the contemplation of the parties can be recovered. *See generally* 5 A.

particularly helpful to plaintiffs who have no available remedy in tort because of such barriers as the statute of limitations[7] or the problems of proof inherent in negligence actions.[8]

B. Malicious Prosecution

The most important element that a plaintiff must establish to prevail in an action for malicious prosecution is that the defendant caused the criminal proceeding to be initiated against the plaintiff without probable cause.[9] Accordingly, an affirmative showing that probable cause existed operates as a complete defense to an action for malicious prosecution. The most expedient way for a defendant to establish the existence of probable cause is to prove that he sought the advice of counsel before initiating the proceeding, and, after a full disclosure of all material facts, the counsel advised him that a reasonable basis for prosecution existed.[10] Advice of counsel operates as a complete defense only if the advice is both sought and followed by the defendant in good faith.[11] Thus, it is not a defense when it appears that the defendant sought legal advice as a subterfuge to shield himself from liability for causing a groundless proceeding to be initiated.

While the existence of a collateral purpose for the plaintiff's initiation of prosecution generally relates to the element of malice, it is properly considered in the context of probable cause when the defendant raises the defense of advice of counsel. In *Barrow v. Weddle Brothers Construction*,[12] the First District Court of Appeals, exercising great deference to the inferences drawn from the record by the trial court, held that a finding that the defendant sought the advice of counsel in good faith was not precluded by a finding that the defendant offered to cause a criminal charge that it initiated to be dismissed if the plaintiff would satisfy a debt he owed to the defendant.[13] The court noted that the defendant's alleged effort to use the criminal charge as a debt collection device could have supported a finding of bad faith, but

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CORBIN, CORBIN ON CONTRACTS § 1007, at 70 (1950); C. MCCORMICK, LAW OF DAMAGES § 137 (1935) [hereinafter cited at MCCORMICK].

[7]The statute of limitations is 2 years for actions in tort, IND. CODE § 34-1-2-2 (Burns 1973), 10 years for actions based on written contracts, *id.*, and 6 years for actions based on oral contracts, *id.* § 34-1-2-1.

[8]For an excellent discussion of the consequences of choosing between a tort and a contract remedy see PROSSER § 92, at 618-22.

[9]*See, e.g.*, L. GREEN, JUDGE AND JURY 341 (1930).

[10]*E.g.*, Indianapolis Traction & Terminal Co. v. Henby, 178 Ind. 239, 97 N.E. 313 (1912); L. GREEN, *supra* note 9, at 344-45; PROSSER § 119, at 843.

[11]*See* case and authorities cited note 10 *supra*.

[12]316 N.E.2d 845 (Ind. Ct. App. 1974).

[13]*Id.* at 848.

concluded that an inference of good faith could be drawn from the record as a whole.[14]

The court, however, need not have been concerned with the defendant's hostility towards the plaintiff. When the advice of counsel defense is not interposed, the existence of a collateral purpose has only slight significance to the probable cause issue. Since probable cause is measured primarily by the reasonableness of the defendant's belief in the guilt of the accused,[15] the defendant need not have been "influenced by a desire to promote the public good"[16] to have had probable cause to initiate charges against the plaintiff. Ill will is the basis of the element of malice, and lack of probable cause cannot be inferred from malice.[17]

C. Premises Liability

Few, if any, areas of Indiana tort law are more confused and unpredictable than that which has been referred to as the law of "premises liability."[18] Indiana continues to adhere to the common law rules by which possessors of land are held to a gradient duty of care that depends entirely on the status attained by the injured entrants. Other jurisdictions have rejected the common law classification system and require that possessors exercise reasonable care toward all entrants, regardless of their status.[19]

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[14]*Id.* at 852. A different result was reached in Yerkes v. Washington Mfg. Co., 326 N.E.2d 629 (Ind. Ct. App. 1975), in which the First District Court of Appeals, in ruling on the propriety of a summary judgment, was required to resolve conflicting inferences in the plaintiff's favor. The defendant caused criminal proceedings to be initiated against the plaintiff for a violation of Indiana's "bad check" statute, IND. CODE § 35-17-5-10 (IND. ANN. STAT. § 10-3037, Burns Supp. 1975). The court held that the defendant was not entitled to summary judgment on the basis of the advice of counsel defense because affidavits submitted by the plaintiff gave rise to the inference that such advice was sought in bad faith. The affidavits alleged that the defendant had accepted the check with knowledge that it was drawn on insufficient funds and that he had agreed not to cash the check until the plaintiff's account was replenished. 326 N.E.2d at 632.

[15]*E.g.*, Yerkes v. Washington Mfg. Co., 326 N.E.2d 629 (Ind. Ct. App. 1975).

[16]316 N.E.2d at 851, *quoting from* Benson v. Bacon, 99 Ind. 156 (1884).

[17]Stivers v. Old Nat'l Bank, 148 Ind. App. 196, 264 N.E.2d 339 (1970); L. GREEN, *supra* note 9, at 346.

[18]*See generally* Note, *Premises Liability: A Critical Survey of Indiana Law*, 7 IND. L. REV. 1001 (1974).

[19]*See, e.g.*, Smith v. Arbaugh's Restaurant, 469 F.2d 97 (D.C. Cir. 1972); Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968); Mile High Fence Co. v. Radovich, 175 Colo. 537, 489 P.2d 308 (1971); Pickard v. City of Honolulu, 51 Hawaii 134, 452 P.2d 445 (1969).

In *Hammond v. Allegretti*,[20] the first premises liability case decided by the Indiana Supreme Court since 1962,[21] the court clarified Indiana law regarding the duty of care owed by possessors to invitees. The court held that possessors must exercise reasonable care under all circumstances for the safety of invitees and that the courts should not attempt to diminish this duty by erecting mechanical rules of law predicated on the existence of one particular circumstance.[22] Since *Hammond* dictates that cases involving the possessor-invitee relationship be decided under the ordinary principles of negligence law, this facet of the law of premises liability should remain relatively free from confusion.

While *Hammond* establishes that the duty owed to invitees will always be the same, the courts have been unable to agree on a uniform definition of the duty owed by possessors to licensees and trespassers. Although courts frequently have stated that the only duty owed to trespassers and licensees is to avoid wilfully or wantonly injuring them,[23] the courts have created so many exceptions to the rule that this area of the law of premises liability has become a "semantic morass."[24] The recent First District Court of Appeals decision of *Pallikan v. Mark*[25] indicates that this unfortunate situation may continue to exist until the supreme court avails itself of an opportunity in a case involving a licensee or trespasser to author a decision as lucid and as well reasoned as *Hammond*.

In *Pallikan* an off-duty fireman was injured when he fell into a large, weed-covered hole located on the defendant's premises. The trial court granted summary judgment for the defendant on the issue of liability, and the court of appeals affirmed. After examining the pleadings for a genuine issue of material fact, the court of appeals found that there were no allegations

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[20]311 N.E.2d 821 (Ind. 1974).

[21]Pier v. Schultz, 243 Ind. 200, 182 N.E.2d 255 (1962), was the most recent of the supreme court's premises liability decisions prior to *Hammond*.

[22]311 N.E.2d at 827-28. The court reversed the holding of the court of appeals that a landowner is under no duty to remove ice and snow from his premises. *Hammond* was recently applied by the First District Court of Appeals in Poe v. Tate, 315 N.E.2d 392 (Ind. Ct. App. 1974). Both courts emphasized that their holdings were limited to cases involving private areas rather than public areas, such as a public sidewalk.

[23]*E.g.*, Lingenfelter v. Baltimore & O.S.W. Ry., 154 Ind. 49, 55 N.E. 1021 (1900).

[24]The United States Supreme Court used the phrase "semantic morass" to describe the common law rules of premises liability in a decision in which the Court refused to extend these rules to the law of admiralty. Kemarec v. Compagnie Generale, 358 U.S. 625, 630-31 (1959). *See* Note, *supra* note 18, at 1004.

[25]322 N.E.2d 398 (Ind. Ct. App. 1975).

that the defendant took "positive action" to injure the plaintiff.[26] For this reason, the court concluded that it could not be said that the defendant had breached any duty that he owed to the plaintiff. The court relied primarily upon *Woodruff v. Bowen*,[27] an 1893 decision in which the supreme court held that firemen were licensees and that the only duty owed by possessors to licensees is "to refrain from any positive wrongful act which may result in [their] injury . . . ."[28] Although the phrase "positive wrongful act" arguably includes a positive negligent act, the courts of appeals have been unable to agree whether the *Bowen* court intended the phrase to denote negligent as well as wilful and wanton acts.[29]

By limiting its inquiry to a determination of whether the defendant had alleged a positive wrongful act, the *Pallikan* court disregarded several other standards that Indiana courts have used to define the duty of care owed to licensees. Most significantly, the court failed to consider the "concealed trap doctrine," which provides that a possessor must disclose any concealed dangerous conditions on the premises of which he has knowledge.[30] Assuming that the plaintiff in *Pallikan* alleged that the defendant knew that the grass and weed-covered hole presented a foreseeable risk of harm to persons entering the premises, it is arguable that the concealed character of the hole created a situation "comparable to entrapment."[31] For this reason, summary judgment may have been improvidently granted; the trier of fact should have been allowed to determine whether the standard of due care required that precautions be taken for the plaintiff's safety.

Another significant aspect of *Pallikan* is the court's expressed reluctance to overrule existing precedent absent legislative direction or the existence of "urgent reasons" to do so.[32] Some states, indeed, have enacted legislation that requires all men to exercise

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[26] *Id.* at 399.

[27] 136 Ind. 431, 34 N.E. 1113 (1893).

[28] *Id.* at 442, 34 N.E. at 1117.

[29] *Compare* Fort Wayne Nat'l Bank v. Doctor, 149 Ind. App. 365, 272 N.E.2d 876 (1971), *with* Surratt v. Petrol, Inc., 312 N.E.2d 487 (Ind. Ct. App. 1974).

[30] *See* Carrano v. Scheidt, 388 F.2d 45 (7th Cir. 1967) (applying Indiana law); Pier v. Schultz, 243 Ind. 200, 182 N.E.2d 255 (1962); PROSSER § 60, at 380-82.

[31] The "condition comparable to entrapment" language was used by the Indiana Supreme Court in Pier v. Schultz, 243 Ind. 200, 182 N.E.2d 255 (1962), in reference to the "concealed trap doctrine." *Id.* at 204, 182 N.E.2d at 257.

[32] 322 N.E.2d at 400.

reasonable care in their daily pursuits.[33] Nevertheless, Indiana courts have not awaited legislative action in the past before abrogating traditional immunity doctrines.[34] It would seem that the confused state of the law in this area at least warrants a careful and forthright examination, if not the abrogation, of the common law rules of premises liability. Other reasons for abrogation have been presented, the most important of which is the need to develop a more rational method of imposing or denying the liability of possessors to entrants.[35] "The policy reasons behind protecting the interest of land ownership with minimal regard for the interest of human safety have lost their persuasive force."[36]

Another important exception to the general rule that a possessor cannot be held liable for negligence to entrants other than invitees is the rule that a possessor must carry on his activities with due care for the safety of licensees.[37] The "active negligence" exception enjoyed the acceptance of Indiana courts[38] until it was overruled by the court of appeals several years ago in *Fort Wayne National Bank v. Doctor*.[39] Shortly after *Doctor* was decided, however, the rule apparently resurfaced in *Pierce v. Walters*[40] under the guise of the paradoxical phrase "wilful and wanton negligence." In the recent case of *Surratt v. Petrol, Inc.*,[41] the Third District Court of Appeals disregarded *Doctor* and, in the course of determining by analogy the duty of care owed to a trespasser on a chattel, followed the *Restatement* rule that a possessor "owes a duty of reasonable care to a discovered trespasser not to injure him through active conduct."[42]

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[33] *E.g.*, CAL. CIVIL CODE § 1714 (West 1973). The California Supreme Court relied on this statute in abrogating the common law classification system in Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

[34] *See, e.g.*, Campbell v. State, 259 Ind. 55, 284 N.E.2d 733 (1972) (tort immunity of state); Brooks v. Robinson, 259 Ind. 16, 284 N.E.2d 794 (1972) (interspousal immunity). *But see* Vaughan v. Vaughan, 316 N.E.2d 455 (Ind. Ct. App. 1974) (court refused to abrogate parental immunity doctrine).

[35] *See generally* Note, *supra* note 18.

[36] *Id.* at 1003.

[37] *See* PROSSER § 60, at 379-80; RESTATEMENT (SECOND) OF TORTS § 341 (1965).

[38] *See* Olson v. Kushner, 138 Ind. App. 73, 211 N.E.2d 620 (1965); Millspaugh v. Northern Ind. Pub. Serv. Co., 104 Ind. App. 540, 12 N.E.2d 396 (1938); Thistlethwaite v. Heck, 75 Ind. App. 359, 128 N.E. 611 (1920); Cleveland, C.C. & St. L. Ry. v. Means, 59 Ind. App. 383, 104 N.E. 785 (1914); East Hill Cemetery Co. v. Thompson, 53 Ind. App. 417, 97 N.E. 1036 (1912); Note, *supra* note 18, at 1026.

[39] 149 Ind. App. 365, 272 N.E.2d 876 (1971).

[40] 283 N.E.2d 560 (Ind. Ct. App. 1972). For a discussion of *Pierce* see Note, *supra* note 18, at 1030-31.

[41] 312 N.E.2d 487, *aff'd on rehearing*, 316 N.E.2d 453 (Ind. Ct. App. 1974).

[42] 312 N.E.2d at 495, *following* RESTATEMENT (SECOND) OF TORTS § 336 (1965).

On petition for rehearing, the defendant contended that the court's application of the active negligence rule was inconsistent with *Doctor*.[43] Squarely addressing this contention, Judge Garrard examined the authorities relied upon by the *Doctor* court and held that they supported that conduct, whether characterized as active, affirmative or positive, provides a basis for holding a possessor liable to discovered trespassers for negligence.[44] Although *Surratt* cannot be considered a true premises liability case since it involved liability to trespassers on chattels, the court's decision is significant to the law of premises liability in at least two respects. First, the court engaged in a well-reasoned analysis of earlier Indiana decisions and concluded that in many of these decisions the courts, in fact, applied the standard of due care under the guise of other doctrines.[45] Second, *Surratt* indicates that the active negligence doctrine will continue to be used by at least some Indiana courts to hold possessors of land to the standard of reasonable care under the circumstances in cases involving licensees and trespassers. The obvious conflict between the courts of appeals concerning the active negligence exception to the wilful-wanton rule presents an issue seriously in need of resolution by the supreme court. While the active negligence doctrine serves the commendable purpose of circumventing the common law rules, recognition of the doctrine could create as many problems as it would solve. The distinction between active and passive negligence is a fiction, the artificiality of which has the potential of breeding confusion and perpetuating the common law classification.[46]

Although a landlord generally is under no duty to take affirmative steps to remedy defective conditions existing on leased premises, he is responsible for maintaining those portions of the premises over which he exercises possession and control.[47] The "possession and control" exception to the general rule of nonliability generally is applied in situations in which the dangerous condition is located in an area where tenants could reasonably be expected to be present, such as a common passageway or an

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[43]316 N.E.2d 453 (Ind. Ct. App. 1974).

[44]*Id.* at 454-55.

[45]For example, the court engaged in an excellent discussion of how earlier courts used the "last clear chance" doctrine to hold possessors to a duty of due care. 312 N.E.2d at 493. *See also* Note, *supra* note 18, at 1010-12.

[46]Since it is often difficult to distinguish between active and passive negligence, a more logical approach would be to hold the possessor to a duty of reasonable care under all circumstances. *Cf.* Hughes, *Duty To Tresspassers*, 68 YALE L.J. 633, 648-49 (1959); James, *Tort Liability of Occupiers of Land: Duties Owed to Trespassers*, 63 YALE L.J. 145, 174-75 (1953).

[47]PROSSER § 63, at 405-08.

approach.[48] In this situation, the landlord has an affirmative obligation to make reasonable repairs and inspections to prevent tenants and other entrants from being exposed to unreasonable risks of harm.

An unusual application of this exception to the general rule of nonliability was made by the Second District Court of Appeals in *Parr v. McDade.*[49] The plaintiff, a tenant of the defendant, was injured when he jumped from his second story apartment to escape a fire occasioned by a defective gas heater located in the apartment of the defendant's resident manager. The proof showed that both the defendant and his resident manager were aware of the defective heater, and that the defendant previously had promised the resident manager that the defective heater would be replaced.[50] The defendant appealed from a substantial jury verdict on the ground that, *inter alia,* he was under no duty to the plaintiff either to repair the defective heater or prevent the defendant manager from using it.

The court of appeals affirmed the decision below, relying on two alternate grounds for establishing the defendant's negligence. First, the court concluded that the employer-employee relationship between the defendant and the resident manager placed the resident manager's apartment, the situs of the defective heater, within the possession and control of the defendant.[51] On this basis, the court approved the trial court's instruction that a landlord must take reasonable steps to remedy known dangerous conditions that exist in areas under his possession and control.

As an alternate basis for its decision, the *Parr* court looked beyond the landlord-tenant relationship to find the existence of a duty of reasonable care. The defendant had argued that, since the resident manager used the gas heater for the sole purpose of her comfort and enjoyment, the resident manager's negligent use of the heater was an act outside of the scope of the employment relationship, for which the defendant could not be held responsible. The court rejected this argument, adopting the *Restatement* view that, under certain circumstances, "a master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from . . . conducting himself as to create an unreasonable risk of bodily harm to [others] . . . ."[52] Applying this rule, the court concluded

[48] *See* RESTATEMENT (SECOND) OF TORTS § 360, Comment d (1965).

[49] 314 N.E.2d 768 (Ind. Ct. App. 1974).

[50] *Id.* at 770.

[51] *Id.* at 771-72.

[52] RESTATEMENT (SECOND) OF TORTS § 317, at 125 (1965).

that the defendant's failure to prevent his resident manager from using the heater on the premises was actionable negligence.

D. Reasonable Care

Dean Prosser has stated that the standard of reasonable care under the circumstances "is as wide as all human behavior."[53] For this reason, the standard seldom, if ever, can be fixed by the creation of absolute rules. The courts, nevertheless, have found it helpful to establish certain formulas that are capable of being adapted to jury instructions that fix the standard of care in recurring fact situations. Several of these formulas have been referred to by courts as "doctrines." Since the term "doctrine" suggests the existence of a mechanical rule of uniform application, it must be kept in mind that the duty to exercise reasonable care is a full one that should not be diluted by rules of law based upon the presence of one particular circumstance in a given case.[54] Accordingly, cases in which the courts have held that a particular type of conduct represents negligence or contributory negligence as a matter of law are often of dubious precedential value.[55]

There are numerous decisions in which Indiana courts have found a plaintiff contributorily negligent as a matter of law when he voluntarily and intentionally exposed himself to a danger created by the defendant's negligence.[56] In two cases decided during the survey period, the courts were urged by the defendants to apply this so-called "equal knowledge doctrine" to remove the issue of contributory negligence from the jury's consideration and deny recovery as a matter of law. In both cases the courts rejected the application of the "doctrine" and looked to the particular circumstances before them.

In *Hobby Shops, Inc. v. Drudy*,[57] a 13-year-old boy was seriously injured when, while running through the defendant's parking lot, he collided with a cable erected several feet above ground level. The defendant argued on appeal from a jury verdict that the plaintiff previously had seen the cable, and, therefore, possessed equal knowledge of its perils. In rejecting this contention the Third District Court of Appeals reasoned that, although the plaintiff may have known of the condition, he may not have appreciated its dangers. Recognizing that both knowledge

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[53]PROSSER § 35, at 188.

[54]*See* Hammond v. Allegretti, 311 N.E.2d 821 (Ind. 1974).

[55]PROSSER § 35, at 188.

[56]*See, e.g.*, Stallings v. Dick, 139 Ind. App. 118, 210 N.E.2d 82 (1965). *See also* Sullivan v. Baylor, 325 N.E.2d 475 (Ind. Ct. App. 1975) (incurred risk).

[57]317 N.E.2d 473 (Ind. Ct. App. 1974).

and appreciation of the risk are essential elements of contributory negligence, the court held that it was within the province of the jury to find that the plaintiff, in light of his age, intelligence and experience, did not appreciate the risk that the cable presented.[58]

In *Dreibelbis v. Bennett*[59] the defendant was struck by a passing automobile as he attempted to place safety flares around a disabled vehicle. The defendant argued on appeal that the plaintiff was guilty of contributory negligence as a matter of law on the basis of the "equal knowledge doctrine." The Third District Court of Appeals rejected this argument by stating that the "doctrine" is limited to cases in which both the plaintiff and defendant were active participants in a dangerous activity.[60] This seems to be an artificial distinction, primarily because it is often difficult, if not impossible, to determine whether particular conduct is "active" or "passive."[61] A more logical approach is found in the *Restatement,* which provides that an intentional and unreasonable exposure to a dangerous condition need not be considered contributory negligence "if such exposure is necessary to the safety of a third person or to accomplish some end which is purely in the public interest . . . ."[62] In *Dreibelbis,* the plaintiff's voluntary efforts to erect the safety flares when others failed to do so seems to have been of legal significance worthy of the court's express recognition.

Another formula used by the courts to delineate the standard of reasonable care in particular fact situations is the "sudden emergency doctrine." In its simplest terms, this formula provides that when an actor is confronted by a sudden emergency and is required to make a hasty choice of which alternative course of action to pursue, the emergency is one factor for the jury to consider in determining whether his choice of available alternatives was an unreasonable choice.[63] An important limitation on the "doctrine," as recently recognized by the First District Court of Appeals in *Anderson v. Western,*[64] is that the existence of an emergency cannot be considered in measuring the reasonableness of the actor's conduct when the actor's own negligence has created the emergency. The emergency cannot be considered in this situa-

[58] *Id.* at 479.

[59] 319 N.E.2d 634 (Ind. Ct. App. 1974).

[60] *Id.* at 639.

[61] *See* James, *supra* note 46, at 174-75.

[62] RESTATEMENT (SECOND) OF TORTS § 466, Comment c, at 512 (1965).

[63] For an approved "sudden emergency" instruction, see Baker v. Mason, 253 Ind. 349, 349, 242 N.E.2d 513, 514 (1968).

[64] 320 N.E.2d 759 (Ind. Ct. App. 1974).

tion because it was not an existing circumstance at the time of the actor's negligence.[65]

When there is sufficient time for deliberation, the actor is required to exercise greater judgment in weighing alternate courses of action. The courts have characterized this weighing process in a formula that has been referred to as the "choice of ways doctrine."[66] In *Easley v. Williams*,[67] the plaintiff, an elderly pedestrian, was injured when she was struck by the defendant's truck as the defendant backed it out of a driveway. A general verdict was entered in favor of the defendant, but the trial court granted the plaintiff's motion to correct errors on the ground that, *inter alia*, it was error to instruct the jury on the "choice of ways doctrine." The record showed that the plaintiff had observed the defendant in his truck before she crossed the driveway and that several paths other than across the driveway were available.[68] Two of the First District Court of Appeals judges agreed that the choice of ways doctrine was inapplicable because the evidence did not show that the path chosen by the plaintiff involved "a danger so great and apparent that an ordinary person would not have chosen that way"[69] and that it would have been too burdensome for the plaintiff, who walked with the assistance of a cane, to select an alternate path.[70] Judge Staton, in dissent, viewed the record differently, stating that there was no evidence that any of the alternative routes available to the plaintiff were more devious than the route that she pursued or that an alternative route would have been unduly burdensome.[71]

Two cases decided during the survey period involved the propriety of potentially misleading jury instructions. In *Chamberlain v. Deaconess Hospital, Inc.*,[72] the trial court included the phrase "proximate cause of the *accident*" in a contributory negligence instruction. The term "accident," of course, technically refers to a situation in which no one was negligent.[73] The First District Court of Appeals strongly disapproved the use of the term in negligence cases, but, upon reviewing the instructions in their entirety, concluded that the jury was not misled. Ironically, an-

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[65]PROSSER § 33, at 169-70.

[66]*See, e.g.*, City of Mitchell v. Stevenson, 136 Ind. App. 340, 201 N.E.2d 58 (1964).

[67]321 N.E.2d 752 (Ind. Ct. App. 1975).

[68]*Id.* at 755 (Staton, J., dissenting).

[69]*Id.* at 754.

[70]*Id.*

[71]The existence of "more devious" alternate routes was one of the reasons stated by the trial court for granting a new trial. Judge Staton concluded that this finding was not supported by the record. *Id.* at 755.

[72]324 N.E.2d 172 (Ind. Ct. App. 1975).

[73]PROSSER § 29, at 140.

other appellate panel liberally used the term "accident" in reference to a situation in which the negligence of a motorist apparently contributed to the injury of the plaintiff.[74]

In *Spears v. Aylor*[75] the trial court instructed the jury that the existence of contributory negligence, "however slight," would bar a plaintiff's recovery. Instructions of this nature are not uncommon, for phrases such as "however slight" or "in any manner" are often used by trial courts to dispel any notions of the comparative negligence doctrine from the minds of jurors.[76] The Third District Court of Appeals expressed strong disapproval of instructions of this nature, but again concluded that the trial court had not committed reversible error. The court's disapproval of the phrase "however slight" is not surprising, for trial judges occasionally have used it inadvertently to refer to the element of causation rather than negligence.[77] Since a slight cause by definition cannot be a proximate cause, the confusion of slight causation with slight negligence has been held to be reversible error.[78] The prudent approach, therefore, would be to eliminate the phrase "however slight" from all contributory negligence instructions. As noted by the court in *Spears*, such a subtle reference to the comparative negligence doctrine is unlikely to have its intended effect on the jury.[79]

In *Indianapolis Union Railway v. Walker*,[80] the First District Court of Appeals set forth definitive guidelines for determining when the absence or presence of warning devices at a public crossing is a factor to be considered in determining whether a railroad is liable for negligence. The rule has long been that railroads are under a duty to exercise reasonable care in operating their trains.[81] The *Walker* court held that since due care is measured in light of the totality of circumstances, it is appropriate to consider the presence or absence of warning devices in determining whether a railroad operated its train in a negligent manner.[82] This is a sound approach, for persons operating a train ordinarily should be required to take greater precautions when approaching unguarded crossings than would be necessary if warning devices were present. On the other hand, a railroad cannot be held liable

[74] *See* Dreibelbis v. Bennett, 319 N.E.2d 634 (Ind. Ct. App. 1974).

[75] 319 N.E.2d 639 (Ind. Ct. App. 1974).

[76] PROSSER § 65, at 421.

[77] *See* Huey v. Milligan, 242 Ind. 93, 175 N.E.2d 698 (1961).

[78] *Id.*

[79] 319 N.E.2d at 643.

[80] 318 N.E.2d 578 (Ind. Ct. App. 1974).

[81] Pennsylvania R.R. v. Sherron, 230 Ind. 610, 105 N.E.2d 334 (1952).

[82] 318 N.E.2d at 582, *citing* Pennsylvania R.R. v. Sherron, 230 Ind. 610, 105 N.E.2d 334 (1952).

for its failure to erect and maintain warning devices at a public crossing unless a statute or ordinance so requires or the crossing is found to be "extra-hazardous."[83] Only in these latter circumstances, can negligence specifically be predicated on the failure to erect and maintain warning devices. While the common practice is to charge expressly that the crossing must be found to have been extra-hazardous before such a duty could be imposed, the *Walker* court held that an instruction permitting the jury to consider the presence or absence of warning devices together with the circumstances that could have rendered the crossing extra-hazardous did not represent reversible error.[84]

E. Proximate Cause

In *Surratt v. Petrol, Inc.*,[85] the defendant left his car in an allegedly high crime area without removing the ignition key. A thief stole the vehicle and, shortly thereafter, disregarded a stop sign and collided with another vehicle. The plaintiff, a passenger in the stolen vehicle, brought an action against the defendant on the ground that the failure to remove the key from the ignition switch was actionable negligence. The trial court granted summary judgment in the defendant's favor on the issue of liability.

The Third District Court of Appeals affirmed the trial court, holding that the owner's negligently leaving his ignition key in a parked automobile "could not be considered the proximate cause of injuries later resulting from the negligent operation of the stolen automobile by a thief."[86] The court based its holding on the earlier decision of *Kiste v. Red Cab, Inc.*,[87] in which the court held that the failure to remove the ignition key from an unattended automobile, whether it be deemed common law negligence or negligence per se,[88] could not be considered the proximate cause of the plaintiff's injuries because the negligent driving of the thief was an effective intervening cause that superseded any negligence of the defendant.[89] The *Surratt* court rejected the plaintiff's contention that *Kiste* created an exception

[83]318 N.E.2d at 582-83, *citing* Central Ind. R.R. v. Anderson Banking Co., 252 Ind. 270, 247 N.E.2d 208 (1969).

[84]318 N.E.2d at 583.

[85]312 N.E.2d 487, *aff'd on rehearing*, 316 N.E.2d 453 (Ind. Ct. App. 1974).

[86]312 N.E.2d at 490.

[87]122 Ind. App. 587, 106 N.E.2d 395 (1952).

[88]IND. CODE § 9-4-1-116 (Burns 1973) provides that it is illegal to leave a motor vehicle unattended without first removing the ignition key. Neither the *Kiste* nor the *Surratt* court considered whether a violation of this statute constituted negligence per se, although the respective plaintiffs appear to have relied on this theory as well as on common law negligence.

[89]122 Ind. App. at 596, 106 N.E.2d at 399.

to the general rule of nonliability in cases in which the automobile was left unattended in a high crime area.[90]

Although the result reached in *Surratt* is in accord with the majority view,[91] the court's reliance on proximate cause to deny recovery seems to have thwarted its apparent attempt to foreclose the possibility of recovery in future "key theft" cases.[92] Since foreseeability is the ultimate test of proximate cause,[93] it logically follows that proximate cause should be a question for the jury when the consequences of one's failure to remove the ignition keys from his unattended vehicle are foreseeable. It is submitted that if a future case were to arise in which the plaintiff could show that it was foreseeable that a thief would steal the vehicle *and* that he would drive it negligently, the proximate cause rationale relied on in *Surratt* would dictate that recovery not be denied as a matter of law. Such a showing seems entirely possible, since recent studies support the conclusion that a thief is more likely to drive an automobile negligently than the average motorist.[94]

The courts have not been reluctant to submit the issue of proximate cause to the jury in cases in which the negligent driving of another was a foreseeable risk. In *Dreibelbis v. Bennett*[95] the defendant was involved in an automobile-truck collision on a two lane highway. Although the disabled vehicles were blocking a major portion of the highway, the defendant left the area to notify the police. The plaintiff, who had stopped at the scene of the collision for the purpose of providing assistance if it were needed, posted several warning flares around the defendant's vehicle when it became apparent that the defendant had not done so. While attempting to rekindle a flare that had been extin-

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[90]Dicta in *Kiste* suggest that such a result would follow if it were also foreseeable that a thief would drive the stolen vehicle negligently.

[91]*See* PROSSER § 44, at 283.

[92]The *Kiste* court, upon examining numerous decisions from other jurisdictions, selected the proximate cause rationale over several other theories as a means of denying recovery. The court stated that future "key-theft" cases could be adjudicated "most decisively" on this basis. 122 Ind. App. at 594, 106 N.E.2d at 398. Apparently, the court believed that a high probability of crime was a reality in other jurisdictions, but would never be a foreseeable circumstance in Indiana. *Id.* at 596, 106 N.E.2d at 399. Perhaps changing social conditions dictate that this premise of fact be re-examined.

[93]*See, e.g.*, Dreibelbis v. Bennett, 319 N.E.2d 634, 638 (Ind. Ct. App. 1974).

[94]*See* Peck, *An Exercise Based upon Empirical Data: Liability for Harm Caused by Stolen Automobiles*, 1969 WIS. L. REV. 909. The *Surratt* court held that it was harmless error, at most, for the trial court to refuse to consider the plaintiff's offer to prove that the vehicle was stolen in a high crime area. 312 N.E.2d at 490. There is no indication in the opinion that the plaintiff attempted to prove the foreseeability of the thief's negligent driving.

[95]319 N.E.2d 634 (Ind. Ct. App. 1974).

guished by a passing vehicle, the plaintiff was struck by a passing motorist who was attempting to avoid colliding with the defendant's vehicle.

The plaintiff brought an action against the defendant on the ground that he violated an Indiana statute that requires drivers of disabled vehicles to display luminous warning devices about their vehicles under certain circumstances.[96] The jury returned a verdict for the plaintiff, and the defendant appealed on the ground that the trial court erred when, *inter alia*, it submitted the issue of proximate cause to the jury. The Third District Court of Appeals rejected the defendant's contention that the negligent driving of the motorist was an effective intervening cause and held that it was reasonably foreseeable that the negligence of the motorist would concur with that of the defendant to proximately cause the plaintiff's injuries.[97] This holding is in accord with the general view that a risk created by one's negligence may include the foreseeable intervention of the negligence of others.[98]

F. Damages

The recent enactment of legislation in many states requiring the installation of seat belts in automobiles[99] has prompted defense attorneys to maintain that a plaintiff's failure to have his seat belt fastened at the time of an automobile collision should be considered contributory negligence.[100] This view has uniformly been rejected since the failure to use seat belts cannot be considered the proximate cause of the collision that caused the initial damage.[101] Some courts and commentators, however, have taken the position that the failure to use seat belts can be relied on to reduce the amount of a plaintiff's recovery under the doctrine of avoidable consequences.[102] The doctrine of avoidable consequences, like the doctrine of contributory negligence, is premised on the

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[96] IND. CODE § 9-8-6-42 (Burns 1973).

[97] 319 N.E.2d at 637-38.

[98] *See, e.g.*, PROSSER § 44, at 274.

[99] *See, e.g.*, IND. CODE §§ 9-8-7-1 to -3 (Burns 1973). It is interesting to note that an Indiana trial court once held that this statute implied the mandatory use of seat belts and fined a motorist for his failure to wear them. *See* La Porte Herald-Argus, Dec. 3, 1964, at 6, col. 1-2; 16 DE PAUL L. REV. 521, 523 (1967).

[100] *See* Kleist, *The Seat Belt Defense—An Exercise in Sophistry*, 18 HASTINGS L.J. 613 (1967); Comment, *Seat Belts and Contributory Negligence*, 12 S.D.L. REV. 130 (1967).

[101] *See* Note, *The Seat Belt Defense: A New Approach*, 38 FORDHAM L. REV. 94, 97 (1969).

[102] *See* Barry v. Coca Cola Co., 99 N.J. Super. 270, 239 A.2d 273 (1967); Comment, *Seat Belts and Contributory Negligence*, 12 S.D.L. REV. 130 (1967).

notion that a plaintiff must exercise due care for the protection of his own interests before he can shift to a negligent defendant the loss for damage to those interests. However, unlike contributory negligence, which is an absolute bar to the plaintiff's recovery, avoidable consequences bars recovery only to the extent that the plaintiff's damages could have been avoided through his exercise of due care. For this reason, the doctrine of avoidable consequences often has been referred to as a rule of damages rather than as an affirmative defense.[103]

The effect of a plaintiff's failure to fasten his seat belts was recently considered by the Third District Court of Appeals in *Birdsong v. ITT Continental Baking Co.*[104] The plaintiff in *Birdsong* had stopped his automobile and was preparing to turn when he was struck from the rear by the defendant. The plaintiff appealed from a jury verdict in the defendant's favor on the ground that a nebulous "seat belt" instruction tendered to the jury by the trial court constituted reversible error.[105] Judges Staton and Lybrook agreed that the instruction was erroneous in that it was misleadingly couched in language referring to both contributory negligence and the apportionment of damages. They disagreed, however, on whether the instruction was an attempt to apply the doctrine of avoidable consequences or the doctrine of comparative negligence.

Judge Staton considered the instruction an attempt to invoke the comparative negligence doctrine since it allowed the jury to reduce the plaintiff's damages in proportion to the degree of negligence the jury assigned to the plaintiff's failure to fasten his seat belts.[106] He reasoned that the instruction was inconsistent with other instructions, stating that contributory negligence operates as a complete bar to recovery, and presumed that it misled the jury.

Judge Lybrook, in a concurring opinion, agreed that, if taken out of context, the phrase "contributory negligence" could have misled the jury. He placed greater emphasis, however, on language limiting the jury's consideration of the plaintiff's failure to fasten his seat belts to the issue of damages.[107] His analysis of the instruction was premised on the trial court's attempt to apply the doctrine of avoidable consequences. Judge Hoffman ap-

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[103]McCormick § 34.

[104]312 N.E.2d 104 (Ind. Ct. App. 1974).

[105]*Id.* at 105-06 (instruction set forth).

[106]Judge Staton also set forth a helpful footnote detailing the status of the comparative negligence doctrine and modifications thereof throughout the country. 312 N.E.2d at 106-07 n.1.

[107]*Id.* at 108.

parently agreed with this analysis of the instructions. He concluded in his dissenting opinion, in obvious reference to the doctrine, that the tendering of the instruction was harmless error since the jury, in finding for the defendant, never reached the issue of damages.[108]

The primary problem with applying the doctrine of avoidable consequences is that it is difficult to prove that a separable part of the plaintiff's injury would not have occurred but for the fact that the plaintiff had left his seat belt unfastened.[109] At the present time this seems to be an insurmountable burden for the plaintiff in a "seat belt" case. In a case similar to *Birdsong*, the Indiana Supreme Court refused to apply the doctrine in spite of expert testimony that the plaintiff would not have suffered an eye injury had he been wearing his seat belts.[110] Nevertheless, Indiana courts seem to have recognized that the doctrine has merit in appropriate circumstances.[111] Despite Judge Lybrook's skepticism that an avoidable consequences instruction could ever be drafted properly,[112] it seems likely that the doctrine would be applied by the court if a case were to arise in which a separable portion of the plaintiff's damages could be shown to a reasonable degree of certainty to have been caused by his lack of due care.

In *Rieth-Riley Construction Co. v. McCarrell*,[113] the First District Court of Appeals held that "the mere fact that a plaintiff was unemployed at the time of his injury does not, in and of itself, preclude the value of recovery for the value of time lost from the date of injury to trial."[114] The court prefaced this holding with an instructive discussion of the damage component generally referred to as "impaired earning ability."[115] Relying primarily upon secondary authority to support its decision,[116] the court separated "impaired earning ability" into two distinct elements: loss of time and decreased earning capacity. The loss of time element, the court reasoned, refers to the value of the time that the plaintiff lost before trial because of his injury. Decreased earning capacity refers to the impairment of the plaintiff's future earning capacity and is measured by the extent to which the plaintiff's ability to earn money in the future has been diminished.

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[108]*Id.* at 109 (Hoffman, J., dissenting).

[109]PROSSER § 65, at 422-24.

[110]Kavanagh v. Butorac, 140 Ind. App. 139, 221 N.E.2d 824 (1966).

[111]*See id.*

[112]312 N.E.2d at 108-09.

[113]325 N.E.2d 844 (Ind. Ct. App. 1975).

[114]*Id.* at 849.

[115]*Id.* at 847.

[116]The court quoted extensively from 22 AM. JUR. 2D *Damages* § 100 (1965).

The holding in *Rieth-Riley* is in accord with the generally accepted view that the true basis of recovery for the impairment of earning ability experienced between the date of injury and the date of trial "is the 'value' of the plaintiff's time, that is, what his services would have brought in the labor market, of which actual wages would merely be evidence."[117] As recognized in *Rieth-Riley,* however, other courts, including the Indiana Court of Appeals,[118] have held that damages can be claimed and recovered solely on the basis of the actual wages that the plaintiff had lost up to the date of trial.[119] It has been suggested that no practical or theoretical difficulties would arise if plaintiffs were permitted to select either the value of lost wages or the value of lost time as their basis of recovery.[120] It is arguable that either basis of recovery is now acceptable in Indiana.

Rieth-Riley also seems to have resolved a question left unanswered by the court of appeals in *Cooper v. High.*[121] In *Cooper* the court expressly declined to decide whether work performed on an exchange basis could be considered in awarding damages for impaired earning ability. The *Rieth-Riley* court plainly stated that homemakers and persons who perform services gratuitously can recover for the value of lost time and the impairment of future earning capacity.[122] This result logically follows from the court's conclusion that "a plaintiff has a right to his own time which cannot be taken from him by a tortfeasor without compensation . . . ."[123] The court set forth the caveat, however, that persons who were not earning wages at the time of injury can expect to encounter difficulty in proving their damages to the requisite degree of certainty. Accordingly, the non-wage-earner plaintiff must remove the amount of damages he seeks to recover from the realm of speculation by introducing evidence of his "age, life expectancy, health, training, experience, intelligence, and talents, as well as the nature of the injury."[124]

In *Scott County School District 1 v. Asher,*[125] the Indiana Supreme Court held that an unemancipated minor as well as his parents can recover the value of medical expenses incurred for

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[117]McCormick § 87, at 310.

[118]Scott v. Nabours, 296 N.E.2d 438 (Ind. Ct. App. 1973).

[119]*See* McCormick § 87, at 309-10.

[120]*Id.*

[121]303 N.E.2d 829 (Ind. Ct. App. 1973), *aff'd,* 317 N.E.2d 177 (Ind. 1974).

[122]325 N.E.2d at 848, *citing* 22 Am. Jur. 2d *Damages* § 100 (1965).

[123]325 N.E.2d at 848, *quoting from* 22 Am. Jur. 2d *Damages* § 100 (1965).

[124]325 N.E.2d at 849.

[125]324 N.E.2d 496 (Ind. 1975).

the treatment of injuries inflicted upon him by a tortfeasor. Although it has long been recognized that parents can recover such expenses,[126] a conflict in the courts of appeals had developed over whether a minor's recovery was limited to medical expenses incurred after emancipation.[127] The *Asher* court reasoned that a minor is liable in contract for such medical expenses under the rule that a minor's contract is not voidable when the contract is for "necessaries." On this basis, the court held that when a minor and his parents are both liable to the provider of medical services, both should be entitled to compensation. A double recovery will not be permitted, however; and in a future action against a tortfeasor seeking recovery of such expenses, the tortfeasor is entitled to raise, by way of defense, a judgment previously paid to either the minor or the minor's parents. It is interesting to note that the holding in *Asher* is limited by its facts to past medical expenses. The court's reliance on a New York case[128] suggests that future expenses likely to be incurred until the child attains the age of majority are recoverable only by the child. The reasoning behind the latter rule is that "the safety of the child will be promoted by allowing the child to recover for the future cost of medical expenses, rather than the parent, who may collect the amount and then fail to devote it to the care of the child."[129]

G. Medical Malpractice

An act to regulate medical malpractice is one of the most important pieces of legislation passed this year by the Indiana General Assembly.[130] The Act, which applies only to claims arising out of an act of alleged medical malpractice occurring after July 1, 1975,[131] sets limits on recovery under claims of medical malpractice and provides a detailed procedure for the settlement or litigation of these claims.

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[126]*See, e.g.*, IND. CODE § 34-1-1-8 (Burns Supp. 1975); MCCORMICK § 91.

[127]*Compare* Scott County School Dist. 1 v. Asher, 312 N.E.2d 131 (Ind. Ct. App. 1974), *with* Allen v. Arthur, 139 Ind. App. 460, 220 N.E.2d 658 (1966).

[128]Clarke v. Eighth Ave. R.R., 238 N.Y. 246, 144 N.E. 516 (1924).

[129]MCCORMICK § 91, at 329.

[130]IND. CODE §§ 16-9.5-1-1 to -9-10 (Burns Supp. 1975) [hereinafter referred to as the Act]. Indiana is not the only state to have confronted the medical malpractice dilemma. At the time of this writing at least fourteen other states have passed legislation this year dealing with some aspect of medical malpractice: California, Florida, Idaho, Iowa, Louisiana, Michigan, Missouri, New York, Nevada, North Carolina, North Dakota, South Dakota, Washington, and Wisconsin.

[131]*Id.* § 16-9.5-1-7.

1. *Limitations on Recovery*

Those medical professions sheltered by the Act are denominated "health care providers." A health care provider is defined as follows:

> 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 nurse, optometrist, podiatrist, chiropractor, physical therapist or psychologist, or an officer, employee or agent thereof acting in the course and scope of his employment.[132]

The health care provider must be "qualified" under the Act in order to enjoy its protection.[133] Qualification is not, however, very difficult to attain; all a health care provider need do to qualify is to obtain liability insurance in the amount of $100,000 per occurrence and pay a special surcharge assessed by the commissioner of insurance to finance a state sponsored patient compensation fund.[134]

If the health care provider is qualified, his potential maximum liability for any act of malpractice is $100,000.[135] Any award or settlement exceeding $100,000 is paid from the state's patient compensation fund.[136] In no event, however, may any award or settlement exceed the statutory maximum recovery of $500,000.[137]

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[132] *Id.* § 16-9.5-1-1(a).

[133] *Id.* § 16-9.5-1-5.

[134] *Id.* § 16-9.5-2-1.

[135] *Id.* § 16-9.5-2-2(b). Several other states have also placed a lid on the medical practitioner's liability. N.D. CENT. CODE § 26-40-11 (Supp. 1975) ($500,000); Act of May 20, 1975, ch. 75-9, § 15, [1975] FLA. SESS. LAW SERV. No. 1, at 17-18 (West 1975), *to be codified as* FLA. STAT. § 627.353(1)(b) ($100,000); ch. 162, §§ 4, 5, [1975] Idaho Sess. Laws 422 ($150,000 for injury or death to one patient, $300,000 for injury or death to more than one patient); Act of Aug. 4, 1975, No. 817, § 1, [1975] LA. SESS. LAW SERV. No. 4, at 1383 (West 1975), *to be codified at* LA. REV. STAT. § 40:1299.42(B)(2) ($100,000); Act published July 23, 1975, ch. 37, § 10, [1975] WIS. LEGIS. SERV. 48-49 (West 1975), *to be codified as* WIS. STAT. § 655.23 ($200,000 per occurance/$600,000 per year).

[136] IND. CODE § 16-9.5-2-2(c) (Burns Supp. 1975). State sponsored funds have been created to pay the amount in excess of the health care provider's liability in at least three other jurisdictions. Act of May 20, 1975, ch. 75-9, § 15, [1975] FLA. SESS. LAW SERV. No. 1, at 18-19 (West 1975), *to be codified as* FLA. STAT. § 627.353(2); Act of Aug. 4, 1975, No. 817, § 1, [1975] LA. SESS. LAW SERV. No. 4, at 1383-84 (West 1975), *to be codified as* LA. REV. STAT. § 40:1299.42(B)(3); Act published July 23, 1975, ch. 37, § 10, [1975] WIS. LEGIS. SERV. 50-53 (West 1975), *to be codified as* WIS. STAT. § 655.27.

[137] IND. CODE § 16-9.5-2-2(a) (Burns Supp. 1975). Similar legislation has been passed in other states. Act of Aug. 4, 1975, No. 817, § 1, [1975] LA. SESS. LAW SERV. No. 4, at 1383 (West 1975), *to be codified as* LA. REV. STAT.

The Act also limits attorney's fees. As to amounts payable by the health care provider's insurer, the plaintiff's attorney may charge any percentage to which he and his client agree.[138] As to amounts received from the patient compensation fund, the plaintiff's attorney may not collect a contingency fee in excess of 15 percent.[139] However, a contingency fee is not obligatory. The claimant may compensate his attorney on a mutually agreeable per diem basis.[140] The plaintiff's election to pay on a per diem basis rather than on a contingency fee basis must be in writing.[141]

The Act also contains a special statute of limitations. For claims arising after July 1, 1975, the claimant must commence an action within two years of the negligent act or omission.[142] If the injured patient is a minor below the age of six, he or his representative has until the child's eighth birthday to instigate an action.[143] No legal disability, besides minority, has any tolling

§ 40:1299.42(B)(1) ($500,000); Act of July 23, 1975, ch. 37, § 10, [1975] WIS. LEGIS. SERV. 52 (West 1975), *to be codified as* WIS. STAT. § 655.27(6) ($500,000, but only if the commissioner finds that certain conditions exist).

[138]The attorney, however, would be subject to ethical restriction regarding the amount of his fee. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 2-106(A).

[139]IND. CODE § 16-9.5-5-1 (Burns Supp. 1975). Other states have imposed restrictions on attorney fees. Ch. 162, § 13, [1975] Idaho Sess. Laws 422 (40% of the award); Act of June 30, 1975, house file 803, § 25, [1975] IOWA LEGIS. SERV. No. 3, at 327 (West 1975), *amending* IOWA CODE § 147.

[140]IND. CODE § 16-9.5-5-1(b) (Burns Supp. 1975).

[141]*Id.*

[142]*Id.* §§ 16-9.5-3-1, -2. The new medical malpractice statute of limitations is very similar to an older statute of limitations. *Id.* § 34-4-19-1 (Burns 1973). As with the new statute of limitations, the older one also limits the time in which a suit based on medical malpractice may be brought. The only significant differences between the two are that the new statute may protect a more limited group than the older statute since the new statute applies only to "qualified" health care providers, *id.* § 16-9.5-1-5 (Burns Supp. 1975), and the new statute places a time restriction not found in the older statute upon suits based on injuries to minors.

Owing to the degree of similarity between the two statutes, the Indiana courts probably will construe the new statute as they did the old. Therefore, the limitation period under the new statute will not begin until the doctor-patient relationship ends or until the patient discovers or reasonably should have discovered the injury, whichever comes first. As to latent conditions, the limitation period does not begin until the doctor-patient relationship ends because the doctor has a continuing fiduciary duty to apprise the patient of any potential harm caused by the doctor's acts or omissions. After the relationship ends, the duty of disclosure also ends, and the statutory period will begin to run. Ostojic v. Brueckmann, 405 F.2d 302 (7th Cir. 1968); Sheets v. Burman, 322 F.2d 277 (5th Cir. 1963); Guy v. Schuldt, 236 Ind. 101, 138 N.E.2d 891 (1956). *See* Note, *Malpractice and the Statute of Limitations*, 32 IND. L.J. 528 (1957).

[143]IND. CODE § 16-9.5-3-1 (Burns Supp. 1975). The tolling of the statute of limitations under the medical malpractice act for injuries occurring before

effect. For acts of malpractice occurring before the effective date, the claimant must bring suit within the longer of two years from the effective date, or the period prescribed for claims arising after the effective date.[144]

2. *Medical Review Panel*

If the claimant is unwilling to settle, his first step under the Act is to obtain an opinion on his claim from a medical review panel.[145] No complaint may be filed in any court of the state until a medical review panel has rendered its opinion.[146] If a physician is one of the defendants, the medical review panel must be composed of three physicians who hold unlimited licenses to practice medicine, and one attorney, who acts solely as a nonvoting chairman.[147] Where a nonphysician is the only defendant other than a hospital, two of the panelists must be from the same class of health care providers as the defendant.[148] Each side has the right to select one medical member of the panel. The two

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the age of eight limits the effect of section 34-1-2-8 (Burns 1973). This latter section postpones the running of any statute of limitations so long as the claimant is under a legal disability, such as minority. Under the case law prior to the Indiana Supreme Court's decision in Chaffin v. Nicosia, 310 N.E.2d 867 (Ind. 1974), *discussed in* Foust, *Torts, 1974 Survey of Indiana Law*, 8 IND. L. REV. 264, 273-74 (1974), section 34-1-2-8 was inapplicable to the medical malpractice statute of limitations contained in section 34-4-19-1 (Burns 1973). Therefore, the limitation period ran during minority. Burd v. McCullough, 217 F.2d 159 (7th Cir. 1954). *See also* Guthrie v. Wilson, 240 Ind. 188, 162 N.E.2d 79 (1959). The supreme court in *Chaffin*, however, changed the law so that minority would toll the statute of limitations. By passing the new statute of limitations, the legislature clearly expressed its intent to nullify the *Chaffin* rule, thereby partially excusing medical malpractice from the provisions of section 34-1-2-8. Exempting medical malpractice, or any other type of action, from the general tolling provision may, however, be constitutionally questionable in Indiana. The supreme court suggested in *Chaffin* that failure to exempt minors from the statute of limitations would violate the Indiana Constitution's guarantee of open courts and redress of grievances. Chaffin v. Nicosia, *supra* at 870, *citing* IND. CONST. art. 1, § 12.

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

[145] *Id.* §§ 16-9.5-9-1 to -10.

[146] *Id.* § 16-9.5-9-2. Legislation requiring the claim to be submitted to some type of screening panel is also found in other recent medical malpractice acts. Act of May 20, 1975, ch. 75-9, § 5, [1975] FLA. SESS. LAW SERV. No. 1, at 10-12 (West 1975), *to be codified as* FLA. STAT. § 768.133; Act of Aug. 4, 1975, No. 817, § 1, [1975] LA. SESS. LAW SERV. No. 4, at 1387-89 (West 1975), *to be codified as* LA. REV. STAT. § 40:1299.47(B); ch. 302, § 6, [1975] Nev. Sess. Laws 409, 410; Act of May 21, 1975, ch. 109, § 11, [1975] MCKINNEY'S SESS. LAW NEWS No. 4, at 138 (West 1975), *to be codified as* N.Y. JUDICIARY § 148-a; Act published July 23, 1975, ch. 37, § 10, [1975] WIS. LEGIS. SERV. 42-48 (West 1975), *to be codified as* WIS. STAT. § 655.02-.21.

[147] IND. CODE § 16-9.5-9-3 (Burns Supp. 1975).

[148] *Id.* § 16-9.5-9-3(e).

panelists selected then select the third.[149] All panel members selected must serve unless they are excused by a judge of a court having jurisdiction over the claim.[150] To be excused, the panelist must present the court with an affidavit showing facts which constitute good cause for exclusion.[151]

The plaintiff begins the selection process by choosing his candidate for the panel. Within 10 days after notification of the proposed panelist, the defendant must make his selection.[152] The parties need not, however, accept their opponent's choice. A challenge without cause within 10 days of any selection will disqualify the proposed panelist.[153] If one side is challenged twice, the judge appoints three potential panelists and allows each side to strike one.[154] The remaining panelist serves.[155]

The procedure for selecting the attorney-chairman is cumbersome. The Act requires the clerk of the Indiana Supreme Court to make a random selection of five attorneys from the roles of the court. Each side may then strike two names;[156] the remaining attorney serves. The Act, however, allows the parties to agree on the attorney-chairman.[157] In light of the complicated alternative means of selection, an agreement is probably the better method.

After the panel is selected, the parties promptly submit their evidence.[158] The evidence may be in written form only, but may include charts, X-rays, lab tests, and excerpts from treatises, as well as the depositions of the parties and witnesses.[159] The panel has the responsibility of obtaining additional information and, if necessary, to consult with other medical experts.[160] The parties are allowed access to any material submitted to the panel.[161]

Either party, after all the evidence has been submitted, may convene the panel for an informal meeting upon 10 days' notice to the other side.[162] At this meeting, the parties may question the panel members concerning any matter relevant to the issues which

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[149] *Id.* § 16-9.5-9-3(b).
[150] *Id.* § 16-9.5-9-3(f).
[151] *Id.* § 16-9.5-9-3(g).
[152] *Id.*
[153] *Id.* § 16-9.5-9-3(h).
[154] *Id.* § 16-9.5-9-3(g).
[155] *Id.*
[156] *Id.* § 16-9.5-9-3(d).
[157] *Id.*
[158] *Id.* § 16-9.5-4-4.
[159] *Id.*
[160] *Id.* § 16-9.5-9-6.
[161] *Id.*
[162] *Id.* § 16-9.5-9-5.

the panel may decide.[163] The panel must render an opinion within 30 days after the parties have presented their evidence and the parties have had the opportunity, if they desire, to question the panel.[164] The Act provides four possible findings which the panel may find separately or in combination:

> (a) The evidence supports the conclusion that the defendant or defendants failed to comply with the appropriate standard of care as charged in the complaint.
>
> (b) The evidence does not support the conclusion that the defendant or defendants failed to meet the applicable standard of care as charged in the complaint.
>
> (c) That there is a material issue of fact, not requiring expert opinion, bearing on liability for consideration by the court or jury.
>
> (d) The conduct complained of was or was not a factor of the resultant damages. If so, whether the plaintiff suffered: (1) any disability and the extent and duration of the disability, and (2) any permanent impairment and the percentage of the impairment.[165]

The panel's findings in no way binds the parties; the claimant may file a subsequent suit regardless of the panel's decision,[166] but the findings can be introduced as an expert opinion in court.[167] In addition, a party may, at his own expense, call any member of the panel as a witness at trial; a panelist so called is required to appear and testify.[168]

3. Settlement Procedure

The legislature also provided a detailed settlement procedure for those cases in which the insurer admits liability up to the

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[163] *Id.*

[164] *Id.* § 16-9.5-9-7.

[165] *Id.* The possible findings do not specifically establish a standard applicable to "informed consent" actions. Several states, however, have adopted acts containing such standards. Thus, if the health care provider follows the procedure outlined in the particular act, he will prevent successful suits based on his alleged failure to disclose the risks of and alternatives to a medical procedure. Act of May 20, 1975, ch. 75-9, § 11, [1975] FLA. SESS. LAW SERV. No. 1, at 14 (West 1975), *to be codified as* FLA. STAT. §§ 768.132(3), -(4); Act of June 30, 1975, house file 803, § 17, [1975] IOWA LEGIS. SERV. No. 3, at 325-26 (West 1975), *amending* IOWA CODE § 147; Act of July 29, 1975, No. 798, § 1, [1975] LA. SESS. LAW SERV. No. 4, at 1354-55 (West 1975), *to be codified as* LA. REV. STAT. §§ 40:1299.40-.46; ch. 301, §§ 2, 3, [1975] Nev. Sess. Laws 408, 409; Act of May 21, 1975, ch. 109, § 1, [1975] MCKINNEY'S SESS. LAW NEWS No. 4, at 134-35 (West 1975), *to be codified as* N.Y. PUB. HEALTH LAW § 2805-d.

[166] IND. CODE § 16-9.5-9-8 (Burns Supp. 1975).

[167] *Id.* § 16-9.5-9-9.

[168] *Id.*

policy maximum of $100,000. The procedure does not apply to any settlement under this maximum; presumably, the legislature did not intend to prescribe the manner in which the insurer and the claimant reach out of court settlements for claims under $100,000. However, the Act does apply to the two possible situations involving settltments above $100,000. The procedure applies if the settlement is for an amount above $100,000 and is agreed upon by the claimant, the insurer, and the commissioner. It also applies if the settlement is agreed upon by the claimant, the insurer, and the commissioner as to the insurer's maximum liability but is disputed as to any additional amount.

All additional payments, up to $500,000, come from the patient compensation fund after the insurer has admitted liability up to his $100,000 maximum.[169] If the claimant seeks recovery from the fund, he must file a petition with the court in which the action is pending, or, if no action is pending, with the circuit or superior court of Marion County.[170] Ten days before the filing of the petition, the claimant must serve a copy upon the health care provider, the insurer, and the commissioner.[171] If all the parties have agreed to the damages owing the claimant from the patient compensation fund, the petition must be filed to obtain court approval of the agreement.[172] If the parties cannot agree on these damages, the petition must demand payment from the patient compensation fund.[173] In either case, the complaint must contain sufficient information to put the insurer and the commissioner on notice of the nature and amount of the claim.[174]

Even though the insurer admits liability up to the statutory maximum, it still retains the power to approve or reject a settlement that calls for payment from the patient compensation fund. If either the commissioner or insurer objects to the amount of damages sought in the claimant's petition, the court sets the matter for a hearing.[175] Since the insurer has admitted liability up

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[169] *Id.* § 16-9.5-2-2(c).

[170] *Id.* § 16-9.5-4-3(1).

[171] *Id.* § 16-9.5-4-3(2).

[172] *Id.* § 16-9.5-4-3(3).

[173] *Id.* § 16-9.5-4-3(4).

[174] *Id.* § 16-9.5-4-3(2).

[175] *Id.* § 16-9.5-4-3(4). The Act is confusing as to the correct procedure to use if the claimant, the insurer, and the commissioner agree on a settlement from the patient compensation fund. Subsection 16-9.5-4-3(4) provides:

> The judge of the court in which the petition is filed shall set the petition for *approval* or, if objections have been filed, for *hearing*, as soon as practicable. The court shall give notice of the hearing to the claimant, the insurer of the health care provider and the commissioner.

(Emphasis added).

to the statutory maximum, the liability of the health care provider is taken as established; the court, without a jury, thus needs to decide only the amount of damages owing from the patient compensation fund.[176] If the claimant, the commissioner, and the insurer agree to the amount due from the patient compensation fund, the court sets a hearing to approve the agreement.[177] In this latter case, the parties still may submit evidence to convince the court that the settlement should be approved.[178]

Subsection 16-9.5-4-3(5), however, states in part as follows:

> At the *hearing* the commissioner, the claimant and the insurer of the health care provider may introduce relevant evidence to enable the court to determine whether or not the petition should be approved if it is submitted on agreement without objections.

(Emphasis added).

Subsection (4) implies that the court has no discretion to exercise if the petition is submitted without objection; subsection (5), on the other hand, expressly grants the court discretion in such an instance. The legislative history indicates that the confusion arose after changes were made in committee in House Bill 1460. The settlement procedure of the Act as contained in the Engrossed House Bill 1460 was unambiguous. If the health care provider and the claimant reached an agreement in excess of the health care provider's maximum liability of $100,000, the claimant was to file a petition with the court. The commissioner of insurance then was given notice and the opportunity to object to the agreement. Even if the commissioner did not object, a hearing would follow, during which the commissioner and the other parties could introduce evidence. If the court was convinced that the petition should be approved, that the plaintiff probably would recover in excess of $100,000 at trial, and that the settlement was fair, the court was to enter judgment on the petition.

Interestingly, the Louisiana legislature adopted almost verbatim the chapter of the Indiana act which contained subsection (4) so that a hearing was always held, thereby removing the ambiguity found in the Indiana act. Act of Aug. 4, 1975, No. 817, § 1, [1975] LA. SESS. LAW SERV. No. 4, at 1385 (West 1975), *to be codified as* LA. REV. STAT. § 40:1299.44(C)(4). Based on the legislative history and the Louisiana interpretation of the Indiana act, the construction that the Indiana legislature probably intended is to require a hearing regardless of whether the parties can agree upon the amount owing the claimant from the patient compensation fund.

[176] IND. CODE § 16-9.5-4-3(5) (Burns Supp. 1975). The Indiana act, as well as the medical malpractice acts of most other states, keeps the resolution of claims completely within the court system. Louisiana and Michigan, however, have passed legislation designed to remove many malpractice disputes from the courts and place them before arbitrators. Both acts encourage the health care provider to present the patient with an arbitration agreement prior to any professional services. Act of July 17, 1975, No. 371, § 1, [1975] LA. SESS. LAW SERV. No. 4, at 650-52 (West 1975), *to be codified as* LA. REV. STAT. §§ 9:4230-36; Act of July 9, 1975, No. 140, §§ 1-3, [1975] MICH. LEGIS. SERV. No. 3, at 273-80 (West 1975), *to be codified as* MICH. COMP. LAWS §§ 600.5040 to .5065.

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

[178] *Id.* § 16-9.5-4-3(5).

4. *Litigation*

If the insurer of the health care provider does not agree to settle at his maximum of $100,000, the plaintiff may file a complaint in any court having jurisdiction and demand a trial by jury.[179] A plaintiff may not ask for a specific amount of damages in his complaint, but rather may ask only for unspecified damages that "are reasonable under the premises."[180] If the jury awards the claimant an amount in excess of the insurer's maximum liability of $100,000, the excess is paid from the patient compensation fund up to a maximum total recovery of $500,000.[181] Advance payments made to the claimant by the insurer or the health care provider are not to be construed as an admission of liability.[182] However, if the court renders final judgment for the claimant, the court must reduce the judgment by the amount of the advances.[183] If more than one defendant is found liable and one of these defendants made advances in excess of his liability, the court must make adjustments to equalize the burdens on the various defendants.[184] In no case, however, must the claimant repay an advance in excess of the final award.[185]

5. *Policing the Health Professions*

The Act also formulates a procedure designed to remove incompetent practitioners from the health care professions. Under this procedure, the health care provider or his insurer and the plaintiff's attorney must report to the commissioner within 60 days every malpractice claim, whether settled or adjudicated.[186] The report must inform the commissioner of the nature of the

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[179] *Id.* § 16-9.5-1-6.

[180] *Id.* Several other states also have placed restrictions on the contents of the plaintiff's complaint. Act of May 20, 1975, ch. 75-9, §§ 8, 9, [1975] FLA. SESS. LAW SERV. No. 1, at 13 (West 1975), *to be codified as* FLA. STAT. § 768.042; Act of Aug. 4, 1975, No. 817, § 1, [1975] LA. SESS. LAW SERV. No. 4, at 1383 (West 1975), *to be codified as* LA. REV. STAT. § 40:1299.41(E).

[181] IND. CODE § 16-9.5-2-2(c) (Burns Supp. 1975).

[182] *Id.* § 16-9.5-2-3.

[183] *Id.* § 16-9.5-2-4.

[184] *Id.*

[185] *Id.* Other legislatures also have passed provisions for adjusting awards to account for advances made by the health care provider. Act of Aug. 4, 1975, No. 817, § 1, [1975] LA. SESS. LAW SERV. No. 4, at 1383 (West 1975), *to be codified as* LA. REV. STAT. § 40:1299.41(D); ch. 298, § 10, [1975] Nev. Sess. Laws 405. Some states, however, go further, reducing awards by the amounts received from collateral sources. Act of May 21, 1975, ch. 109, § 10, [1975] MCKINNEY'S SESS. LAW NEWS No. 4, at 137-38 (West 1975), *to be codified as* N.Y. CIVIL PRAC. § 4010.

[186] IND. CODE § 16-9.5-6-1(c) (Burns Supp. 1975).

claim, the alleged injury, the damages asserted, the attorney fees and other expenses incurred by both sides, and the amount of any settlement.[187] The commissioner, in turn, submits the name of the health care provider to the appropriate professional board.[188] The professional board reviews the health care provider's fitness to continue practice. The board may sanction the health care provider, if necessary, through censure, probation, suspension, or revocation of his license.[189]

6. *Risk Manager*

The Act provides for a "risk manager," an insurance company appointed by the commissioner to provide insurance to those health care providers who are unable to obtain coverage elsewhere.[190] If a health care provider has been rejected by at least two insurers, the health care provider forwards to the risk manager an application for insurance along with proof of the prior rejections.[191] The risk manager may either accept or refuse to issue a policy.[192] If the risk manager refuses to insure the applicant, the risk manager must send notice of the rejection to the applicant together with the reason for the rejection.[193] The applicant then has 10 days to file an appeal with the commissioner, who will review the application and either uphold the risk manager or order that it issue insurance.[194] Awards against the risk manager can be paid only from funds appropriated by the legislature for that purpose or from money generated by premiums.[195] The risk manager's own resources are not liable for any losses.[196]

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[187] *Id.*

[188] *Id.* § 16-9.5-6-2(a).

[189] *Id.*

[190] *Id.* § 16-9.5-8-3.

[191] *Id.* § 16-9.5-8-6.

[192] *Id.* § 16-9.5-8-7.

[193] *Id.*

[194] *Id.*

[195] *Id.* § 16-9.5-8-3.

[196] *Id.* Louisiana also has adopted the risk manager device to assure insurance coverage for health care providers. Act of Aug. 4, 1975, No. 817, § 1, [1975] LA. SESS. LAW SERV. No. 4, at 1386-87 (West 1975), *to be codified as* LA. REV. STAT. § 40:1299.46. The majority of the states that have attempted to make insurance available to health care providers have adopted the temporary joint underwriting association (JUA) concept. The JUA is a legislatively mandated association of all personal liability insurers operating in a state. The JUA is responsible for underwriting risks that cannot obtain coverage on the voluntary market. *E.g.*, Act of May 21, 1975, ch. 109, § 17, [1975] MCKINNEY'S SESS. LAW NEWS No. 4, at 140-41 (West 1975), *to be codified as* N.Y. INS. LAW § 682. At least two states have created state-sponsored programs to provide insurance. N.D. CENT. CODE § 26-40-03 (Supp. 1975); Act of May 12, 1975,

7. Constitutionality

Health care providers probably will continue to carry unlimited insurance coverage until the courts ultimately decide the Act's constitutionality. This section discusses some of the constitutional issues respecting the Act which may arise in the near future.

The restriction placed upon a claimant's maximum recovery raises one possible constitutional problem. The Act potentially violates the equal protection clause of the fourteenth amendment by establishing a classification between persons injured by medical malpractice, whose potential recovery is statutorily limited, and those injured by all other torts, whose recovery is not limited. Whether any classification meets equal protection standards may depend upon whether the classification discriminates against a suspect class. Where a suspect class is involved, the state bears the burden of proving that a compelling state interest requires that the distinction be made between membership in the affected and unaffected classes.[197] The class of persons injured by medical malpractice, however, does not meet the accepted test for a suspect class, since membership in the class is not immutable, as is race or alienage,[198] nor is the discrimination against the class of long-standing duration.[199]

If the class discriminated against is not suspect, the courts apply a much lower level of scrutiny.[200] If the low scrutiny standard is used, the party contesting the statute bears the burden of proving that the legislation is arbitrary and without a rational basis.[201] Since the courts' role in questioning the constitutionality

No. 43, § 1, [1975] MICH. LEGIS. SERV. No. 1, at 90 (West 1975), *to be codified as* MICH. COMP. LAWS § 500.2502.

[197]Frontiero v. Richardson, 411 U.S. 677 (1973); Loving v. Virginia, 388 U.S. 1 (1967); Korematsu v. United States, 323 U.S. 214 (1944); Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). *See also* Stroud, *Sex Discrimination in High School Athletics*, 6 IND. L. REV. 661 (1973).

[198]San Antonio School Dist. v. Rodriquez, 411 U.S. 1, 28 (1972); Graham v. Richardson, 403 U.S. 365, 372 (1971); United States v. Carolend Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).

[199]Frontiero v. Richardson, 411 U.S. 677 (1973); San Antonio School Dist. v. Rodriquez, 411 U.S. 1 (1972); Indiana High School Athletic Ass'n v. Raike, 323 N.E.2d 66 (Ind. Ct. App. 1975).

[200]San Antonio School Dist. v. Rodriquez, 411 U.S. 1 (1972); McGowan v. Maryland, 366 U.S. 420 (1961); Indiana High School Athletic Ass'n v. Raike, 323 N.E.2d 66 (Ind. Ct. App. 1975).

[201]The rational basis test is satisfied if the legislature specifies the interests upon which an act is based. Stroud, *supra* note 197, at 633. In this instance the courts could look to the original version of House Bill 1460, which provides in relevant part:

of legislation is limited under low level scrutiny,[202] the probability is low that the courts will find irrational the legislative basis for limiting medical malpractice liability and overturn the Act.

The more crucial issue is whether the Act violates the due process clause of the fourteenth amendment by abrogating a claimant's interest in a common law right without providing a substitute. In upholding a workmen's compensation statute, the United States Supreme Court in *New York Central Railroad Co. v. White*[203] stated in dicta:

The general assembly finds that:
(a) The number of suits and claims for damages arising from professional patient care has increased tremendously in the past several years and the size of judgments and settlements in connection therewith have increased unreasonably.
(b) The effect of such judgments and settlements, based frequently on now legal precedents, have caused the insurance coverage to uniformly and substantially increase the cost of such insurance coverage.
(c) These increased insurance costs are being passed on to the patient in the form of higher charges for health care service and facilities.
(d) The increased costs of providing health care services, the increased incidents of claims and suits against health care providers, and the unusual size of such claims and judgments, frequently out of proportion to the actual damages sustained, has caused many liability insurance companies to withdraw from the insuring of high risk health care providers.
(e) The rising number of suits and claims is forcing health care providers to practice defensively, viewing each patent as a potential adversary in a lawsuit, to the detriment of both the health care provider and the patient. Health care providers for their own protection, are often required to employ excessive diagnostic procedures for their patients, unnecessarily increasing the cost of patient care.
(f) Another effect of the increase of suits and claims and the costs thereof is that some health care providers decline to provide certain health care services which in themselves entail some risk of patient injury.
(g) The cost and difficulty in obtaining insurance for health care providers discourages young physicians from entering into the practice of medicine in the state of Indiana, resulting in the loss of physicians to other states.
(h) The inability to obtain or the high cost of obtaining insurance affects the medical and hospital services available in the state of Indiana to the detriment of its citizens.
(i) Some health care providers have been forced to curtail the practice of all or a part of their profession because of the non-availability or the high cost of liability insurance.
(j) The cumulative effect of suits and claims is working both to the detriment of the health care providers and to the citizens of this state.
H.R. 1460, 99th Gen. Assembly, 1st Sess. § 1(a)-(j) (1975).

[202] *See* cases cited note 200 *supra*.

[203] 243 U.S. 188 (1917).

> [I]t perhaps may be doubted whether the state could abolish all rights of action, on the one hand, or all defenses, on the other, without setting up something adequate in their stead.[204]

Although dicta, several courts have adopted the *White* rule.[205] Even if this rule is applied to the medical malpractice law, the Act may, nevertheless, be constitutional. The General Assembly has not abolished all rights or all defenses in medical malpractice actions; the Act only imposes limits on a claimant's recovery. However, if the claimant must be compensated for the limits placed upon his right of recovery, the Act may not be constitutional since very little is given to the claimant in exchange for this right.[206]

Even if the substitution provided for the limitation on the claimant's right of recovery is found adequate or unnecessary, the due process clause still requires that the Act not arbitrarily infringe upon a person's interest.[207] In addition, if, according to the Supreme Court, the interest is a fundamental interest, the state must show a compelling need to infringe upon it.[208] An interest is fundamental if it is "explicity or implicity guaranteed by the Constitution."[209] A contestant of the Act may attempt to bring within the definition of a fundamental right a claimant's right to receive full recovery for a medical malpractice injury. However, if a court does not find the claimant's right to be fundamental, the court will apply the same low judicial scrutiny used

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[204]*Id.* at 201 (dicta).

[205]Kluger v. White, 281 So. 2d 1 (Fla. 1973); Manzanares v. Bell, 214 Kan. 589, 522 P.2d 1291 (1974); Pinnick v. Cleary, 360 Mass. 1, 271 N.E.2d 592 (1971); Montgomery v. Daniels, 367 N.Y.S.2d 419 (Sup. Ct., Kings County, 1975). *But see* Haney v. International Harvester Co., 294 Minn. 375, 201 N.W.2d 140 (1972).

[206]The Act may make expert testimony more available to the plaintiff. Under IND. CODE § 16-9.5-9-9 (Burns Supp. 1975), the medical review panel's findings can be used by the plaintiff at trial as expert opinion. In addition, the same section requires any member of the panel to serve as a witness at trial if called. Although the provisions of section 16-9.5-9-9 apply to both sides of a malpractice suit, the plaintiff probably gains the most since he may use the provisions to overcome the difficulty frequently encountered in obtaining expert testimony from a health care provider against another health care provider.

[207]Memorial Hosp. v. Maricopa City, 415 U.S. 250 (1974); Kusper v. Pontikes, 414 U.S. 51 (1973); San Antonio School Dist. v. Rodriquez, 411 U.S. 1 (1972); Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

[208]*See* cases cited note 207 *supra.*

[209]San Antonio School Dist. v. Rodriquez, 411 U.S. 1, 17 (1972).

in equal protection cases to judge the reasonableness of the Act.[210]

If the Act is not found defective under the Federal Constitution, at least one question arises under the Indiana Constitution. The right to trial by jury in civil matters[211] may be violated by Indiana Code section 16-9.5-4-3(5). This section makes the issue of damages a matter for the court in those instances in which the insurer has admitted liability up to the statutory maximum and the insurer, the claimant, and the commissioner of insurance are unable to agree on the additional amount, if any, owing from the patient compensation fund. However, since the Act compensates the claimant for the denial of a jury trial on the issue of damages by establishing the health care provider's liability as a matter of law,[212] a court may find the trade-off sufficient to overcome the limited violation of the claimant's right.

XIX. Trusts and Decedents' Estates

*Melvin C. Poland**

During the current survey period there were no cases in the trust area and only three in the decendents' estates area considered worthy of comment. The most significant development during the period was the enactment of Public Law 288.[1] A number of the changes made by this legislation are minor and will receive little more than comment in the footnotes. Other changes are quite significant and will be dealt with to the extent space limitations permit.

A. Case Developments

1. Will Contests

In *Haskett v. Haskett*[2] the principal issue on appeal was whether a petition to determine heirship constituted a will contest

[210]San Antonio School Dist. v. Rodriquez, 411 U.S. 1 (1972); Indiana High School Athletic Ass'n v. Raike, 323 N.E.2d 66 (Ind. Ct. App. 1975).

[211]IND. CONST. art. 1, § 20.

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

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[1]Ind. Pub. L. No. 288 (Apr. 22, 1975), *amending* scattered sections of IND. CODE tits. 29, 32. The Act became effective January 1, 1976.

[2]327 N.E.2d 612 (Ind. Ct. App. 1975).