The Disappearing Rights of Plaintiffs Under a Legal Disability

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I. Introduction

Historically, limitations on actions were generally held to be in derogation of the common law and were looked upon with disfavor.[1] As we moved into the twentieth century, the courts began to look favorably upon statutes of limitation as a method to prevent claims against governmental entities and to encourage diligence among plaintiffs.[2] In the 1970's, special interest legislation produced limitations on the rights of children; these statutes have been liberally construed by the courts in Indiana.[3] In Indiana, as well as other states, the trend appears to limit actions through arbitrary time constraints. One exception to this trend was the adoption of a modified discovery rule in *Barnes v. A.H. Robins Co., Inc.*,[4] where the Indiana Supreme Court recognized that the strict application of a statute of limitations may create, in some instances, a great and intolerable injustice.[5]

As limitations on actions crept into the early English common law, savings statutes were passed which protected children and others under

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[1]Shideler v. Dwyer, 417 N.E.2d 281, 283 (Ind. 1981). Statutes of limitations, as we know them, originated in England. Originally, there was no limitation on when a person could bring an action against another for a particular wrong. Eventually, statutes of limitation were utilized. At the same time, rules developed which prevented the statute from running during a period when a person was under some legal disability. The rules were thought necessary to protect the individual's right to seek redress for the wrong done against him after his disability was removed. Infants were among the individuals protected under these rules. W. Ferguson, Statutes of Limitation Saving Statutes 7-59 (1978).

[2]*Shideler,* 417 N.E.2d at 283; Spoljaric v. Pangan, 466 N.E.2d 37, 43 (Ind. Ct. App. 1984).

[3]*See Shideler*, 417 N.E.2d at 283.

[4]476 N.E.2d 84 (Ind. 1985).

[5]For example, many courts now apply discovery rules in various types of actions. The Indiana Supreme Court recently adopted such a rule for cases in which the plaintiff suffered an injury as the result of protracted exposure to a foreign substance. *Id.* In these types of cases, the statute of limitations begins "to run from the date the plaintiff knew or should have discovered that she suffered an injury or impingement, and that it was caused by the product or act of another." *Id.* at 87-88. The court declined to extend the rule to all types of tort cases but did not preclude that possibility from happening in the future. *Id.* at 87.

a legal disability from the harsh result of having their rights extinguished before they were legally competent to exercise them.[6] Similarly, many states in this country enacted savings statutes to preserve the actions of those under a legal disability.[7] While this was once true in Indiana, the legislation of the seventies, coupled with judicial interpretations of this legislation, has whittled away at the protection provided children and those under a legal disability. A recent illustrative case is *Orr v. Turco Manufacturing Co., Inc.*,[8] in which the Indiana Court of Appeals found that the products liability statute[9] requiring minors to bring a products liability claim within two years from the date of the injury, regardless of the minor's age, barred the claim of an injured child. As shall be seen from the legislative history discussed later in this Article, the legislation was squarely aimed at limiting liability without regard to whether the case was good or bad and without consideration for its impact on children.[10] Without more distance between ourselves and the issue, it may be impossible definitively to determine the present effect of the trend to eliminate rights of the legally disabled, but it is pertinent to question the direction in which we are headed.

II. The Granting of an Extension of Time

In Indiana, an infant is permitted to bring an action "(1) in his own name; (2) in his own name by a guardian ad litem or a next friend; [or] (3) in the name of his representative," if the representative has been appointed by the court.[11] By statute, "[a]ny person being under legal disabilities when the cause of action accrues may bring his action within two (2) years after the disability is removed."[12] This provision does not, in the literal sense, stop the statute of limitations from running; rather, the statue of limitations begins to run when the cause of action accrues.[13] However, because of his minority status, the child is given two years after attainment of majority to bring his cause of action if the full statute of limitations runs while he is still a minor.[14] Yet, in the last decade, this extension of time has been narrowed by legislative and court action.

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[6]*See* W. Ferguson, *supra* note 1, at 13-14.

[7]*See id.* at 7-59.

[8]484 N.E.2d 1300 (Ind. Ct. App. 1985).

[9]Ind. Code § 33-1-1.5-5 (1982).

[10]*See infra* text accompanying notes 45-48.

[11]Ind. R. Tr. P. 17(c) (1986).

[12]Ind. Code § 34-1-2-5 (1982). This does not prohibit children from pursuing an action while they are still minors. Rather, it merely preserves their right to bring an action within two years of their attaining majority status. Norris v. Mingle, 217 Ind. 516, 29 N.E.2d 400 (1940).

[13]King v. Carmichael, 136 Ind. 20, 35 N.E. 509 (1893).

[14]*Id.*

III. Taking Away the Child's Safety Net

A. The Products Liability Act

In 1978, the Indiana legislature passed the Indiana Products Liability Act, which included the following:

> This section *applies to all persons regardless of minority or legal disability. Notwithstanding I.C. 34-1-2-5*, any product liability action must be commenced within two years after the cause of action accrues or within ten (10) years after the delivery of the product to the initial user or consumer; except that, if the cause of action accrues more than eight (8) years but not more than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.[15]

This statute became the focus of the Indiana Court of Appeals' decision in *Orr v. Turco Manufacturing Co., Inc.*[16]

B. The Orr *Decision*

In *Orr*, Nicolette Orr was injured on a swing set in 1979 when she was ten years old. Paul Orr was appointed guardian of Nicolette's estate on June 23, 1983. On June 30, 1983, an action was filed against Turco, the manufacturer of the swing set. In response, Turco filed a motion to dismiss, asserting that the action had been filed more than two years after the injury occurred and was, therefore, barred by the products liability statute of limitations.

Orr attempted to argue that Indiana Code section 33-1-1.5-5 did not apply to persons with a legal disability or minority status. In addition, Orr argued that courts had the authority and responsibility to determine when a cause of action accrued.[17] In rejecting both of these arguments,

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[15]Ind. Code § 33-1-1.5-5 (1982) (emphasis added). Prior to the enactment of this statute, minors had two years after attaining majority to file product liability actions. *See* D'Andrea v. Montgomery Ward & Co., Inc., 571 F.2d 403 (7th Cir. 1978) (applying Indiana law).

[16]484 N.E.2d 1300 (Ind. Ct. App. 1985).

[17]*Id.* at 1302 (relying on the Indiana Supreme Court's decision in Barnes v. A.H. Robins, Inc., 476 N.E.2d 84 (Ind. 1985)). In *Barnes*, the plaintiffs had utilized a contraceptive device known as the Dalkon Shield. Each plaintiff had suffered injuries in 1972-1979 due to the use of the device but did not discover the connection between their use of the shield and their illnesses until they saw a 60 Minutes program in 1981. The plaintiffs, upon learning of the association between the Dalkon Shield and the problems they suffered, filed actions in 1981. The supreme court was asked to determine when the statute of limitations would begin to run in such actions, and in response to this inquiry adopted the discovery rule. *Barnes*, 476 N.E.2d at 87.

the court of appeals noted that the statute in question was clear and unambiguous and provided no exceptions for either minority or legal disability.[18] Therefore, the court was bound to follow the mandate of the legislature and bar Orr's claim which was brought more than two years after the injury was suffered.[19]

Perhaps more importantly, the court also rejected Orr's argument that the statute violated article 1, section 12 of the Indiana Constitution.[20] In doing so, the court relied on two prior Indiana decisions, *Dague v. Piper Aircraft Corp.*[21] and *Rohrabaugh v. Wagoner.*[22]

C. *The* Dague *Decision*

In *Dague*, the Indiana Supreme Court was asked to determine whether the products liability statute of limitations violated article 1, section 12 of the Indiana Constitution.[23] This section provides in part that: "All

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[18]*Orr*, 484 N.E.2d at 1302.

[19]*Id.* The court of appeals subsequently determined in a companion case that the intent of the legislature was so clearly expressed that an award of attorney fees was proper. Orr v. Turco Mfg. Co., Inc., 496 N.E.2d 115 (Ind. Ct. App. 1986). The court determined that in light of the statutory language, Orr could not in good faith argue that minors were not covered by the two year provision in the products liability statute. The arguments made by Orr were deemed meritless. The appeal was found "to be frivolous because wholly without merit, and thus presumptively taken in bad faith." *Orr*, 496 N.E.2d at 118.

The award of attorney fees in this action creates an untenable problem for plaintiffs' attorneys. Although Orr's argument based on the wording of the statute may have been tenuated, Orr also asserted that the statute violated the Indiana Constitution. The products liability statute of limitations had previously withstood a constitutional attack but had not been questioned with regard to minors' claims. *Orr*, 484 N.E.2d at 1302; *see also* Dague v. Piper Aircraft Corp., 275 Ind. 520, 530, 418 N.E.2d 207, 313 (1981). Even if Orr inartfully presented her case, and that is not to say that she did, would this fact make the case so meritless as to justify an award of attorney fees especially when similar statutes had been successfully attacked in other states? The court of appeals relied on the fact that Indiana's medical malpractice statute had been upheld with respect to minors and that the decision in that case was dispositive of the issue raised by Orr. *Orr*, 484 N.E.2d at 1303 (citing Rohrabaugh v. Wagoner, 274 Ind. 661, 413 N.E.2d 891 (1980)). Because the court believed the decision was dispositive, it determined that Orr's appeal was meritless. This decision leaves attorneys in the position of having to decide whether to launch a constitutional attack on a statute where another, but not identical, statute has been upheld and risk being assessed for attorney fees or forgo the attack.

Presumably, the assessment of attorney fees is intended to discourage "frivolous" lawsuits. The extent to which it will accomplish that objective may never be known; however, it is certain to have a chilling effect on lawyers when they consider taking on controversial litigation.

[20]*Orr*, 484 N.E.2d at 1302.

[21]275 Ind. 520, 418 N.E.2d 207 (1981).

[22]274 Ind. 661, 413 N.E.2d 891 (1980).

[23]In *Dague*, the plaintiff filed a four count complaint against Piper Aircraft seeking to recover damages for the wrongful death of her husband. Her husband had died as a

courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law."[24] The plaintiff argued that the ten-year limitation contained in Indiana's product liability statute cut off her actions based on the theories of strict liability and negligence without providing an alternative remedy.[25] This effectively deprived her of access to the courts and therefore, the provision violated article 1, section 12 of the Indiana Constitution.[26]

The supreme court disagreed. The court reasoned that the legislature is entitled to change the common law[27] and that the legislature was within its authority in enacting legislation that narrowed the time frame in which an action could be brought. The court concluded that there is no vested right in a rule of common law and that the right to bring a common law action is not a fundamental right.[28] The court ultimately decided that the Products Liability Act did not contravene article 1, section 12 of the Indiana Constitution.[29] Significantly, the court never discussed the portions of the statute dealing with minors and persons under a disability. This issue was never presented to the court. The *Dague* case merely held that in general, the statute of repose was constitutional. Because the *Dague* court did not consider the constitutionality of the clause making the limitation applicable to children, the *Dague* decision should not have been considered dispositive of the *Orr* case.

D. The Child and the Medical Malpractice Action

Rohrabaugh v. Wagoner,[30] although instructive, did not deal with

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result of injuries sustained when the Piper Pawnee aircraft he was piloting crashed on July 7, 1978. The decedent passed away on September 5, 1978, and his wife filed her complaint on October 1, 1979, alleging that the decedent's injuries and death were caused by a defective condition in the aircraft. It was undisputed that the aircraft had been manufactured in 1965 and placed into the stream of commerce on March 26, 1965. A federal district court granted Piper Aircraft's motion for summary judgment on the basis of Indiana's ten-year statute of repose. On appeal, the Seventh Circuit certified several issues to the Indiana Supreme Court, including the issue of whether the ten-year statute of repose violated the Indiana Constitution. *Dague*, 275 Ind. at 522-23, 418 N.E.2d at 209.

[24]IND. CONST. art. I, § 12 (1851, amended 1984).

[25]*Dague*, 275 Ind. at 529, 418 N.E.2d at 212. The statutory provision provides in pertinent part: "[A]ny product liability action . . . must be commenced within two [2] years after the cause of action accrues or *within ten [10] years after the delivery of the product to the initial user or consumer* . . . ." IND. CODE ANN. § 34-4-20A-5 (Burns Supp. 1986) (emphasis added).

[26]*Dague*, 275 Ind. at 529, 418 N.E.2d at 212.

[27]*Id.*, 418 N.E.2d at 213.

[28]*Id.*

[29]*Id.* at 530, 418 N.E.2d at 213.

[30]274 Ind. 661, 413 N.E.2d 891 (1980).

the products liability statute questioned in *Orr*. Rather, *Rohrabaugh* dealt solely with the medical malpractice statute of limitations.[31] The plaintiff in *Rohrabaugh* was a minor between age six and eighteen, both when her action was brought and when the alleged acts of malpractice occurred.[32] The medical malpractice statute of limitations provided that minors under the age of six had until their eighth birthday to pursue an action while all other minors had only two years "from the date of the alleged act, omission or neglect" to pursue their action.[33] The plaintiff brought her malpractice action in 1979, more than two years after the enactment of the medical malpractice statute and more than two years after the effective date of the Act.[34] The trial court dismissed the plaintiff's action as being untimely filed and the supreme court affirmed that decision.

The plaintiff asserted that the medical malpractice statute violated the rights guaranteed by both the fourteenth amendment of the United States Constitution and article 1, sections 12 and 23 of the Indiana Constitution.[35] The court first noted that the legislature was not required to exempt children from the operation of statutes of limitation.[36] The

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[31]*Id. Rohrabaugh* was not the first Indiana case to address the medical malpractice statute's limitation of minors' claims. In Chaffin v. Nicosia, 261 Ind. 698, 310 N.E.2d 867 (1974), the Indiana Supreme Court determined that the statute of limitations in the old medical malpractice statute did not override the special statute of limitations for persons under a legal disability. *Id.* at 703, 310 N.E.2d at 870. The court noted that requiring a minor to file his action within the two-year period provided by the medical malpractice statute would be "extraordinarily harsh" and inconsistent with the legislature's intention of creating a legal disability to protect minors. *Id.* at 704, 310 N.E.2d at 871. However, after this ruling, the medical malpractice statute was amended to set up the current system. *See infra* note 33 and accompanying text. Nevertheless, the court's focus on the impact on children and their right to access to the courts is instructive in reviewing the present situation.

[32]274 Ind. at 662, 413 N.E.2d at 892.

[33]*Id.* at 663, 413 N.E.2d at 892 (quoting IND. CODE § 16-9.5-3-1 (1976)). The Act also provided that any action which accrued before the enactment of the statute had to be brought within: "(a) Two years of the effective date of this article; or (b) The period described in section 1 of this chapter." IND. CODE § 16-9.5-3-2 (1976). The plaintiff had missed both of these deadlines. *Rohrabaugh*, 274 Ind. at 663, 413 N.E.2d at 892.

[34]*Rohrabaugh*, 274 Ind. at 663, 413 N.E.2d at 892.

[35]*Id.*, 413 N.E.2d at 893. Article 1, section 23 of the Indiana Constitution states: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which upon the same terms, shall not equally belong to all citizens." IND. CONST. art. I, § 23.

[36]274 Ind. at 664, 413 N.E.2d at 893 (citing Sherfey v. City of Brazil, 213 Ind. 493, 13 N.E.2d 568 (1938), in which the court stated that neither infancy nor incapacity suspended the requirement to give notice of injury to a municipality as required by statute. Again, this decision made no examination of the historical use of savings statutes with regard to minors. It merely stated that children, like adults, had to meet the statutorily imposed notice provision.)

court then decided that children were not a suspect class and did not require strict judicial scrutiny.[37] Therefore, the constitutional analysis utilized by the court only required the classification in the statute to "be reasonable, not arbitrary," and that it "rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[38] Unfortunately, the court did not appear then to consider the peculiar situation in which all children are placed in seeking redress for an injury.

Rather than examining children's need for access to the legal system, the court focused entirely on the purpose of the legislation, i.e. to reduce physicians' exposure to medical malpractice suits by limiting the time period in which suits could be brought and thereby to assure the availability of malpractice insurance at a reasonable cost.[39] The legislature apparently feared that health care services would be withdrawn from the public if such measures were not taken.[40] In weighing the benefit of such a limitation to the medical profession and insurance industry against the burden placed on children, the court stated:

> [T]he Legislature: 'may well have given consideration to the fact that most children by the time they reach the age of six years are in a position to verbally communicate their physical complaints to parents or other adults having a natural sympathy with them. Such communications and the persons whom they reach may to some appreciable degree stand surrogate for the lack of maturity and judgment of infants in this matter. The Legislature may well have considered the fact of some importance that many health care providers are specially trained professional persons meeting state standards for licensing, and are, therefore, entitled to a special degree of trust.'[41]

The court concluded that the classification utilized in the medical malpractice statute was reasonably related to the purpose of the legislation and that "children of this class and adults are similarly circumstanced

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[37]*Rohrabaugh*, 274 Ind. at 666, 413 N.E.2d at 893-94.

[38]*Id.* (quoting Johnson v. St. Vincent Hospital, Inc., 273 Ind. 374, 392, 404 N.E.2d 585, 597 (1980)).

[39]274 Ind. at 666, 413 N.E.2d at 894.

[40]*Id.* This again raises the interesting question of whether the recurring insurance crises are caused by 1) the tort system, 2) the unrestrained investment practices of the insurance industry, 3) the competitive forces of the marketplace in which the insurance industry operates, 4) the insurance industry itself for its own benefit, or 5) all of the above.

[41]*Id.* at 667, 413 N.E.2d at 895 (quoting Johnson v. St. Vincent Hospital, Inc., 273 Ind. 374, 404, 404 N.E.2d 585, 604 (1980)).

with regard to their ability to bring malpractice actions."[42] Therefore, the statute was held to be constitutional and "consistent with the protection offered by our State and Federal Constitutions to equal protection of the laws."[43]

Notably, the *Rohrabaugh* decision dealt solely with the statute of limitations in the medical malpractice statute. When evaluating the statute, the court had to determine whether the provisions of the statute were a reasonable method of dealing with the perceived health care and insurance crisis. This evaluation involved an examination of the provision with that particular goal in mind. The decision does not stand for the proposition that any statute of limitations is per se constitutional. The *Orr* decision, however, treated the *Rohrabaugh* case as controlling precedent even though the goals of the two statutes were not the same.

The products liability statute was passed because of an alleged insurance crisis. No public service such as health care was involved. Thus, the determination in *Rohrabaugh* that limiting minors' rights was reasonable for the medical malpractice statute should not mean the same was true for the products liability statute. The court in *Orr* simply relied on the *Rohrabaugh* decision without conducting a separate analysis of the different factors involved in the products liability legislation. In fact, the court refused to consider the Minutes of the Select Joint Committee on Products Liability on the basis that the language in the statute was unambiguous.[44] This raises a question regarding the role of the Minutes and whether legislative history is relevant in determining whether the limitation on the child's right to bring an action was a reasonable method of dealing with the problem confronting the legislature.

A review of the Minutes would have revealed that the major concern was the ten-year limitation and that the enactment of the limitation was not expected to decrease insurance rates paid by Indiana manufacturers, although that was the stated goal of the legislation.[45] The insurance industry nevertheless urged the passage of the limitations so that Indiana "could serve as an example to the other states in drafting their laws."[46] It was acknowledged that it is "fitting and appropriate for counsel or injured parties to seek to make recoveries under the tort system and it is proper for them to have the tools with which to bring their cases."[47]

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[42]274 Ind. at 667, 413 N.E.2d at 895.

[43]274 Ind. at 668, 413 N.E.2d at 895. Considering the specific reasons for the passage of the medical malpractice statute, *Rohrabaugh* should not have been treated as being dispositive of the *Orr* case without an independent analysis of the purpose of the products statutes.

[44]*Orr*, 484 N.E.2d at 1302.

[45]Minutes of the Select Joint Committee on Products Liability (Sept. 19, 1977).

[46]*Id.*

[47]Minutes of the Select Joint Committee on Products Liability (Sept. 1977) (statement presented by William F. Burfeind, Asst. Counsel, American Insurance Assoc.)

Yet, the statute takes the tools needed for seeking redress away from minors. Although the committee acknowledged that it might be appropriate to give children additional time to file an action, no such provision was included in the final draft.[48] A review of the evidence presented to the committee fails to reveal the basis for excluding such a provision. No testimony appears to have been given concerning the impact such a provision would have had on the "perceived crisis" or the impact on children of failing to protect their access to the courts. An examination of the legislative history provides substantial evidence for the contention that the purpose of the legislation could have been accomplished without encroaching on the rights of children. Other courts have examined similar legislative histories to determine the impact of such legislation on children and have concluded that the elimination of the historic savings provision was unreasonable.

E. An Alternative Analysis

Illustrative of cases in which courts have examined legislative histories in construing statutes of limitations similar to that in Indiana's Products Liability Act is *Sax v. Votteler*,[49] in which the Texas Supreme Court determined that the statute of limitations applied to minors' claims in medical malpractice actions was unconstitutional.[50] The Texas statute, which is similar to that of Indiana, provided that minors under the age

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[48]Minutes of the Select Joint Committee on Products Liability (Oct. 14, 1977). The products liability statute is a political response to the alleged insurance crisis. One cannot doubt the reality of the crisis today as well as at the time this statute was passed. Yet its cause is another matter. Some point to a litigation explosion and frivolous lawsuits as the cause, but the allegation is yet to be proven. The Justice Department set up the Willard Commission to study tort reform. It reported a 758% increase in federal products liability litigation in the past ten years. *Extent and Policy Implications of the Current Crisis in Insurance Availability*, I TORT POLICY WORKING GROUP 42 (1986). However, it ignored data which shows that a substantial portion of the increase relates to one product, asbestos. Even considering the impact of mass tort litigation involving asbestos, Bendectin, Agent Orange and the Dalkon Shield, such suits have outpaced population growth by only two percentage points. Farrell & Glaberson, *The Explosion in Liability Lawsuits is Nothing But a Myth*, BUSINESS WEEK, April 21, 1986 at 24. Generally, civil cases have declined 10% since 1981 in state court systems according to the National Center for State Courts and the Rand Institute for Civil Justice. That there is and was an insurance crisis is beyond dispute, but surely there must be some relationship between the remedy and the alleged wrong to justify radical legislation that overturns well established common law. The legislative history of the products liability statute merely identifies the problem. There is no evidence to establish that the restriction on children's rights is related to the availability or cost of insurance. If victims have less access to the courts, we will have less litigation—not because we have fewer wrongs but because it is harder to pry open the court house door.

[49]648 S.W.2d 661 (Tex. 1983).

[50]*Id.*

of six years had until their eighth birthday to file their claims.[51] All other children had two years from the date of medical treatment or from the date the tort was committed to file their action.[52]

The plaintiff in *Sax* had undergone an operation for the removal of her appendix on May 10, 1976, when she was eleven years old. The physician continued his treatment of the plaintiff until August 5, 1976. On February 20, 1979, the plaintiff filed her action against the physician, alleging that the doctor had mistakenly removed one of her fallopian tubes rather than her appendix. The physician filed a motion for summary judgment, arguing that the claim was barred by the two-year statute of limitations. The trial court granted the motion and the court of appeals affirmed the judgment. The supreme court, however, reversed the decision in part and remanded the case for trial on the merits.[53]

In reversing, the court noted that Texas had historically tolled the statute of limitations for minors' claims.[54] At the time of the medical malpractice statute's passage, minors had until two years after they attained majority to bring a tort action.[55] The Saxes attacked the Texas statute, arguing that the minor was being deprived of her rights to due process and equal protection of the law as guaranteed by the fourteenth amendment of the United States Constitution and the Texas Constitu-

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[51]*Id.* at 663. The Texas statute at issue in the *Sax* case provided:

> Notwithstanding any other law, no claim against a person or hospital covered by a policy of professional liability insurance covering a person licensed to practice medicine or podiatry or certified to administer anesthesia in this state or a hospital licensed under the Texas Hospital Licensing Law, as amended (Art. 4437f, Vernon's Texas Civil Statutes), whether for breach of express or implied contract or tort, for compensation for a medical treatment or hospitalization may be commenced unless the action is filed within two years of the breach or the tort complained of or from the date the medical treatment that is the subject of the claim or the hospitalization for which the claim is made is completed, *except that minors under the age of six years shall have until the eighth birthday in which to file, or have filed on their behalf such claim.* Except as herein provided, this section applies to all persons regardless of minority or other legal disability.

Professional Liability Insurance for Physicians, Podiatrists, and Hospitals Act, ch. 330, 1975 Tex. Gen. Laws 864 (emphasis added) (expired 1977) (substantially similar provision regarding statute of limitations present at TEX. REV. CIV. STAT. ANN. art. 45901i (Vernon 1977), except the amended law substitutes age 12, thus providing minors would have until age 14 to file).

[52]*Sax*, 648 S.W.2d at 663.

[53]*Id.* The court reversed the decision with respect to the minor's cause of action, but affirmed the holdings of the lower court that the parents' claim for medical expenses and loss of earnings during the minority of the plaintiff-child was barred by the statute of limitations. *Id.* at 667.

[54]*Id.*

[55]*Id.* This was also the situation in Indiana prior to the passage of the medical malpractice and products liability statutes of limitations legislation. *See supra* text accompanying notes 13 and 35.

tion.[56] The Texas court held that "the right to bring a well-established common law cause of action cannot be effectively abrogated by the legislature absent a showing that the legislative basis for the statute outweighs the denial of the constitutionally-guaranteed right of redress."[57] Like the Indiana statute, the Texas statute had been passed in an effort

> to provide an insurance rate structure that would enable health care providers to secure liability insurance and thereby provide compensation for their patients who might have legitimate malpractice claims. The specific purpose of the provision in question was to limit the length of time that the insureds would be exposed to potential liability.[58]

The court noted that in order to meet her burden of proof, the plaintiff had to show that she had a "cognizable common law cause of action that [was] being restricted" and that "the restriction was unreasonable or arbitrary when balanced against the purpose of the statutes."[59] There was no question that a child had a common law cause of action that was being restricted.[60] The problem was, therefore, to determine whether the restriction was unreasonable.

In Texas, children have no right to bring a cause of action on their own until the disability of minority is removed.[61] This does not distinguish Texas minors from Indiana minors. Although Indiana minors are technically permitted access to the courts,[62] they are effectively prohibited from gaining access unless a third party assists them in retaining counsel and managing the case.[63] This effectively places Indiana children in the same situation as Texas children because any action they bring as minors is dependent on the actions of third parties.

In Texas, as in Indiana, the parents, guardians, or next friends of

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[56]*Sax*, 648 S.W.2d at 667. The traditional due process guarantee is provided in the Texas Constitution art. I, § 19, which states: "No citizen of this state shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." In addition, the Texas Constitution art. I, § 13, which is similar to the Indiana Constitution art. I, § 12, provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." This second provision is sometimes referred to as the "Open Courts Provision," but is considered a due process guarantee. *Id.* at 664. *Compare* TEX. CONST. art. I, § 13 *with* IND. CONST. art. I, § 12.

[57]*Sax*, 648 S.W.2d at 665-66.

[58]*Id.* at 666.

[59]*Id.*

[60]*Id.*

[61]*Id.*

[62]*See* IND. R. TR. P. 17(c).

[63]*See generally* State *ex rel* Keating v. Bingham, 233 Ind. 504, 121 N.E.2d 727 (1954).

the child may institute an action on behalf of the child while the child is a minor.[64] Under the Texas medical malpractice statute, the failure of the parent or guardian to institute the action in a timely fashion precluded the child from asserting her cause of action. The child also had no recourse against the parents for their failure to pursue an action because of the doctrine of parent-child immunity.[65] As a result, the court stated:

> The child, therefore, is effectively barred from any remedy if his parents fail to timely file suit. Respondents argue that parents will adequately protect the rights of their children. This Court, however, cannot assume that parents will act in such a manner. It is neither reasonable nor realistic to rely upon parents, who may themselves be minors, or who may be ignorant, lethargic, or lack concern, to bring a malpractice lawsuit action within the time provided by [the medical malpractice statute].[66]

Although the court acknowledged that the length of time an insured is exposed to liability will affect insurance rates, it concluded that the statute in question was an unreasonable method of dealing with the problem because it abrogated the child's right of redress without providing a reasonable alternative.[67] This approach assures that minors will continue to have a right to seek redress for injuries, while the Indiana approach severely curtails this right. Unlike the Indiana courts, the Texas court also squarely faced the problems confronted in seeking redress in the legal system.

IV. Conclusion

The analysis utilized by the Texas Supreme Court attempts to balance the loss of the right of redress against the need to limit the time frame in which actions may be brought. In contrast, Indiana decisions have ignored the realities of the child's inability to pursue an action on his own. It is time for both the courts and the legislature to recognize that the child's right to bring an action in Indiana is gradually being eroded. Children are totally dependent on third parties to pursue their actions and now, in both the areas of products liability and medical malpractice, children may lose their right of redress if their parents, guardians or next friends, either from ignorance or lack of concern, do not pursue

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[64]Tex. Civ. Code Ann. § 1994 (Vernon 1964).

[65]*Sax*, 648 S.W.2d at 667. Indiana also recognizes the continued vitality of the doctrine of parent-child immunity. *See* Buffalo v. Buffalo, 441 N.E.2d 711 (Ind. Ct. App. 1982).

[66]648 S.W.2d at 667.

[67]*Id.*

the child's legal remedies. A child of eight may be able to say "I am hurt," but this does not translate into the ability to recognize that he has a right to seek legal redress or to seek out a third party who is willing to pursue that right for him. The historical protection afforded minors still has validity in the area of statutes of limitations. The right to seek legal redress for wrongs committed against a person is one of the corner stones of our society and legal system. The current trend of legislation and case law in Indiana threatens this right. Unless these statutes are reevaluated by the courts and legislature and their impact on the child's right to seek redress is considered, the minor's right to seek legal redress for wrongs committed against him may be further reduced in situations where the child has no one willing to pursue his action for him.

An exceedingly logical friend recently related that when he was ten years old, he was playing with his brothers when his father suddenly picked him up and spanked him. He turned in hurt and bewilderment and asked, "What did I do to deserve that?" "Nothing," his father replied. "Then why was I spanked?" "To teach you that this is not a rational world," was the answer. Lawyers and judges learn sooner than most that this is not a rational world. It should be part of our responsibility, however, to make it more so. The limitations on the rights of the legally disabled, as modified recently by the legislature, do not do that.