LITIGATING MEDICAL MALPRACTICE CASES IN INDIANA

Barry Rooth
Merrillville, IN

WHY DO I REPRESENT PATIENTS/PLAINTIFFS IN MEDICAL MALPRACTICE CASES, ESPECIALLY IN INDIANA?

- *See, e.g.*, *Eakin v. Kumiega*, 567 N.E.2d 150, (Ind.App. 1991); *Miller v. Mayberry*, 506 N.E.2d 7 (Ind. 1987)

THE INDIANA MEDICAL MALPRACTICE ACT

Current cite: I.C. 34-18-1-1, *et seq.*

Effective July 1, 1975

NEW YORK TIMES OP-ED, 10/6/94

Crushed By My Own Reform By Frank Cornelius

In 1975, I helped persuade the Indiana Legislature to pass what was acclaimed as a pioneering reform of the medical malpractice laws: a $500,000 cap on damage awards, and elimination of all damages for pain and suffering. I argued successfully that such limits would reduce health care costs and encourage physicians to stay in Indiana – the same sort of arguments that not underpin the medical industry's call for national malpractice reform.

Today, from my wheelchair, I rue that that accomplishment. Here is my story.

On February 22, 1989, I underwent routine arthroscopic surgery after injuring my left knee in a fall. The day I left the hospital, I experienced a great deal of pain and called the surgeon several times. He called back the next day and told my wife to get me a bedpan. He then left on a skiing trip. I sought out another surgeon, who immediately diagnosed my condition as a reflex sympathetic dystrophy – a degenerative nervous disorder brought on by trauma or infection, often during surgery.

A few months later, when a physical therapist improperly red the instructions on a medical device, I received a tremendous current of electricity through my left leg. This seriously complicated my condition.

In August 1990, another physician proposed a medical procedure, but used the wrong instrument; that left me with several holes in the vena cava, the main vein from the legs to the heart. I would have to bled to death in my room if my wife had not come to see me that evening and called for help. As another physician tried to save my life, he punctured my left lung.

The cost of this cascading series of medical debacles is painful to tally:

I am confined to a wheelchair and need a respirator to keep breathing. I have not been able to work.
I have a continuous physical pain in my legs and feet, prompting my doctor to hook me up to an apparatus that drips morphine. My pain used to rate a 10 on a scale of 1 to 10. Now it's about a 4.
Twice, I have received last rites from my church.

(cont'd) My marriage is ending, and the emotional fallout on our five children has been difficult to witness, to say the least.

At the age of 49, I am told that I have less than two years to live.

My medical expenses and lost wages, projected to retirement if I should live that long, come to more than $5 million. Claims against the hospital and physical therapist have been settled for a total of $500,000 – the limit on damages for a single incident of malpractice. The Legislature has raised that cap to $750,000, and I may be able to college some extra damages if I can sue those responsible for the August 1990 incident the nearly killed me. But apparently because of bureaucratic inertia, the state medical panel that certifies such claims has yet to act on mine.

The kicker, of course, is that I fought to enact the very law that limits my compensation. All my suffering might have been worthwhile, on some cosmic scale, if the law had accomplished its stated purpose. But it hasn't. (Emphasis added.)

Indiana's health care costs increased 139.4 percent from 1980 to 1990 – just about the national average. The state ranked 32nd in per capita health spending in 1990 – the same as in 1980.

It is understandable that the damage cap has done nothing to curb health care spending; the two have almost nothing to do with each other. In 1992, the Congressional Budget Office reported that medical malpractice litigation accounted for less than 1 percent of total healthcare spending. I doubt that the percentage in Indiana is much different.

Make no mistake; damage caps are arbitrary, wholly disregarding the nature of the injury and the pain experience by the plaintiff. They make it harder to seek and recover compensation for medical injuries; extend unwarranted special protection to the medical industry; and remove the only effective deterrent to negligent medical care, since the medical profession has never done an effective job of disciplining negligent doctors.

Medical negligence cannot be reduced simply by restricting consumers' legal rights. That will happen only when the medical industry begins to effectively police its own. I don't expect to see that day. (Emphasis added.)

U.S.News News

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NEWS / HEALTHCARE OF TOMORROW

Medical Errors Are Third Leading Cause of Death in the U.S.

10 percent of U.S. deaths are due to preventable medical mistakes.

By Steve Sternberg | Senior Writer May 3, 2016, at 6:30 p.m.

PER C.D.C., IN 2013:

611,105 died from heart disease;

584,881died from cancer;

251,454 died from **MEDICAL ERRORS.**

(149,205 died from chronic respiratory disease)

WHO IS COVERED BY THE ACT?

I.C. 34-18-2-24.5:

"'Qualified provider" means a health care provider that is qualified under the article … by complying with the procedures set for the in I.C. 34-18-3."

I.C. 34-18-3-1:

"If a health care provider does not qualify, the patient's remedy is not affected by this article."

HOW DOES A HCP "QUALIFY"?

Per I.C. 34-18-3-2:

Filing "proof of financial responsibility" under I.C. 34-18-4-1;

and

Paying the "surcharge" assessed on all HCO's under I.C. 34-18-5-1.

"FINANCIAL RESPONSIBILITY" IS DEMONSTRATED BY:

1. Proof of Insurance;
2. Surety Bond;

   Or, for Hospitals

3. Financial Statements demonstrating assets sufficient to satisfy all potential claims.

PAYING THE SURCHARGE:

I.C. 34-18-5-1: To create a source of money for the patient's compensation fund, an annual surcharge shall be levied on all health care providers in Indiana.

Amount of surcharges determined by an "actuarial program" used to determine actuarial risk to PCF – I.C. 34-18-5-2(a).

Investigation

THE RUNAWAY DOCTOR

When luxury-loving Dr. Mark Weinberger vanished, in 2004, he left in his wake a wife saddled with more than $6 million in debts, a father headed for bankruptcy, and hundreds of patients who say he misdiagnosed them and performed completely unnecessary sinus surgeries. Now "The Nose Doctor" of Merrillville, Indiana, is facing prison, along with more than 350 malpractice suits, after finally being captured while hiding out in a tent in the Italian Alps. The author investigates charges that a talented young physician became a greedy, mutilating monster.

BY BUZZ BISSINGER | DECEMBER 21, 2010 12:00 AM

T&R Theodoros and Rooth, P.C. Attorneys at Law
A Reputation of Caring. A Tradition of Results.

PCF Payout Date	Total Amount Paid	Number of Petitions Filed	Total Number of claims paid	Number of Verdicts Paid	Average payment on case with $750,000 cap	Average payment on case with $1,250,000 cap	Breakdown of case by type	Type of provider (% of Total Payout)
July 2013	$112,538,070.28	59, plus 1 request for combined settlements	409 (342 Weinberger payments)	8 total; 3 tried by HCP; 5 tried by PCF	1 case paid; at $450,000	398 cases paid; Average = $282,758.97	29 wrongful death of adult (7%) 4 wrongful death of child (1%) 342 personal injury to adult (84%) 34 personal injury to child (8%)	15% hospital 76% physician 0% nursing home 9% all other
January 2013	$63,930,126.34	74, plus 2 requests for combined settlements	85 (4 Weinberger payments)	3 total; 1 tried by HCP; 2 tried by PCF	2 cases paid; Average = $587,500	84 cases paid; Average = $747,084.84	37 wrongful death of adult (44%) 10 wrongful death of child (12%) 31 personal injury to adult (36%) 7 personal injury to child (8%)	42% hospital 47% physician 9% nursing home 2% all other
July 2012	$73,840,661.31	69, plus 5 requests for combined settlements	94 (4 Weinberger payments)	7 total; 6 tried by HCP (2 Weinberger claims); 1 tried by PCF	1 case paid at $650,000	93 cases paid; Average = $785,921.09	44 wrongful death of adult (47%) 4 wrongful death of child (4%) 38 personal injury to adult (40%) 8 personal injury to child (9%)	27% hospital 56% physician 3% nursing home 14% all other
January 2012	$53,494,978.56	68, plus 1 request for a combined settlement	79	8 total; 3 tried by HCP; 5 tried by PCF	4 cases paid; Average = $575,000	76 cases paid; Average = $673,618.13	36 wrongful death of adult (45%) 6 wrongful death of child (8%) 31 personal injury to adult (39%) 6 personal injury to child (8%)	35% hospital 53% physician 4% nursing home 8% all other

Indiana Raises Patient Compensation Fund Surcharge

- Indiana has announced that effective April 1st, 2014 it is increasing the surcharge to medical providers in the Patient Compensation Fund (PCF). Doctors will face a 13% increase while hospitals will see a 21.2% uptick. The patient compensation fund provides $1,000,000 in coverage excess of $250,000 in commercial malpractice insurance. The state also has an absolute cap on damages of $1,250,000 for those that participate in the fund.
- The increase appears to be due almost entirely to the exploits of Dr. Mark Weinberger, who's run from the law got him on Americas Most Wanted and cost the PCF fund $112.5M. The compensation fund balance stood at $198M in the summer of 2010 but had shrunk to $75M at the beginning of 2014.
- The increase comes as a bit of a shock to many physicians, who seeing premium decreases of 5-10% from commercial carriers. The lowest physician surcharge rises to $2,100 and the highest is $23,400, depending on specialty. Not pocket change but still a fraction of what many of their peers pay across the border in Illinois.

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WHAT CONDUCT IS COVERED BY THE ACT?

I.C. 34-18-2-18: ""Malpractice" means a tort or breach of contract based on health care or professional services that were provided, or that should have been provided, by a health care provider, to a patient."

"[T]he Act applies to conduct, curative or salutary in nature, by a health care provider acting in his or her professional capacity, and is designed to exclude only that conduct "unrelated to the promotion of a patient's health or the provider's exercise of professional expertise, skill, or judgment."

Van Sice v. Setany, 595 N.E.2d 264, 266 (Ind.App. 1992)

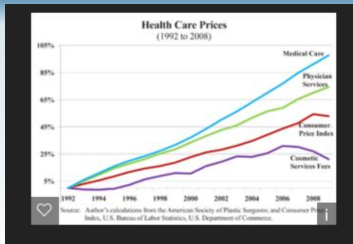
PRIMARY FEATURES:

1. Cap on all damages;
2. Each case presented to a Medical Review Panel;
3. Patients Compensation Fund; and
4. Limit on Attorneys Fees.

THE ACT CAPS <u>ALL</u> DAMAGES: I.C. 34-18-14-1

"The total amount recoverable for an injury or death of a patient may not exceed the following:

1975 – 1991:	$ 500,000;
1991 – 1999:	$ 750,000;
1999 – July, 2017:	$1,250,000;
July, 2017 – 2019	$1,650,000; and
2019 - ?	$1,800,000.



STATE-BY-STATE SURVEY OF CAPS

32 with Caps on Negligent Infliction of Emotional Distress

16 with No Caps

2 With Caps on <u>All</u> Damages (Ind., Neb.)

Indiana = Worst State for Injured Patients

See,http://www.nolo.com/legal-encyclopedia/state-state-medical-malpractice-damages-caps.html

COMMENCEMENT OF A MEDICAL MALPRACTIC ACTION

The plaintiff files a "proposed complaint" with IDOI;

Filing fee of $5.00 + $2.00 for each additional defendant;

No dollar amount in demand;

No summons – Commissioner forwards PC to each provider;

Parties may agree to waive this requirement, I.C. 34-18-8-5;

PRACTICE TIP: Filing a "proposed complaint" per I.C. 34-18-7-3 only tolls statute against a qualified provider and only in cases involving covered acts.

So, **PRACTICE TIP**: Check the DOI for status, and if unsure as SOL approaches, double-file;

But, *see*, I.C. 34-18-8-7 (anonymous filing);

PRACTICE TIP: If you double-file without knowing they're qualified, file anonymously. *Id. Kho, M.D. v. Pennington*, 846 N.E.2d 1036 (Ind.App. 2006).

FOR "QUALIFIED HCO'S, CAN'T FILE IN COURT UNLESS: 1) PROPOSED COMPLAINT REVIEWED BY MRP; AND 2) OPINION RENDERED BY MRP. I.C.34-18-8-4 = JURISDICTIONAL.

Indiana Patient's Compensation Fund

Indiana State Department of Insurance

311 West Washington St, Ste. 300

Indianapolis, IN 46204

Contact: (317) 232-5253 Fax: (317) 232-5251

Search For Claims — By claim number or plaintiff name

Search For Health Care Provider — By license #, name or specialty

Additional Information: http://www.in.gov/idoi/2614.htm

Disclaimer:

This site is a public service for informational purposes only. The State of Indiana and Indiana Department of Insurance do not warrant, represent, or guarantee the reliability and completeness of information in the Patient's Compensation Fund Public Database. The information on this site is not intended to be a final determination of a health care provider's qualification with the Indiana Patient's Compensation Fund. Consult legal counsel before using information contained on this site for a purpose under the Indiana Medical Malpractice Act. Qualification for a certain time period does not imply qualification for every action of a health care provider during that time period.

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A REPUTATION OF CARING. A TRADITION OF RESULTS.

GUINN V. LIGHT, 558 N.E.2d 821 (Ind. 1990):

Filing a proposed complaint with the commissioner of insurance tolls the statute of limitations until the commissioner or his agent informs the parties that the provider has not qualified under the Act. The commissioner is the appropriate public officer to make such a determination. If the commissioner determines that the provider has not qualified and so notifies the parties, the statute of limitations begins running again and the claimant must file an action in court or risk being barred by the statute of limitations.

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MEDICAL REVIEW PANELS – I.C. 34-18-10-1, i.e., Phase I of Med Mal Claim (1.5-3+ years):

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MRP'S OPINION IS NOT CONCLUSIVE, BUT ADMISSIBLE IN EVIDENCE.

AND MRP ASSUME ROLE OF EXPERT WITNESSES IN SUBSEQUENT CIVIL LITIGATION.

I.C. 34-18-10-23.

WHY MRP'S ARE BAD FOR PATIENTS:

F.G.T.H.H.;

Undue Delays;

Doesn't Perform Designated Function; e.g., WEINBERGER Panels.

PLAINTIFFS WIN PANELS 18.6% OF TIME

				2014	9	30	0	8	0
2014	997	57	0		0	0	0	0	0
Total	28341	2252	14451		2688	9214	693	1854	2

MRP'S DUTY:

MRP is tasked with the duty to review evidence and render an expert opinion as to whether the HCO(s) failed to comply with applicable standard of care as charged in the proposed complaint. I.C. 34-18-10-1.

PRACTICE TIP: Carefully craft your proposed complaint broadly to ensure jurisdiction in subsequent civil complaint, in accord with the principle of notice pleading, *i.e.*, Ind.R.TrialPro. 8. See, I.C. 34-18-11-1.

AN ATTORNEY ACTS AS MRP CHAIR.
THE ROLE OF MRP CHAIR:

Advisor To MRP; Expedite Member Selection; Convene Panel; Expedite MRP Review; Establish Submission Schedule; Forward MRP Report to Insurance Commissioner. I.C. 34-18-10-1, *et seq*.

EITHER PARTY CAN REQUEST PANEL NO EARLIER THAN 20 DAYS AFTER FILING PROPOSED COMPLAINT

SELECTION OF MRP MEMBERS:

Chairman: By agreement or through striking list form Clerk of the Supreme Court. I.C. 34-18-10-4

PRACTICE TIP: OBTAIN STIPULATION FROM DEFENDANTS TO SELECT AN **EXPERIENCED** PANEL CHAIR. "WEINBERGER LESSON" (Could save a couple of years).

SELECTION OF 3 HCP MEMBERS OF MRP:

Any HCP "who holds a license to practice in their profession shall be available for selection." I.C. 34-18-10-5.

SELECTION OF HCP MRP MEMBERS:

3 HCP members;

Each party selects 1 and those 2 select a third;

Multiple parties = I strike for the side;

If 1 individual defendant who "specializes in limited area," 2 HCP MRP's must be of the same specialty.

SUBMISSION OF EVIDENCE TO THE MRP

Evidence may consist of medical charts, x-rays, lab tests, treatises, depositions, "any other form of evidence allowable by the medical review panel"

I.C. 34-18-10-17

Q – SO WHAT SHOULD A PARTY INCLUDE IN THEIR SUBMISSION?

MILLER v. MEMORIAL HOSPITAL,
679 N.E.2d 1329, 1332 (Ind. 1997):

The plaintiff's action is [not] restricted by the substance of the submissions presented to the [MRP] . . . There is no requirement for the plaintiffs 'to fully explicate and provide particulars or legal contentions regarding the claim."

BUT

***See, K.D. v. Chambers*, 951 N.E.2d 855 (Ind.App. 2011), *trans. den'd*, 962 N.E.2d 654 (Ind. 2011):**

The Court refused to interpret *Miller* so broadly as, "to allow a plaintiff to argue at trial separate breaches of the SOC that were presented in submissions of evidence to the panel." *Id.* at 865.

DISCOVERY DURING PANEL STAGE IS PERMISSIBLE BUT THERE ARE STRATEGIC CONSIDERATIONS.

ISSUE 1: Will a party be allowed to take a second deposition?

ISSUE 2: What is the duty to supplement discovery per the Rules of Trial Procedure?

PANEL MEETINGS

The Chair convenes MRP meeting at request of party. A party has the right to attend and "question the panel." I.C. 34-18-10-20.

TIME LIMITATION FOR EXPERT OPINION

"The panel shall give its expert opinion within … 180 days after the selection of the last member of the initial panel. I.C. 34-18-10-13.

OPINION OF MRP - I.C. 34-18-10-22:

The Evidence Does/Does not Support the Conclusion That the Defendant Failed to Comply with the Applicable Standard of Care as Charged in the Proposed Complaint;

or

Material Issue of Fact;

and

Whether Conduct was or was not a Factor of the Resultant Damages.

"A PARTY . . . WHO FAILS TO ACT AS REQUIRED BY THIS CHAPTER WITHOUT GOOD CAUSE SHOWN IS SUBJECT TO MANDATE OR APPROPRIATE SANCTIONS UPON APPLICATION TO THE COURT DESIGNATED IN THE PROPOSED COMPLAINT AS HAVING JURISDICTION." I.C. 34-18-10-14.

A PLAINTIFF'S CLAIM MAY BE DISMISSED FOR FAILURE TO PROSECUTE THE C\LAIM

Reck v. Knight, 993 N.E.2d 627 (Ind.App. 2013);
Ramsey v. Moore, 946 N.E.2d 584 (Ind.App. 2010);
Rambo v. Begley, 796 N.E.2d 314 (Ind.App. 2003);
Rivers v. Methodist, 654 N.E.2d 811 (Ind.App. 1995);
Galindo v. Christensen, 569 N.E.2d 702 (Ind.App. 1991).

Q – CAN A DEFENDANT HAVE SANCTIONS IMPOSED FOR FAILING TO TO ACT AS REQUIRED?

ORDER ON PETITION FOR PRELIMINARY DETERMINATION AND DEFAULT JUDGMENT

Petitioners, Josephina Aguila on behalf of Pedro Aguila, Frederick Ard, Darren Bala, Ro
Besler, Cella King, and Larry Salinas have moved for a preliminary determination to obtain a de
judgment against the respondent, Anonymous Hospital, for failure to comply with the p
chairman's submission schedule and for failing to tender their respective submissions to the me
review panels well past the 180-day deadline provided by Indiana Code section 34-18-1
Concluding that petitioner's motion is well founded and that the sanction of default is warranted,
Court hereby GRANTS petitioners' motion and enters a default judgment against Anonym
Hospital as to all petitioners.

So ORDERED this 15th day of July 2016.

PRACTICE TIP: Get your submissions in on time or request and obtain agreement for extensions -

ADHERE TO ALL DEADLINES!

THE ACT HAS A MECHANISM FOR ENFORCING DISCOVERY AND DETERMINING AFFIRMATIVE DEFENSES OR OTHER ISSUE NOT RESERVED FOR MPR – PRELIMINARY DETERMINATIONS UNDER CHAPTER 11.

S.O.L. TOLLED FOR 90 DAYS AFTER RECEIPT OF PANEL OPINION

90 days + time left on statute as of the date of filing of the proposed complaint.

POST-PANEL MED MAL LITIGATION

Phase II – 3-4 years

SPECIAL CHALLENGES IN MED MAL LITIGATION

Contributory Negligence;
$50,000 - $150,000 in trial costs;
Anti-Patient Jury Instructions;
Extra Skeptical Jurors;
81% Chance of adverse MRP Opinions;
Capped Damages;
Challenging Cost/Fee Ratio.

VERDICTS AGAINST A QUALIFIED HCP

The PCF shall pay that amount of a certified "final judgment" over $250,000.00, I.C. 34-18-6-6.

SETTLING A CLAIM AGAINST A QUALIFIED HCP:

WHO'S RESPONSIBLE FOR SATISFYING A SETTLEMENT FOR OR AWARD OF DAMAGES?

The HCO up to $250,000, I.C. 34-18-14-3(b);

And

The Patient Compensation Fund for the Excess up to an additional $1,000,000.00, I.C. 34-18-14-3(c).

A settling HCP may satisfy their obligation by the combination of cash and "periodic payments" that, combined pay $250,000.00 over time, so long as the settlement package has a present value in excess of $187,000.00. I.C. 34-18-14-4.

(At least 1 settling HCP must pay $50,000, I.C. 34-18-14-4(b)(2).)

PETITION FOR EXCESS DAMAGES,

I.C. 34-18-15-3,

PHASE III (6-12 mos.)

PETITION FOR EXCESS DAMAGES FROM THE PCF - I.C. 34-18-11-1, *et seq.*:

Initiated by the filing a Petition;

New action requiring summons, service and a "response;"

MRP stayed pending Resolution of the Petition.

Petition filed in court named in Proposed Complaint or Marion County

A bench trial/hearing should be set "as soon as practicable," I.C. 34-18-15-3(4).

"The court shall consider the liability of the [HCP] as admitted and established." I.C. 34-18-15-3(5).

ISSUES AT HEARING ON PETITION:

"The trial court must view the elements of duty, breach, causation as admitted and established."

Robertson v. B.O., 977, N.E.2d 341. 343 (Ind. 2012).

Settlements with and awards against the PCF are paid out on the 15th of the months following the close of each calendar quarter. I.C. 34-18-6-4.

MASS MEDICAL TORTS

The New York Times

A Small Indiana Town Scarred by a Trusted Doctor

I.C. 34-18-15-4: If a [HCP] or the HCP's surety or liability insurance carrier fails to pay any agreed settlement or judgment within ninety (90) days, the agreed settlement or final judgment shall be paid from the patient's compensation fund, and the fund shall be subrogated to any and all of claimant's rights against the HCP, the HCP's surety or liablity insurance carrier, or both, with interest, reasonable costs, and attorneys fees.

THANK YOU and don't hesitate to call with questions.

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