Knowing your Neighbor: A Primer on Indiana Tort-Related Law for Illinois Lawyers

by Adam J. Sedia & William A. Vlasek

I. Introduction

It is useful for Illinois practitioners to develop a basic understanding of the way its next-door neighbor handles tort issues. Geography dictates this. Cook County, the second most populated county in the nation, borders Lake County, Indiana's second most populated county. America's third most congested highway is I-80/I-94 between Portage, Indiana, and Thornton, Illinois.[1] Farther south, the Indiana cities of Terre Haute, Vincennes, and Evansville lie near the Illinois state line. The high volume of commerce and travel flowing across the state line means that many injured Illinoisans will have claims that they must pursue in Indiana's courts. Illinois attorneys will need a quick, easy reference on Indiana tort law to evaluate and pursue those claims. This article provides such a source.

Indiana's tort regime is significantly different from Illinois's. Understanding those differences is key to successful practice across the state line.

Politically, the states are very different. Illinois is generally regarded as a liberal, Democratic stronghold, and Indiana as a conservative, Republican stronghold. This gives rise to a general perception of Illinois law as plaintiff-friendly and Indiana law as insurer-friendly.

Furthermore, Illinois's appellate judges are popularly elected. Indiana's appellate judges are appointed by the governor (usually Republicans) from nominees chosen by a commission. Because the political environment largely controls who become the judges, perceptions about each state's politics also affect perceptions about its case law.

Whatever the popular perception of each states bias, this perception is incorrect as it regards the law. In some respects, Indiana's tort law is more generous to plaintiffs than Illinois. Part of the purpose of this article is to dispel that common misconception. Indiana has several aspects of tort law that favor plaintiffs.

The primary purpose of this article, though, is simply to provide a concise, easily understood summary of concepts in Indiana tort law that differ from those in Illinois. The eight areas of focus here are wrongful death, claims against government entities, medical malpractice, products liability, UM/UIM claims, dram shop claims, bad faith, the nonparty defense, and tort prejudgment interest. Additionally, advice on appearing *pro hac vice* in Indiana is given for those wishing to practice in Indiana courts.

II. Wrongful Death

In Indiana, as in Illinois, wrongful death actions are governed by statutes that were enacted to supply a right that did not exist at common law.[2] Indiana's first version of the Act dates to 1852, only six years after the right was first created in England.[3]

Indiana's Wrongful Death Act provides for a two-year statute of limitations and allows recovery of damages "including, but not limited to, reasonable medical, hospital, funeral and burial expenses, and lost earnings of such deceased person resulting from said wrongful act or omission."[4] Though the statute explicitly excludes damages for grief, it allows recovery for loss of love and companionship for only the surviving spouse and dependent children.[5] Also, damages for the decedent's pain and suffering before their death are not recoverable in a wrongful death action; pain and suffering from an injury are only available to a deceased plaintiff when something other than the injury caused the decedent's death.[6]

The statute authorizes the "personal representative" to prosecute a wrongful death action for the decedent, which the courts have held means the executor or administrator of the probate estate, if one has been appointed.[7] This means that a personal representative for the probate estate can oust a previously-appointed special administrator for the wrongful death estate alone.[8] In the case of a testate wrongful death decedent, Indiana practitioners should always name the executor as the *one* party to pursue these claims, as they are preferred by law.

Ind. Code § 34-23-1-1 also specifies in detail to whom the damages inure. First, the part of damages recovered "for reasonable medical, hospital, funeral and burial expense" falls to the estate to pay those expenses.[9] The remaining damages fall first to any surviving spouse and *dependent* children [in equal shares].[10] The statute draws no distinction between legitimate or illegitimate children;[11] the standard for recovery is dependency alone - that is, a need for support *or* the decedent's

past contribution to such support.[12] Collateral relatives, parents, siblings, and non-dependent adult children cannot recover damages.[13]

If the decedent died without a surviving spouse or dependant next of kin, then "the damages inure to the exclusive benefit of the person or persons" who pay the expenses of the decedent's last illness and of prosecuting the wrongful death action.[14] These include hospital and medical expenses, funeral and burial expenses, estate administration expenses, and reasonable attorney's fees.[15]

The last of these items is particularly important: Indiana's courts have held that the statutory language allows the estate to recover its reasonable attorney's fees as part of the damages in a wrongful death action.[16] Also, wrongful death proceeds do not become part of the decedent's probate estate and are not subject to the claims of the decedent's creditors.[17]

II. Claims against Government Entities

In Indiana, all tort claims against government entities are governed by Ind. Code § 34-13-3. The statute imposes rather strict limits on the ability to bring tort claims against government entities. All other claims, including those in contract and in equity, fall outside the statute.

The statute imposes strict notice requirements. For a claim against a state entity, the claimant must provide notice to the attorney general and the agency involved within 270 days of the occurrence.[18] For claims against political subdivisions (counties, cities, towns), the claimant must provide written notice to the subdivision's governing body and the Indiana Political Subdivision Risk Management Commission within 180 days of the occurrence.[19] The notice must state the circumstances and extent of the loss, the time and place of the occurrence, the names of all persons known to be involved, the amount of the damages sought, and the claimant's address.[20] Once the government entity receives this notice, it has 90 days to notify the claimant of its approval or denial of the claim.[21]

So long as the notice requirements are observed, the normal two-year statute of limitations for torts applies, but the notice does not toll the statute.[22] Failure to provide notice, however, will subject a suit to dismissal. Also, in suing state governmental organizations, both the head of the organization and the Indiana Attorney General must be served.[23]

The statute also sets forth twenty-four categories of immunity for government entities.[24] Of note among these is "discretionary immunity," which the Indiana Supreme Court relaxed to simply mean immunity for policymaking decisions that officeholders are elected to perform.[25] The remaining categories deal with immunity for the design and conditions of public facilities,[26] or the performance of judicial and law enforcement functions.[27]

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The statute also imposes caps on damages: a government entity cannot be liable for more than $700,000 for each person for each occurrence, or for more than $5 million for all persons in one occurrence, or for punitive damages.[28] Furthermore, the traditional contributory negligence rules apply in actions against government entities,[29] unlike the rules of comparative fault that apply in actions against private parties.[30]

To avoid malpractice, practitioners pursuing cases against Indiana governmental entities should always keep the notice requirements in mind. The damage caps and categories of immunity, for their part, govern the economic feasibility of the case.

III. Medical Malpractice

Similar to claims against government entities, Indiana has enacted the Medical Malpractice Act (MMA), which imposes limitations on claims against healthcare providers, for tort or breach of contract arising out of their professional services.[31] The MMA defines "healthcare provider" very broadly.[32]

The MMA applies only to providers who file proof of financial responsibility and pay into the Indiana Patients' Compensation Fund (PCF), a state-administered trust used to pay damages for medical malpractice claims.[33] Government entities that are healthcare providers fall under the MMA, rather than the Tort Claims Act.[34] The MMA does not apply to claims against healthcare providers that arise outside of the provision of healthcare services - for example, in premises liability claims against hospitals.[35]

Prerequisite to bringing a medical malpractice action is the filing of a proposed complaint with the Indiana Insurance Commissioner, formation of a medical review panel, and the panel reviewing and issuing an opinion on the proposed complaint.[36] The filing of the proposed complaint tolls the two-year statute of limitations,[37] but a plaintiff may also actually file the action while the proposed complaint is being reviewed, as long as the complaint contains no identifying information for the defendants and the plaintiff takes no action beyond scheduling a trial date.[38] Indeed, during review, a trial court has no jurisdiction to rule on any issue of law or fact reserved for the medical review panel, but it may make preliminary determinations on other issues.[39]

The proposed complaint then goes before the medical review panel for review.[40] The panel consists of three healthcare providers, one chosen by each side and the third chosen by the first two, and is chaired by an attorney, chosen by agreement of the parties or striking from a panel of five names.[41] All healthcare providers and attorneys in the state are eligible to serve on a panel.[42] In the case of an individual defendant, the healthcare provider panelists must be members of the defendant's profession, preferably within the same specialty.[43]

Once the panel is formed, the parties submit their evidence to

it. Usually the parties have taken depositions and submit the transcripts, along with the plaintiff's medical bills, records and any expert reports. Within 180 days, the panel must render its expert opinion regarding whether or not the defendant breached the standard of care and, if so, whether that breach proximately caused any damage.[44] The panel's opinion is admissible at trial, and the parties have the right to call its members as witnesses at trial.[45] Regardless of the panel's ultimate opinion, either party has the right to try the case, as long as it survives summary judgment.

Damages for medical malpractice are capped at $1.25 million.[46] Of this, the provider is only responsible for up to $250,000, which is privately insured; the PCF is liable for the remainder.[47] However, the statutory caps apply to damages only, not to collateral litigation expenses.[48] Pre-judgment and post-judgment interest may be awarded in medical malpractice cases, and any amount of interest in excess of the damage caps is collectible against the healthcare provider.[49]

If the provider settles for its limit of $250,000, the plaintiff may claim an excess damages award from the PCF by filing a petition with the court.[50] If the PCF fails to pay within 90 days, the plaintiff may recover interest, costs, and reasonable attorney's fees from the PCF,[51] but the attorney cannot recover more than 15 percent of any recovery from the PCF.[52] The PCF has the right to take the excess damages claim to trial, but the settlement with the provider precludes the PCF from contesting the existence or cause of the underlying injury for which the provider settled.[53]

Legislative attempts at limiting medical malpractice claims have foundered in Illinois. Such is not the case in Indiana. A practitioner seeking to pursue medical malpractice claims in Indiana should be familiar with Indiana's MMA.

IV. Products Liability

Products liability in Indiana is governed by the Products Liability Act, Ind Code § 34-20. Unlike the statutes discussed previously, it imposes no damages cap or special procedures; instead, it sets forth the conditions for liability for defective products. The statute imposes strict liability on a manufacturer, distributor, or seller of a defective product as long as (1) the consumer is in the class of persons that the seller should reasonably foresee as being subject to harm caused by the defective condition, (2) the seller is engaged in the business of selling the product, and (3) the product is expected to and does reach the user without substantial alteration.[54] The statute also imposes a ten-year statute of repose, measured from the date of delivery to the initial user or consumer.[55] The statute also imposes a rebuttable presumption that the product is not defective.[56]

The act defines the circumstances under which a product may be considered defective. First, a product is defective when its condition is (1) not contemplated by reasonable persons among its expected users or consumers, and (2) is unreasonably dangerous to the expected user or consumer when used in reasonably expectable ways.[57] A product is also defective if the seller fails to properly package or label the product to give reasonable warnings of danger or give reasonable instructions on the product's proper use.[58] Products incapable of being made safe are not considered defective.[59]

V. Claims against Uninsured/ Underinsured Motorists Insurers and Alcoholic Beverage Providers

These two subjects, though seemingly unrelated, are addressed together because they share the same difference between Illinois and Indiana. Whereas Illinois has statutes governing both types of claims, in Indiana they are governed by common law.

Unlike Illinois's forced arbitration provisions, Indiana's scheme for handling UM/UIM claims is fairly straightforward. When a dispute arises about payment under a UM/UIM policy, the insured can commence an action directly against its insurer for recovery. The only restriction on the claim is that the insurer retains subrogation rights to any action against the tortfeasor to the extent of its payment.[60]

Similarly, Indiana's Dram Shop Act (Ind. Code § 7.1-5-10-15.5) is significantly shorter and simpler than Illinois's Dram Shop Act (235 Ill. Comp. Stat. 5/6-21). Indiana's statute merely provides that for an alcohol provider to be liable, "the person furnishing the alcoholic beverage had actual knowledge that the person to whom the alcoholic beverage was furnished was visibly intoxicated at the time the alcoholic beverage was furnished" and that damages be proximately caused by the intoxication.[61] All remaining aspects of dram shop claims are governed by common law. The damage caps and other restrictions of the Illinois act do not exist in Indiana.

VI. Insurer's Liability for Acting in Bad Faith

The standard for bad faith in Indiana is a high one: "To prove bad faith, the plaintiff must establish, with clear and convincing evidence, that the insurer had knowledge that there was no legitimate basis for denying liability."[62] Only the insured can bring it as a direct action against the insurer.[63] Nevertheless, the claim has enough flexibility to be useful in seeking recovery from insurers for judgments in excess of policy limits.

In cases where a plaintiff obtains a judgment against a defendant in excess of the defendant's insurance coverage, Indiana permits the defendant to assign their claim of bad faith breach of contract against their insurer to the plaintiff in exchange for the plaintiff forbearing from collecting the excess

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judgment from them directly.[64] In determining the extent of damages for bad faith, Indiana follows the "judgment rule," rather than the "payment rule."[65] This means that the insurer can be held liable for the entire amount of the excess judgment, rather than merely the amount that the insured would be able to pay.[66] This rule also applies to deceased insureds: the failure to file a claim against a deceased insured's probate estate or the liquidity of the estate does not reduce the plaintiff-assignee's ability to pursue the full value of the excess judgment.[67]

VII. The Nonparty Defense

Indiana, like Illinois, at least for suits against private entities, observes a comparative fault scheme, in which any percentage of fault assigned to the plaintiff proportionately reduces the plaintiff's damages.[68] If the plaintiff's fault is greater than that of all defendants combined, recovery is barred.[69]

A striking difference between the states lies in how fault by third parties is assigned. Illinois's contribution act allows a defendant to bring third parties into the suit allowing contribution among tortfeasors. Indiana, however, explicitly bars any right of contribution among tortfeasors.[70] Instead, it allows a defendant to assert as an affirmative defense the "nonparty defense," in which the defendant alleges that the plaintiff's damages "were caused in full or in part by a nonparty."[71] The defendant must plead the defense for it to apply, and bears the burden of proof at trial.[72]

The nonparty defense can be deadly for plaintiffs. Its effect is, absent dismissal or summary judgment, to place the named nonparty on the jury form, allowing the jury to assign it a percentage of the fault, proportionately reducing the plaintiff's recovery. The plaintiff must amend its complaint and name the nonparty as a defendant to recover for any fault assigned to it. This can sometimes put the plaintiff in the position of defending the nonparty at trial.

Indiana's Trial Rules allow liberal amendment of pleadings,[73] but the ability to amend can be seriously hampered by the statute of limitations. The statute contemplates this, and provides that any defendant served with a complaint at least 150 days before the statute of limitations expires must assert its nonparty defense at least 45 days before the statute of limitations expires.[74] In medical malpractice cases, the defendant has only 90 days after service to assert the nonparty defense.[75] The trial court, however, does have discretion to allow or disallow a nonparty defense considering the defendant's reasonable opportunity to discover and name nonparties, and the plaintiff's ability to name the nonparty as a defendant before the statute of limitations expires.[76]

Two practices greatly diminish the lethal nature of the nonparty defense: naming all potential parties in the initial complaint and filing well before the statute of limitations is set to run.

VIII. Prejudgment Interest

In Indiana, the traditional rule was that prejudgment interest could only be awarded when damages were readily ascertainable before reduction to judgment.[77] This meant that it was generally not available in personal injury cases.[78] In 1988, however, the Indiana General Assembly enacted Ind. Code § 34-52-4, abrogating the common-law rule.[79] That statute allows a plaintiff to make a written offer of settlement within one year of filing suit that provides for payment within 60 days of acceptance.[80] This is informally known as a qualified settlement offer, or QSO. If the defendant refuses to accept the QSO and the judgment ultimately entered is at least 75 percent of the QSO amount, the trial court can award prejudgment interest at a rate of between six and ten percent for a period of up to four years, computed from a statutorily-prescribed date.[81]

A few pitfalls do exist. First, the court can exclude from the accrual period any time that it deems resulted from the plaintiff's delay.[82] Also, prejudgment interest is not available if the defendant, within nine months of the plaintiff filing suit, sends a written settlement offer that provides for payment within 60 days of acceptance, the plaintiff rejects that offer, and the offer is at least two-thirds of the judgment amount.[83] And, ultimately, the decision to award interest, as well as the determination of the principal amount, rate, and accrual period, all lie within the discretion of the trial court.[84]

This scheme is an effective tool to place additional risks on a defendant for its failure to settle. It does require action by the plaintiff, however. The effective practitioner will put the QSO to good use, and hopefully reap its benefits.

IX. Appearing *Pro Hac Vice*

Presumably, many readers of this article will need *pro hac vice* admission to use the information in this article. Accordingly, a word on that procedure is appropriate. An attorney not licensed in Indiana seeking to appear as counsel before any court or administrative body must follow Admission and Discipline Rule 21. To be admitted before a court, an attorney must first meet the following conditions: (1) an Indiana attorney has appeared and agreed to act as co-counsel; (2) the petitioning attorney does not live, work, or regularly engage in business in Indiana; (3) the petitioning attorney has paid the required registration fee to the Clerk of the Supreme Court; and (4) the petitioning attorney files a verified petition setting forth detailed information (outlined in the rule) about their practice, admissions, and appearances.[85] The court where the applicant seeks admission has complete discretion to admit the attorney, on determination that good cause exists for the appearance, or deny admission altogether.[86]

Rule 21 also states, "[a]bsent good cause, repeated appearances by any person or by members of a single law firm pursuant to this rule shall be cause for denial of the petition."[87] Indiana courts, both at the trial and appellate

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level, display a strong preference for Indiana attorneys representing parties in court. Some courts deny petitions for admission *pro hac vice* more than they grant them. Illinois practitioners should consider this (and also consider licensure in Indiana) when applying for *pro hac vice* admission.

X. Conclusion

This article has touched on what the authors believe the most common and important differences of substantive law that affect tort actions. This article does not attempt to cover all the differences between Indiana and Illinois law such as notice pleading in Indiana versus fact pleading in Illinois, Indiana's Trial Rules versus Illinois's Code of Civil Procedure, Indiana's adherence to the Federal Rules as to the use of depositions versus Illinois's distinction between discovery and evidentiary depositions, and so on. Those topics are left for another time.

While medical malpractice claims and tort claims against government entities are more restrictive in Indiana than in Illinois, Indiana law is more generous for plaintiffs having UM/UIM claims, dram shop claims, and bad faith claims against insurers. Illinois has no provision that compares with Indiana's tort prejudgment interest statute.

The limited scope of this article is instead to provide practitioners of tort law in Illinois with a brief reference to some of the more important issues that may arise in the course of cross-border practice.

Endnotes

[1] The Weather Channel, Press Release, November 23, 2010, *available at* http://press.weather.com/press-releases/the-weather-channel-ranks-americas-top-10-most- congested-roads/ (last visited November 11, 2013).

[2] *Ed Wiersema Trucking Co. v. Pfaff*, 643 N.E.2d 909, 911 (Ind. Ct. App. 1994).

[3] *Id.*

[4] Ind. Code § 34-23-1-1.

[5] *McCabe v. Comm'r*, 949 N.E.2d 816, 818 (Ind. 2011), *quoting* Ind. Code § 34-23-1-2(c).

[6] *Best Homes, Inc. V.v. Rainwater*, 714 N.E.2d 702, 705 (Ind. Ct. App. 1999).

[7] *Brenton v. Lutz*, 993 N.E.2d 235, 238-41 (Ind. Ct. App. 2013).

[8] *Id.*

[9] Ind. Code § 34-23-1-1.

[10] *Id.*

[11] *S.M.V. v. Littlepage*, 443 N.E.2d 103, 110 (Ind. Ct. App. 1982).

[12] *Deaconess Hosp., Inc. v. Gruber*, 791 N.E.2d 841, 845 (Ind. Ct. App. 2003).

[13] *Ed Wiersema Trucking*, 643 N.E.2d at 913 (non-dependent adult children).

[14] *Id.*

[15] *Id.*

[16] *Hillebrand v. Estate of Large*, 914 N.E.2d 846, 850 (Ind. Ct. App. 2009).

[17] *Thomas v. Eads*, 400 N.E.2d 778, 783 (Ind. Ct. App. 1980).

[18] Ind. Code § 34-13-3-6.

[19] Ind. Code § 34-13-3-8.

[20] Ind. Code § 34-13-3-10.

[21] Ind. Code § 34-13-3-11.

[22] *Walker v. Memering*, 471 N.E.2d 1202, 1204-05 (Ind. Ct. App. 1984).

[23] Ind. R. Trial P. 4.6(A)(3).
[24] Ind. Code § 34-13-3-3.
[25] *Peavler v. Bd. of Comm'rs*, 528 N.E.2d 40, 46 (Ind. 1988).
[26] *See* Ind. Code § 34-13-3-3(1)-(5), (18).
[27] *See* Ind. Code § 34-13-3-3(6)-(9), (11)-(13), (20)-(22), (24).
[28] Ind. Code § 34-13-3-4.
[29] Ind. Code § 34-51-2-2.
[30] Ind. Code § 34-51-2-5.
[31] Ind. Code § 34-18-2-18.
[32] Ind. Code § 34-18-2-14.
[33] Ind. Code §§ 34-18-3-1 to -3, 34-18-6.
[34] Ind. Code § 34-18-3-4.
[35] *Winona Mem. Found'n v. Lomax*, 465 N.E.2d 731, 742 (Ind. Ct. App. 1984).
[36] Ind. Code § 34-18-8-4.
[37] Ind. Code § 34-18-7-1, -3.
[38] Ind. Code § 34-18-8-7(a).
[39] Ind. Code § 34-18-11-1.
[40] Ind. Code § 34-18-10-2.
[41] Ind. Code §§ 34-18-10-3, -4, -6, -7.
[42] Ind. Code §§ 34-18-10-4(1), -5.
[43] Ind. Code § 34-18-10-8.
[44] Ind. Code §§ 34-18-10-13, -21, -22.
[45] Ind. Code § 34-18-10-23.
[46] Ind. Code § 34-18-4-3(a).
[47] Ind. Code § 34-18-4-3(b)-(c).
[48] *Poehlman v. Feferman*, 717 N.E.2d 578, 584 (Ind. 1999).
[49] *Id.*; *Cahoon v. Cummings*, 734 N.E.2d 535, 547-48 (Ind. 2000).
[50] Ind. Code § 34-18-15-3.
[51] Ind. Code § 34-18-15-4.
[52] Ind. Code § 34-18-18-1.
[53] *Robertson v. B.O.*, 377 N.E.2d 341, 348 (Ind. 2012).
[54] Ind. Code § 34-20-2.
[55] Ind. Code § 34-20-3-1(b).
[56] Ind. Code § 34-20-5-1.
[57] Ind. Code § 34-20-4-1.
[58] Compare 215 ILCS 5/143a(1) with Ind. Code § 34-20-4-2.
[59] Ind. Code § 34-20-4-4.
[60] Ind. Code § 27-7-6-5(a).
[61] Ind. Code § 7.1-5-10-15.5(b).
[62] *Freidline v. Shelby Ins. Co.*, 774 N.E.2d 37, 40 (Ind. 2002).
[63] *Menefee v. Schurr*, 751 N.E.2d 757, 761 (Ind. Ct. App. 2001).
[64] *State Farm Mut. Auto. Ins. Co. Vv. Estep*, 873 N.E.2d 1021, 1024-25, 1028 (Ind. 2007); *Erie Ins. Co. v. Hickman*, 622 N.E.2d 515, 518-19 (Ind. 1993).
[65] *Econ. Fire & Cas. Co. Vv. Collins*, 643 N.E.2d 382, 386 (Ind. Ct. App. 1994).
[66] *Id.* at 384-86.
[67] *Pistalo v. Progressive Cas. Ins. Co.*, 983 N.E.2d 152, 158-59 (Ind. Ct. App. 2012).
[68] Ind. Code § 34-51-2-5.
[69] Ind. Code § 34-51-2-6.
[70] Ind. Code § 34-51-2-12.
[71] Ind. Code § 34-51-2-14.
[72] Ind. Code § 34-51-2-15.
[73] Ind. R. Trial P. 15(A).
[74] Ind. Code § 34-51-2-16.
[75] Ind. Code § 34-51-2-17.
[76] Ind. Code § 34-51-2-16.
[77] *Kosarko v. Padula*, 979 N.E.2d 144, 146 (Ind. 2012).
[78] *Id.*
[79] *Id.* at 145, 147.
[80] Ind. Code § 34-51-4-6.
[81] Ind. Code §§ 34-51-4-6, -8, -9.
[82] Ind. Code § 34-51-4-8(b).
[83] Ind. Code § 34-51-4-5.
[84] *Kosarko*, 979 N.E.2d at 150.
[85] Ind. Adm. & Disc. R. 3, § 2(a).
[86] *Id.*
[87] *Id.*, § 2(a)(vii).

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