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Medical Malpractice Statute Which Prevents Tolling of Limitations during Infancy Violates Due Process Clause of Texas Constitution.

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LIMITATION OF ACTIONS—DISABILITY OF INFANCY—Medical Malpractice Statute Which Prevents Tolling of Limitations During Infancy Violates Due Process Clause of Texas Constitution

Sax v. Votteler,
648 S.W.2d 661 (Tex. 1983).

Eleven year old Lori Beth Sax was operated on by Dr. T.P. Votteler to remove her appendix in May, 1976.[1] The parents of Lori Beth, individually and as next friend of their daughter, brought suit against Dr. Votteler in February, 1979, alleging that he had negligently removed a fallopian tube instead of the appendix.[2] At trial, Dr. Votteler relied on the provision in the Texas Insurance Code[3] which limited malpractice actions to two years from the date of last treatment by the physician.[4] The trial court granted the defendant's motion for summary judgment.[5] The court of appeals affirmed,[6] finding no equal protection violations, and ruling that the Saxes' due process argument had not been properly preserved for appeal.[7] The

1. Sax v. Votteler, 648 S.W.2d 661, 663 (Tex. 1983).
2. *See id.* at 663.
3. TEX. INS. CODE ANN. art. 5.82 (Vernon 1975) (repealed 1977).
4. *Id.* § 4. Section 4 of article 5.82 provides:

> 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 in 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 their eighth birthday in which to file, or have filed in their behalf, such claim. Except as herein provided, this section applies to all persons regardless of minority or other legal disability.

Id.

5. *See* Sax v. Votteler, 648 S.W.2d 661, 663 (Tex. 1983).
6. *See* Sax v. Votteler, 636 S.W.2d 461, 465 (Tex. App.—Texarkana 1982), *aff'd in part, reversed and remanded in part,* 648 S.W.2d 661, 663 (Tex. 1983).
7. *See id.* at 465. The lower court ruled that the Saxes had not raised due process, and specifically the "Open Courts Provision" of article I, section 13 of the Texas Constitution, as a defense to Dr. Votteler's motion for summary judgment. The lower court added, however, that even if considered, the due process question would not compel reversal of the trial court. *See id.* at 465.

Texas Supreme Court granted a writ of error.[8] Held—*Affirmed in part, reversed and remanded in part.* A medical malpractice statute which prevents tolling of limitations during infancy and purports to bar a minor's cause of action violates the due process clause of the Texas Constitution.[9]

Statutes of Limitation have been employed for centuries to discourage lawsuits which are based on stale or fraudulent claims.[10] A recognized consequence of such a limitation is that there may be some legitimate plaintiffs who will be denied recovery.[11] Nevertheless, courts generally enforce the limitation statutes when applicable, relying on the legislature's determination of how such a class of cases should be treated.[12] As the statutes developed, they began to vary according to the underlying causes of action being asserted.[13] In addition, exceptions to the general rules of limitation were promulgated to accomodate those persons on whom the limitations would create an obvious hardship.[14]

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8. Sax v. Votteler, 648 S.W.2d 661, 663 (Tex. 1983).

9. *See id.* at 667.

10. *See* R. SOHM, THE INSTITUTES 282-84 (J. Ledlie trans. 3rd ed. 1970) (outlining the general laws of limitation in Roman law); *Developments in the Law—Statutes of Limitations,* 63 HARV. L. REV. 1177, 1177-79 (1950) (noting early history of limitations in Roman, English, German, and Swiss law); *see also* TEX. REV. CIV. STAT. ANN. art. 4590i, § 4.01 (Vernon Supp. 1982-1983) (requiring plaintiff in medical malpractice actions to give sixty days notice to defendants before filing suit); TEX. BUS. & COM. CODE ANN. § 17.50A (Vernon Supp. 1982-1983) (requiring plaintiff in Deceptive Trade Practice actions to give thirty days notice in order to recover treble damages). Notice statutes are a statutory method of more recent origin used to discourage non-meritorious claims. By requiring plaintiffs to notify potential defendants of any contemplated legal action, the parties are encouraged to negotiate and make offers of settlement before their dispute is brought into court. *See* Comment, *An Analysis of the 1979 Deceptive Trade Practices Act and Possible Ramifications of Recent Amendments: Is the Act Still Consumer Oriented?,* 11 ST. MARY'S L.J. 885, 907 (1980) (noting how amendments which limit damages if notice is not given promote negotiation).

11. *See* Robinson v. Weaver, 550 S.W.2d 18, 20 (Tex. 1977) (exclusion of legitimate claims "an unfortunate, occasional by-product").

12. *See, e.g.,* Kavanaugh v. Noble, 332 U.S. 535, 539 (1947) (statutes of limitation strictly construed by judiciary and act to "cut off rights, justifiable or not"); Demchuk v. Duplancich, 440 N.E.2d 112, 115 (Ill. 1982) (upholding Dram Shop Act limitation of one year, citing legislature's choice not to amend in 18 years); Littlefield v. Hayes, 609 S.W.2d 627, 630 (Tex. Civ. App.—Amarillo 1980, no writ) (discovery rule court-created and may be abolished by legislature). *But see* Aljadir v. University of Penn., 547 F. Supp. 667, 669 (E.D. Penn. 1982) (equitable tolling may be applied to extraordinary situations); Henderson Clay Products, Inc. v. Edgar Wood & Assoc., Inc., 451 A.2d 174, 175 (N.H. 1982) (statute protecting class of persons by limitation held unconstitutional).

13. *See* TEX. REV. CIV. STAT. ANN. art. 5526 (Vernon 1975) (personal injury causes of action limited to two years); *id.* art. 5527 (debt causes of actions limited to four years); *see also* J. POMEROY, CODE REMEDIES §§ 589-90 (1929) (noting varied types of pleading which developed with statutes of limitation).

14. *See, e.g.,* McClung v. Johnson, 620 S.W.2d 644, 647 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.) (limitation on attorney malpractice tolled as long as attorney-client relation-

Infancy has long been regarded as such an exception, and the enforcement of legal deadlines has consequently been tolled during the minority of the person in question.[15] The concept of tolling became necessary because the courts recognized that minors have a common law right to sue others in certain actions but lack the legal capacity to sue until they are adults.[16] The exception of disability of infancy thus acts to preserve a minor's cause of action until he or she is recognized as an adult at law and has the opportunity to initiate the legal process in his or her own capacity.[17] Texas has recognized the disability of infancy since 1841,[18] and its across-the-board application has been withdrawn only in very limited instances.[19]

The field of medical malpractice is one instance where the disability of infancy has been made inapplicable by a legislative act.[20] During the 1970's, malpractice litigation and the resulting liability of physicians and hospitals increased dramatically.[21] Finding malpractice insurance costs ex-

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ship exists); Adler v. Beverly Hills Hosp., 594 S.W.2d 153, 155 (Tex. Civ. App.—Dallas 1980, no writ) (false imprisonment cause of action accrues when imprisonment ends); TEX. REV. CIV. STAT. ANN. art. 5535 (Vernon Supp. 1982-1983) (providing for disabilities of minority, married persons under 21 years of age, imprisonment and insanity); *see also* J. ANGELL, LIMITATIONS OF ACTIONS AT LAW 194-207 (1869) (accounting for the more familiar disabilities as well as disability of slavery or persons "beyond the seas").

15. *See, e.g.,* Lacy v. Williams, 8 Tex. 182, 187-88 (1852) (minor heir's suit for recovery of property tolled during infancy); McCulloch v. Renn, 28 Tex. 793, 797 (1866) (minor's suit for recovery of slaves not barred by limitation); Law of Feb. 5, 1841, art. 997, § 11, 1841 Tex. Gen. Laws 163, 2 H. GAMMEL, LAWS OF TEXAS 630 (1898) (providing for tolling of limitations until majority).

16. *See* Texas Utils. Co. v. West, 59 S.W.2d 459, 461 (Tex. Civ. App.—Amarillo 1933, writ ref'd) (minor has cause of action for wrongful death of parent); Fall v. Webber, 47 S.W.2d 365, 366 (Tex. Civ. App.—Dallas 1932, writ ref'd) (defendant's attempt to join actions of injured child and parent not allowed).

17. *See, e.g.,* Cox v. McDonnell-Douglas Corp., 665 F.2d 566, 572 (5th Cir. 1982) (minor could bring wrongful death cause of action even if mother's claim was barred); Doran v. Compton, 645 F.2d 440, 452 (5th Cir. 1981) (defendant's motion for summary judgment based on limitation denied, minority of plaintiff preserves claim); Flores v. Edinburg Consol. Indep. School Dist., 554 F. Supp. 974, 982-83 (S.D. Tex. 1982) (limitations tolled in civil rights action brought by minor).

18. *See* Law of Feb. 5, 1841, art. 997, § 11, 1841 Tex. Gen. Laws 163, 2 H. GAMMEL, LAWS OF TEXAS 630 (1898).

19. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Supp. 1982-1983) (current statute limiting tolling for malpractice actions of minors to twelve years of age); TEX. FAM. CODE ANN. § 13.01 (Vernon Supp. 1982-1983) (four year limit for initiation of paternity suits not tolled by infancy).

20. *See* TEX. INS. CODE art. 5.82 (Vernon 1975) (repealed 1977).

21. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 1.02 (Vernon Supp. 1982-83) (legislature's findings of increased claims as basis for malpractice insurance act); *see also* Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications,* 55 TEXAS L. REV. 759, 760 (1977) (citing example of premiums increasing 100 percent be-

cessive or even prohibitive, doctors and insurers lobbied in the state legislatures for relief.[22] The legislative responses varied widely, but most statutes incorporated some combination of a limitation on the amount of recovery,[23] a limitation on the time in which a malpractice action can be filed,[24] and/or the creation of a medical panel or arbitration board.[25] Of those statutes which employed time limitations, many specifically provided that actions brought by minors against health care providers should be tolled only for an abbreviated time, notwithstanding other laws which may toll limitations until majority.[26] State courts have generally upheld medical malpractice statutes containing such provisions when subjected to review under the federal and state constitutions.[27]

Prior to 1975, Texas courts struggled with the application of the discovery doctrine to tort cases involving physicians.[28] In that year, the Texas legislature enacted the Professional Liability Insurance for Physicians,

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tween 1974 and mid-1975); Abraham, *Medical Malpractice Reform: A Preliminary Analysis,* 36 MD. L. REV. 489, 490-91 (1977) (referring to specific insurance company's claims rising over 130 percent in six years).

22. *See* Birnbaum, *Physician's Counter-Attack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions,* 45 FORDHAM L. REV. 1003, 1005 (1975) (noting physicians' petitioning for legislative redress); Higgs, *Physician's Countersuits: A Solution To The Medical Malpractice Dilemma?,* 28 DRAKE L. REV. 81, 81-82 (1977) (noting growth of physician activism and the growing use of countersuit).

23. *See* IND. CODE ANN. § 16-9.5-2-2(a) (Burns 1983) ($500,000 aggregate limit on recovery); LA. REV. STAT. ANN. § 40:1299.42B(1) (West 1977) ($500,000 limit on recovery).

24. *See, e.g.,* ALA. CODE § 6-5-482 (1977) (general two year limitation; minors younger than four have until eighth birthday); ARIZ. REV. STAT. ANN. § 12-564 (1982) (general three year limitation; minors younger than seven have limitation run from age seven); DEL. CODE ANN. tit. 18, § 6856 (Supp. 1982) (general two or three year limitation; minors younger than six have limitation run from age six).

25. *See, e.g.,* ILL. ANN. STAT. ch. 10, § 201-214 (Smith-Hurd 1983) (state arbitration board utilized for malpractice claims); IND. CODE ANN. § 16-9.5-9-1 (Burns 1983) (malpractice plaintiffs required to submit claim to medical review panel); LA. REV. STAT. ANN. § 40:1299.47 (West Supp. 1983) (plaintiffs required to submit claim to medical review panel); *see also* Eastin v. Broomfield, 570 P.2d 744, 749 (Ariz. 1977) (constitutionality of medical review panel upheld). Medical review panels and arbitration boards have been challenged on grounds of right to trial by jury, *see id.* at 749; equal protection, *see id.* at 750-51; as an impermissible judicial comment on the evidence, *see id.* at 749, 750; and as an usurpation of the judicial function of the courts, *see id.* at 750.

26. *See, e.g.,* MO. ANN. STAT. § 516.105 (Vernon Supp. 1982) (minors under 10 have until 12th birthday); OHIO REV. CODE ANN. § 2305.11 (Baldwin 1982) (minors under 10 have until 14th birthday); TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Supp. 1982-1983) (minors under 12 have until 14th birthday).

27. *See* Reese v. Rankin Fite Memorial Hosp., 403 So. 2d 158, 160-62 (Ala. 1982) (statute limiting minor's time to bring suit constitutional); Baird v. Loeffler, 433 N.E.2d 194, 195-96 (Ohio 1982) (minor's claim barred by limitation, reasonable time of one year after limiting statute in effect).

28. *See* Robinson v. Weaver, 550 S.W.2d 18, 20-21 (Tex. 1977) (in a 5-4 decision,

Podiatrists, and Hospitals Act (referred to hereinafter as the 1975 Liability Act).[29] This Act required that malpractice claims be brought within two years from the alleged tort or its last related treatment.[30] The 1975 Liability Act further provided that the disability of infancy preserved a cause of action only until a child's sixth birthday from which time the limitation begins to run.[31] These provisions were codified as article 5.82 of the Texas Insurance Code, and were challenged and upheld in the Texas courts of appeal.[32] In 1977, the Texas legislature passed the Medical Liability and Insurance Improvement Act (referred to hereinafter as article 4590i) to replace the medical malpractice sections of the Insurance Code.[33] Article

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Supreme Court of Texas ruled discovery doctrine not applicable to claim of misdiagnosis by defendant physician).

29. TEX. INS. CODE ANN. art. 5.82 (Vernon 1975) (repealed 1977).

30. *See* Delgado v. Burns, 650 S.W.2d 505, 506-07 (Tex. App.—Houston [14th Dist.] 1983, no writ) (discovery doctrine does not apply to foreign objects since 1975 Liability Act has set absolute time limit). *But see* Robinson v. Weaver, 550 S.W.2d 18, 21 (Tex. 1977) (discovery rule still applies to actions based on foreign objects left in body, vasectomies, and excessive x-ray exposure); Nelson v. Krusen, 635 S.W.2d 582, 585 (Tex. App.—Dallas 1982, no writ) (citing discovery rule exceptions of *Robinson*). The cause of action in *Robinson* had accrued before the 1975 Malpractice Act was in effect. *See* Robinson v. Weaver, 550 S.W.2d 18, 19 (Tex. 1977). *Delgado* and *Nelson* appear to be in direct conflict in interpreting how cases such as those described in *Robinson* are affected by the 1975 Liability Act. The *Delgado* court ruled that the 1975 Malpractice Act destroyed court-created discovery rules pertaining to medical malpractice actions, but made no reference to the decision in *Robinson*. *See* Delgado v. Burns, 650 S.W.2d 505, 507 (Tex. App.—Houston [14th Dist.] 1983, no writ). The *Nelson* court ruled the exceptions of *Robinson* were controlling, and would continue to be effective until the Supreme Court ruled otherwise. *See* Nelson v. Krusen, 635 S.W.2d 582, 584-85 (Tex. App.—Dallas 1982, no writ); *cf.* Newberry v. Tarrin, 594 S.W.2d 204, 206-07 (Tex. Civ. App.—Corpus Christi 1980, no writ).

31. TEX. INS. CODE ANN. art. 5.82 (Vernon 1975) (repealed 1977).

32. *See* Littlefield v. Hayes, 609 S.W.2d 627, 629 (Tex. Civ. App.—Amarillo 1980, no writ); Wallace v. Homan & Crimen, Inc., 584 S.W.2d 322, 323-24 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.). In *Littlefield,* the plaintiff was seven months late in filing suit, and the court of appeals ruled that the action was barred, stating article 5.82 had a rational basis and the court would defer to the finding of the legislature. *See* Littlefield v. Hayes, 609 S.W.2d 627, 629 (Tex. Civ. App.—Amarillo 1980, no writ). In *Wallace,* the plaintiff brought suit for the wrongful death of his father which had occurred in 1961. Although the plaintiff had filed suit two days before his twentieth birthday, the El Paso Court of Civil Appeals ruled that the two year limitation ran from the effective date of the new 1975 Liability Act, and not from the plaintiff's eighteenth birthday, thereby making his claim late by three weeks. *See* Wallace v. Homan & Crimen, Inc., 584 S.W.2d 322, 324 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.). Presumably, *Sax* and *Wallace* are not in conflict because the plaintiff in *Wallace* did not plead a violation of article I, section 13 of the Texas Constitution. *See id.* at 324. The Supreme Court made no mention of *Wallace* in the *Sax* opinion; however, it is evident that *Wallace* is no longer controlling on this issue. *See* Sax v. Votteler, 648 S.W.2d 661, 667 (Tex. 1983).

33. TEX. REV. CIV. STAT. ANN. art. 4590i (Vernon Supp. 1982-1983). Section 10.01 provides:

4590i, the statute currently in effect, tracks the language of its predecessor, but provides that minors under twelve have until their fourteenth birthday to file a malpractice claim.[34]

In *Sax v. Votteler,*[35] the minor plaintiff and her parents challenged the constitutionality of section 10.01 of the 1975 Liability Act.[36] The pleading by a minor of a due process violation distinguished the facts in *Sax* from the earlier decisions of the courts of appeal.[37] The *Sax* decision did not rely on any previous case concerning medical malpractice.[38] In an opinion written by Justice Kilgarlin, the supreme court concluded, without dissent, that article I, section 13 of the Texas Constitution[39] confers "additional rights" of access to the courts which, in this instance, were

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> Notwithstanding any other law, no health care liability claim may be commenced unless the action is filed within two years of the occurrence of the breach or tort or from the date the medical or health care treatment that is the subject of the claim or the hospitalization for which the claim is made is completed; provided that minors under the age of 12 years shall have until their 14th birthday in which to file, or have filed in their behalf, the claim. Except as herein provided, this subchapter applies to all persons, regardless of minority or other disability.

Id. § 10.01.

34. *See id.* § 10.01. The provision limiting a minor's claim has yet to be challenged. *See* Borderlon v. Peck, 26 Tex. Sup. Ct. J. 494 (July 6, 1983); Schepps v. Presbyterian Hosp. of Dallas, 26 Tex. Sup. Ct. J. 466 (June 25, 1983). In *Borderlon,* the lower courts ruled that article 4590i had eliminated fraudulent concealment as a defense to limitations and that the legislature had created an absolute time limit in which to bring an action. *See* Borderlon v. Peck, 643 S.W.2d 233, 235 (Tex. App.—El Paso 1982), *rev'd and remanded,* 26 Tex. Sup. Ct. J. 494 (July 6, 1983). In a 5-4 decision, the Texas Supreme Court ruled that the principles of equitable estoppel were to be applied, notwithstanding the absolute language of the statute. *See* Borderlon v. Peck, 26 Tex. Sup. Ct. J. 494, 495 (July 6, 1983). The dissent supported the position of the court of appeals, and expressed concern that the ruling by the majority would make the limitation section of article 4590i meaningless. *See id.* at 496-97. In *Schepps,* the appellants challenged the sixty day notice requirement of article 4590i. The trial court granted summary judgment on the grounds that notice had not been given, and the court of appeals affirmed. *See* Schepps v. Presbyterian Hosp. of Dallas, 638 S.W.2d 156, 158 (Tex. App.—Dallas 1982), *aff'd in part, rev'd and remanded in part,* 26 Tex. Sup. Ct. J. 466 (June 25, 1983). The Supreme Court ruled that, although the notice requirement was mandatory, it did not destroy the plaintiff's cause of action. *See* Schepps v. Presbyterian Hosp. of Dallas, 26 Tex. Sup. Ct. J. 466, 469 (June 25, 1983). The failure of the plaintiff to give notice resulted in an abatement of the cause for sixty days, and the cause was remanded to the trial court. *See id.* at 469.

35. 648 S.W.2d 661 (Tex. 1983).

36. *See id.* at 644.

37. *See* Littlefield v. Hayes, 609 S.W.2d 627, 628 (Tex. Civ. App.—Amarillo 1980, no writ) (challenge to limitation of 1975 Liability Act by adult); Wallace v. Homan & Crimen, Inc., 584 S.W.2d 322, 323 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.) (minor plaintiff did not plead due process in challenging 1975 Liability Act limitation).

38. *See* Sax v. Votteler, 648 S.W.2d 661 (Tex. 1983).

39. *See* TEX. CONST. art. I, § 13. Section 13 provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts

unreasonably denied.[40] The test used by the *Sax* court was that a plaintiff must show that a common law right to bring suit has been abridged, and that the abridgment was unreasonable when weighed against the purposes of the statute in question.[41] In applying this rationale to the instant case,[42] the court first noted that a minor has a right to recover in a personal injury case, and that this right is not the same as the parent's right to recover damages.[43] Secondly, since a minor could not bring suit in his own name until his disability has been removed, the limitation requires the minor to rely on parents or a legal guardian for timely legal action.[44] Such a reliance in effect restricted a minor's common law right to bring an action into court.[45] The right to bring suit for personal injury outweighed the need to reduce the potential liability of health care providers, and as a result, the court found that a violation of due process existed.[46] The parents of Lori Beth were properly barred, however, by the defense of limitations from suing for damages which they had incurred, and that part of the lower court's opinion was affirmed.[47] In concluding, the court specifically set out the damages Lori Beth could potentially recover if her claim was upheld at

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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." *Id.*

40. *See* Sax v. Votteler, 648 S.W.2d 661, 664 (Tex. 1983).

41. *See id.* at 664-65. The court cited Waites v. Sondock, 561 S.W.2d 772, 773 (Tex. 1977) (use of legislative continuance violated right of immediate redress); Lebohm v. City of Galveston, 275 S.W.2d 951, 952 (Tex. 1955) (city ordinance requiring notice of any street defect before it was liable for injury is unconstitutional); Hanks v. City of Port Arthur, 48 S.W.2d 944, 945 (Tex. 1932) (city ordinance requiring notice of street defect before claim can be filed ruled unconstitutional) as examples of how article I, section 13 had been previously interpreted. None of the above cases dealt with a limitation of action, but instead were examples of laws which were overturned because they unreasonably inhibited due process in obtaining legal redress under the Texas Constitution, article I, section 13. *See* Waites v. Sondock, 561 S.W.2d 772, 773 (Tex. 1977); Lebohm v. City of Galveston, 275 S.W.2d 951, 952 (Tex. 1955); Hanks v. City of Port Arthur, 48 S.W.2d 944, 945 (Tex. 1932).

42. Sax v. Votteler, 648 S.W.2d 661, 666 (Tex. 1983).

43. *See id.* at 666; *cf.* Sanchez v. Schindler, 651 S.W.2d 249, 250-51 (Tex. 1983). In *Sanchez,* the supreme court overturned its longstanding pecuniary loss rule in wrongful death actions. Previously, parents who sued for the wrongful death of their child were limited in their recovery to what income the child could have generated less the cost of raising the child. *See id.* at 251. The court followed the lead of Selders v. Armentrout, 207 N.W.2d 686, 688-89 (Neb. 1973) and other decisions allowing parents to recover for mental anguish and for loss of society and companionship. *See* Sanchez v. Schindler, 651 S.W.2d 249, 252 (Tex. 1983). This decision is another reflection of how the Texas Supreme Court is changing its views in order to treat minors as individuals, rather than as an asset or a liability to their parents. *See id.* at 252, 253.

44. *See* Sax v. Votteler, 648 S.W.2d 661, 667 (Tex. 1983).

45. *See id.* at 667.

46. *See id.* at 667.

47. *See id.* at 667.

trial.[48]

The Supreme Court of Texas in *Sax* has taken a realistic and reasonable approach in resolving a conflict between common law rights and statutory limitations.[49] The conclusion is sound: those persons under the disability of infancy have a right to bring common law actions, and the abrogation of this right is considered unreasonable and therefore unconstitutional.[50] The court arrived at this conclusion by first finding that the due process issue had been preserved for review.[51] Although framed in the language of equal protection, the Saxes' pleading did state the issue of a minor's due process right to bring a claim and this question should have been considered by the lower court.[52] The Supreme Court went on to review the statute in light of the Texas Constitution and found article 5.82 to be unconstitutional only to the extent necessary to eliminate the due process problem.[53] The purposes of the 1975 Liability Act were also briefly discussed.[54] The main concern of the court was the right of a minor to bring a cause of action into court without being dependent upon another individ-

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48. *See id.* at 667.

49. *See id.* at 667.

50. *See id.* at 667; *cf. In re* J.A.M., 631 S.W.2d 730, 732 (Tex. 1982). In *J.A.M.*, the Texas Supreme Court held that a provision of the Family Code which limited the initiation of paternity suits to one year from the birth of the child was unconstitutional. *See id.* at 732. This provision was repealed in 1981 and replaced with a four year limitation. *See* TEX. FAM. CODE § 13.01 (Vernon Supp. 1982-1983). The Texas Supreme Court withheld its opinion in *J.A.M.* until the United States Supreme Court rendered its decision in Mills v. Habluetzel, 456 U.S. 91, 101 (1982). In *Mills,* the Supreme Court found the one year limitation of paternity actions in Texas to be violative of the equal protection clause of the United States Constitution. Justice O'Connor wrote a concurring opinion in which four other justices joined, to emphasize the majority opinion should not be interpreted to mean the present four year Texas statute was constitutional. *See id.* at 102. The Texas Supreme Court made reference to Justice O'Connor's concurring opinion, but reserved its opinion as to any possible implications. *See In re* J.A.M., 631 S.W.2d 730, 732 (Tex. 1982).

51. *See* Sax v. Votteler, 648 S.W.2d 661, 665 (Tex. 1983).

52. *See* Sax v. Votteler, 636 S.W.2d 461, 465 (Tex. App.—Texarkana 1982), *aff'd in part, rev'd and remanded in part,* 648 S.W.2d 661 (Tex. 1983). The lower court relied on Rule 166-A(c) of the Texas Rules of Civil Procedure, which provides in pertinent part: "Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal." TEX. R. CIV. P. 166-A(c). *See* Sax v. Votteler, 636 S.W.2d 461, 465 (Tex. App.—Texarkana 1982), *aff'd in part, rev'd and remanded in part,* 648 S.W.2d 661 (Tex. 1983).

53. *See* Sax v. Votteler, 648 S.W.2d 661, 667 (Tex. 1983); *cf.* Grove Mfg. Co. v. Cardinal Const. Co., 534 S.W.2d 153, 155 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.) (entire Workmen's Compensation Act challenged as violative of article I, § 13, but court reviewed only as to question of arbitrariness).

54. *See* Sax v. Votteler, 648 S.W.2d 661, 666 (Tex. 1983); *cf.* Schepps v. Presbyterian Hosp. of Dallas, 26 Tex. Sup. Ct. J. 466, 469 (June 26, 1983). In *Schepps,* the supreme court interpreted the notice statute of article 4590i and placed great emphasis on the legislative history of the Act. *See id.* at 469.

ual's adult standing.[55] The court sharpened its focus when reviewing a minor's claim and rendered a decision on the basis of the plaintiff's having independent, individual rights, and not simply those which are ancillary to her parent's rights and actions.[56] Thus, the minor's right to toll limitations is not merely an equitable principle, but is guaranteed under the Texas Constitution.[57]

The Supreme Court's concern for plaintiff's rights was also present in *Schepps v. Presbyterian Hospital of Dallas,*[58] a decision rendered only six weeks after *Sax.* In *Schepps,* the trial court concluded that dismissal of a malpractice claim was proper when it was shown that the plaintiff had failed to comply with the statutory notice requirement.[59] The Supreme Court, relying on the stated purpose contained in article 4590i itself,[60] found that dismissal was "an undue restriction" of the plaintiff's right to sue.[61] The *Schepps* opinion demonstrates the tendency of the Texas Supreme Court to interpret a statute so that a cause of action will be preserved, if the statutory language may be so construed.[62] Thus, the tendency of the court to protect a claimant's cause of action applies to both constitutional review and interpretation of state statutes, as evidenced by the opinions in *Sax* and *Schepps.*[63] Taken together, *Sax* and *Schepps* are strong plaintiff cases which counteract to some degree the procedural defenses of

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55. *Cf.* TEX. FAM. CODE ANN. §§ 31.01, 31.02 (Vernon Supp. 1982-1983) (allowing minor to be legally emancipated at age 16 upon positive finding by court). Once emancipation of the minor has occurred, the disabilities of minority may be removed for some or all purposes. *See id.* § 31.01(a) (Vernon Supp. 1982-1983). Some argue the age of possible emancipation should be as young as 14 years of age. *See* Comment, *The Uncertain Status of the Emancipated Minor: Why We Need a Uniform Statutory Emancipation of Minors Act (USEMA),* 15 U.S. F. L. REV. 473, 483 (1981).

56. *See* Sax v. Votteler, 648 S.W.2d 661, 667 (Tex. 1983).

57. *See id.* at 667; *cf.* Texas Dept. of Human Resources v. Delley, 581 S.W.2d 519, 522 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.) (paternity action tolled during infancy since cause of action accrued before limitation was enacted). The one year limitation for bringing a paternity suit was held not to be retroactive and the four year statute was held to be applicable. The Dallas court then found the disability of infancy to apply, noting the importance of the minor's ability to bring his or her own action upon majority. *See id.* at 522; *see also* Solender, *Family Law: Parent and Child,* 34 SW. L.J. 159, 170 (1980) (importance of tolling limitations in paternity suits since fundamental rights of child involved).

58. 26 Tex. Sup. Ct. J. 466, 469 (June 25, 1983).

59. *See id.* at 466-67; TEX. REV. CIV. STAT. ANN. art. 4590i, § 4.01 (Vernon Supp. 1982-1983) (plaintiff "shall" notify all potential defendants of claims sixty days before filing suit).

60. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 4.01 (Vernon Supp. 1982-1983).

61. *See* Schepps v. Presbyterian Hosp. of Dallas, 26 Tex. Sup. Ct. J. 466, 469 (June 26, 1983).

62. *See id.* at 469; *see also* Salvaggio v. Brazos City Water Control, 598 S.W.2d 227, 229 (Tex. 1980) (rules of appellate review liberally construed in favor of appellant).

63. *See* Schepps v. Presbyterian Hosp. of Dallas, 26 Tex. Sup. Ct. J. 466, 469 (June 26, 1983); Sax v. Votteler, 648 S.W.2d 661, 667 (Tex. 1983).

notice and limitations in medical malpractice actions.[64]

One obvious ramification of the *Sax* decision concerns the constitutionality of article 4590i, the present statute which places limitations on malpractice actions.[65] The tolling limitation for minors filing claims has been raised from six to twelve years of age.[66] If the *Sax* rationale is to be followed, it is difficult to perceive how the new statute is any more reasonable than the previous provision of the 1975 Liability Act.[67] After *Sax,* the only acceptable version of such a medical malpractice statute appears to be one which does not affect common law disabilities.[68] If this reasoning is extended, it is difficult to conceive of any cause of action belonging to a minor which would not be tolled, in view of the due process analysis used by the court in *Sax.*[69]

A second and less immediate effect of the instant case is on malpractice insurance rates.[70] The 1975 Liability Act represented an attempt to draw some boundaries around a treating physician's liability so that medical malpractice insurance costs could be kept within reason.[71] The practical effect of the *Sax* ruling is to increase physicians' liability, especially if they are treating infants or children. Pediatricians, for example, will become greater insurance risks because they will be exposed to many more years of liability per patient than the adult practitioner.[72] One solution to this une-

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64. *See* Schepps v. Presbyterian Hosp. of Dallas, 26 Tex. Sup. Ct. J. 466, 469 (June 26, 1983); Sax v. Votteler, 648 S.W.2d 661, 663 (Tex. 1983).

65. *See* TEX. REV. CIV. STAT. ANN. art. 4590i (Vernon Supp. 1982-1983).

66. *See id.* § 10.01.

67. *See* Sax v. Votteler, 648 S.W.2d 661, 664 (Tex. 1983); TEX. INS. CODE ANN. art. 5.82 (Vernon 1975) (repealed 1977).

68. *See Sax v. Votteler*, 648 S.W.2d 661, 664 (Tex. 1983). The court also noted that there are no alternative remedies for the type of claim raised in the instant case. *See id.* at 667. In other causes of action in which a minor's claim is limited, such as paternity suits, at least some alternative remedy is available. For example, the State of Texas sponsors Aid for Dependent Children (AFDC) which is designed to provide funds where child support payments by a father are not available or are insufficient. *See* TEX. HUM. RES. CODE ANN. § 31.005 (Vernon 1980).

69. *See* Sax v. Votteler, 648 S.W.2d 661, 667 (Tex. 1983). The court did state that the right of the individual and the legislative basis of a law will be balanced, indicating that a crisis or a condition of sufficient magnitude within the state could outweigh a minor's right to toll limitations. *See id.* at 665-66. Apparently medical malpractice insurance and its related effects were considered such a crisis in 1975. *See id.* at 666. More recently, the number of claims has dropped but the amount of damages awarded has increased. *See* Davis, *Physician's Perspective,* 10 TEX. TECH L. REV. 331, 331 (1979).

70. *See* Littlefield v. Hayes, 609 S.W.2d 627, 629-30 (Tex. Civ. App.—Amarillo 1980, no writ) (finding establishment of standards for health care liability as a rational basis for the statute).

71. *See id.* at 629-30; *see also* Doran v. Compton, 645 F.2d 440, 450 (5th Cir. 1980) (citing need to lower insurance rates as main concern for passage of 1975 Liability Act).

72. *See* Sax v. Votteler, 648 S.W.2d 661, 667 (Tex. 1983). The court lists as possible

ven distribution of liability would be to implement provisions used in other states.[73] In Illinois, for example, after the medical malpractice statute was found to be unconstitutional,[74] the state enacted a law creating an arbitration board for malpractice claims.[75] Since article 4590i is not due to expire until 1993,[76] another solution would simply be to revise or eliminate section 10.01 so that a full minority may be tolled. Any method of reducing malpractice liability, however, will be challenged in court, since it will in some way limit the injured party's common law right to sue.[77]

The practice of tolling the statute of limitations for the disability of infancy is not new in itself, but the concept behind the statute has been revitalized by the decision in *Sax*. By employing the Texas Constitution, the Supreme Court of Texas grants due process protection to minors, guaranteeing them the ability as well as the right to bring a cause of action.[78] In doing so, the Supreme Court has foreclosed one of the legislative alternatives utilized to combat the continued rise in medical malpractice liability.

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damages recoverable by the minor: "physical pain and mental anguish, both past and future, disfigurement, loss of earning capacity after she attains the age of eighteen years, any medical expenses she may in reasonable probability incur after her eighteenth birthday, and any other damages peculiar to her." *Id.* at 667.

73. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 6.03 (Vernon Supp. 1982-1983) (creation of Texas Medical Disclosure Panel); *id.* § 11.02 (limitation of $500,000 on recovery). The Texas Medical Disclosure Panel was created for the purpose of determining which medical operations require disclosure in suits based on informed consent. *See id.* § 6.03. The provision limiting damages to $500,000 "does not apply to the amount of damages awarded on a health care liability claim for the expenses of necessary medical, hospital and custodial care received before judgment or required in the future treatment of the injury." *Id.* § 11.02(b).

74. *See* Wright v. DuPage Hosp. Ass'n., 347 N.E.2d 736, 739-46 (Ill. 1974). In *Wright,* the Illinois Supreme Court found a number of limiting devices unconstitutional, including the $500,000 limit recovery, the medical review panel, and mandatory renewal of malpractice insurance by insurers. *See id.* at 739-46.

75. *See* ILL. ANN. STAT. ch. 10, § 201 (Smith-Hurd 1983).

76. *See* TEX. REV. CIV. STAT. ANN. art. 4590i (Vernon Supp. 1982-1983).

77. *See* Wright v. DuPage Hosp. Ass'n., 347 N.E.2d 736, 739-46 (Ill. 1976).

78. *See* Sax v. Votteler, 648 S.W.2d 661, 667 (Tex. 1983).