

University of Miami Law Review

Volume 33
Number 4 1978 *Developments in Florida Law*

Article 12

6-1-1979

The Medical Malpractice Reform Act of 1975: The Unanswered Issues of *Carter v. Sparkman*

J. B. Spence

Joel Stillman

Follow this and additional works at: <https://repository.law.miami.edu/umlr>

Recommended Citation

J. B. Spence and Joel Stillman, *The Medical Malpractice Reform Act of 1975: The Unanswered Issues of Carter v. Sparkman*, 33 U. Miami L. Rev. 1155 (1979)

Available at: <https://repository.law.miami.edu/umlr/vol33/iss4/12>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

The Medical Malpractice Reform Act of 1975: The Unanswered Issues of *Carter v. Sparkman*

J. B. SPENCE* AND JOEL STILLMAN**

In the wake of rising criticism of Florida's Medical Malpractice Reform Act of 1975, the authors examine several constitutional issues which were not addressed by the supreme court in its validation of the Act in Carter v. Sparkman. The Act is criticized as constitutionally deficient on equal protection and substantive and procedural due process grounds. In their appeal for reform, the authors present several salient insights into the burdens placed on medical malpractice claimants under the present Act.

I. INTRODUCTION	1155
II. THE STATUTORY SCHEME	1158
III. JUDICIAL VALIDATION IN <i>Carter v. Sparkman</i>	1161
IV. EQUAL PROTECTION	1164
V. DUE PROCESS	1169
A. <i>Substantive Due Process</i>	1169
B. <i>Procedural Due Process</i>	1174
VI. CONCLUSION	1182

I. INTRODUCTION

The rising cost of medical malpractice insurance in the mid-1970's¹ surfaced as a national problem of seemingly overwhelming magnitude. At least one commentator perceived the situation as threatening "to disrupt the practice of medicine, the operations of insurance companies, and ultimately the availability of medical services."² Although the validity of such hyperbole did not receive unquestioned acceptance in every community,³ the actions of medi-

* LL.B., 1951, University of Miami. Member of the Florida Bar and partner in the law firm of Spence, Payne, Masington & Grossman, P.A., Miami, Florida.

** J.D., 1979, University of Miami. Former member, *University of Miami Law Review*.

1. The total dollar amount spent for medical malpractice insurance in 1966 was \$95,300,000. By 1970, the cost of identical coverage had risen to \$370,600,000, a 289% increase. CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, *MEDICAL MALPRACTICE: A SURVEY OF ASSOCIATED PROBLEMS AND PROPOSED REMEDIES 7-8* (1975) [hereinafter cited as C.R.S. REPORT], cited in Comment, *The Constitutional Considerations of Medical Malpractice Screening Panels*, 27 AM. U. L. REV. 161, 161 n.2 (1977).

2. Note, *The Florida Medical Malpractice Reform Act of 1975*, 4 FLA. ST. U. L. REV. 50, 50 (1976) [hereinafter cited as *Florida Medical Malpractice*].

3. See, e.g., *Jones v. State Bd. of Medicine*, 97 Idaho 859, 876, 555 P.2d 399, 416 (1976), cert. denied, 431 U.S. 914 (1977) (existence of national medical malpractice insurance crisis does not necessarily indicate that the problem pervades Idaho). See also Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977), where Justice White, dissenting in part, commented:

cal insurers in particularized locales have served to fuel such perceptions. In Florida, for example, the Argonaut Insurance Company, which supplied group liability insurance for approximately half of the state's physicians, raised its rates by an average of ninety-six percent, effective January 1, 1975.⁴ By April, 1975, Argonaut sought a further ninety-five percent increase, arguing that its insolvency was imminent and threatening to withdraw coverage altogether.⁵

The reaction of the medical community to the insurance situation,⁶ as well as general public concern over the increasing number of malpractice claims filed against the providers of health care,⁷ focused both state⁸ and national⁹ attention upon the medical malpractice issue. In Florida, the impetus for remedial action came from the Florida Medical Association, local medical societies and individual practitioners.¹⁰ Eventually, legislative response for medi-

I agree that it was within the power of the Legislature to determine that a medical malpractice crisis exists although the record before us does not reflect the existence of such a crisis. If there has been an explosion in malpractice claims, the resulting inundation has not reached this court.

Id. at 127, 256 N.W.2d at 674.

4. *Florida Medical Malpractice*, *supra* note 2, at 51.

5. *Id.* Subsequently, however, a federal district court held that the company had failed to establish either inadequate rates or insolvency, thus entitling intervening physicians to the January, 1975 charges. *Argonaut Ins. Co. v. Florida Medical Ass'n*, No. 75-140 (M.D. Fla. May 19, 1975), *cited in Florida Medical Malpractice*, *supra* note 2, at 51 & n.6.

6. One of the more dramatic reactions occurred in northern California in May, 1975, where a strike by anesthesiologists and surgeons eliminated all but emergency room surgery in two-thirds of the hospitals. *NEWSWEEK*, June 9, 1975, at 58. In Florida, during that same year, a spokesperson for the Dade County Medical Association announced that some 3,000 south Florida physicians were planning a work slowdown as a protest against the cost of malpractice insurance. *Florida Medical Malpractice*, *supra* note 2, at 50 n.1. Other reactions to the situation by Florida medical practitioners are noted in French, *Florida Departs from Tradition: The Legislative Response to the Medical Malpractice Crisis*, 6 *FLA. ST. U. L. REV.* 423, 424 (1978).

7. In 1966, 18,200 medical malpractice cases were pending in the United States whereas in 1970, 32,900 such cases were pending. This represents an eighty-one percent increase during that four-year period. *C.R.S. REPORT*, *supra* note 1, at 7-8.

8. Tort reforms enacted by the states in response to the medical malpractice situation have included limitations on liability statutes, changes in statutes of limitations and informed consent statutes, elimination of the collateral source rule, codification of the locality rule, modifications of standard of proof statutes, elimination of the ad damnum clause in pleadings, and limitations on contingency fee sliding scales. *HEALTH POLICY CENTER OF GEORGETOWN UNIVERSITY, A LEGISLATOR'S GUIDE TO THE MEDICAL MALPRACTICE ISSUE 9-11* (1976), *cited in* Comment, *supra* note 1, at 162 n.8.

9. *See, e.g., CONTINUING MEDICAL MALPRACTICE INSURANCE CRISIS, 1975: HEARINGS BEFORE THE SUBCOMM. ON HEALTH OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 94th Cong., 1st Sess. (1975)* [hereinafter cited as *1975 SENATE HEARING ON MALPRACTICE*]. For an earlier federal investigation into the apparent increase in medical malpractice litigation, see *SENATE SUBCOMMITTEE ON EXECUTIVE REORGANIZATION, 91st Cong., 1st Sess., MEDICAL MALPRACTICE: THE PATIENT VERSUS THE PHYSICIAN* (1969).

10. *Florida Medical Malpractice*, *supra* note 2, at 57-58. The New York experience ap-

cal malpractice reform culminated in the passage of the Medical Malpractice Reform Act of 1975.¹¹

While the existence of a "crisis" seems to have been generally accepted in 1975, substantial doubt has arisen since that time as to the exact nature and scope of the problem.¹² A variety of legislative committees on both the federal and state levels have expressed frustration at the absence of reliable data which can be used to document the existence of the alleged problem.¹³ Nonetheless, even assuming that a medical malpractice insurance crisis did exist in 1975, commentators now suggest that it has since abated.¹⁴ Thus, there is controversy as to whether a genuine crisis did exist in Florida in the mid-1970's. The focus of this article, however, will not discuss this aspect, nor will any attempt be made to support the view that deficiencies in Florida's Medical Malpractice Reform Act can be explained "by the fact that the Act is a product of the desperate, emotion-charged atmosphere which surrounded the medical malpractice issue during the 1975 legislative session."¹⁵ Rather, this article will examine the constitutional validity of the medical me-

pers to have been similar. In *Abrams v. Brooklyn Hosp.*, 91 Misc. 2d 380, 398 N.Y.S.2d 114 (Sup. Ct. 1977), the court remarked that New York's medical malpractice reform legislation, which provides for mediation panels not unlike those of Florida, "was enacted by our legislature at the urging of the medical societies and the medical profession in general." 398 N.Y.S.2d at 115. See also AMERICAN BAR ASSOCIATION, 1977 REPORT OF THE COMMISSION ON MEDICAL PROFESSIONAL LIABILITY 44 (1977) [hereinafter cited as ABA REPORT] (health care providers have been instrumental in the passage of pre-trial review statutes).

11. FLA. STAT. §§ 768.44-.50 (1977).

12. See, e.g., Note, *The Massachusetts Medical Malpractice Statute: A Constitutional Perspective*, 11 SUFFOLK U.L. REV. 1289, 1290 (1977) [hereinafter cited as *Mass. Medical Malpractice*] (measuring magnitude and effect of malpractice problem in a particular locality is difficult). See also note 3 *supra*.

13. See, e.g., *Mass. Medical Malpractice*, *supra* note 12, at 1291 n.6, (citing INTERIM REPORT OF THE SPECIAL COMMISSION ESTABLISHED TO MAKE AN INVESTIGATION AND STUDY OF MEDICAL PROFESSIONAL LIABILITY INSURANCE AND THE NATURE AND CONSEQUENCES OF MEDICAL MALPRACTICE, MASS. H.R. REP. NO. 4380, 18 (1976) ("no reliable data available" to assess dimensions of malpractice problem); 1975 SENATE HEARING ON MALPRACTICE, *supra* note 9, at 121 (statement by James F. Dickson, III, M.D., Acting Deputy Asst. Sec'y for Health) (one difficulty in formulating solutions to malpractice problems is "absence of a solid base of reliable data on which analysis can be undertaken").

14. See, e.g., ABA REPORT, *supra* note 10. That report states:

When the [ABA] Commission was established in February, 1975, a crisis in the delivery of medical care seemed imminent because of the unavailability of liability insurance at a cost which was acceptable to highrisk providers. Now, a little more than two years later, the medical malpractice crisis seems to have abated, and much of the attention to such problems has shifted to products liability, legal malpractice and municipal liability.

Id. at 9. For a Florida commentator who agrees that the crisis has waned, see French, *supra* note 6, at 440.

15. *Florida Medical Malpractice*, *supra* note 2, at 103.

diation panels provided for by the Act, an inquiry which suggests that medical malpractice plaintiffs are deprived of an opportunity for a fair hearing of their claims.

II. THE STATUTORY SCHEME

Although the scope of the Malpractice Reform Act is broad,¹⁶ a predominant feature of the legislation is the establishment of mediation panels which operate as a screening mechanism for medical malpractice claims. The Act requires a plaintiff to submit any malpractice claim to the panel before that claim can be filed in any state court.¹⁷ The claim, which is to be made on a form provided by the circuit court, must be filed initially with the clerk of that court, with service of process effected as provided by law.¹⁸ All parties named as defendants in the claim must file an answer within twenty days of the date of service, and no further pleadings are allowed.¹⁹ If no answer is filed, the mediation panel's jurisdiction is terminated and the plaintiff may proceed with a lawsuit.²⁰

The three-member mediation panel is composed of a judicial referee, who is the presiding member, a licensed physician and an attorney.²¹ The judicial referee, who must be a circuit judge, is appointed by an unspecified "blind" system.²² The physician is selected from a list of licensed practitioners, the list being prepared by the chief judge of each judicial circuit.²³ In making the list, the chief judge is authorized to accept the recommendations of "recognized professional medical societies," and the list is, if possi-

16. The Act embodies three general approaches to reform in the medical malpractice area. First, it attempts to assure the availability of medical liability insurance coverage by the pooling of risks by insurance carriers. Second, the Act aims to protect patients through provisions which are designed to identify and discipline incompetent or negligent physicians. Third, the Act modifies judicial handling of malpractice claims by establishing mediation panels and by altering the awarding of damages by juries. For a brief overview of all aspects of the Act, see French, *supra* note 6.

17. The pertinent provision is as follows:

Any person or his representative claiming damages by reason of injury, death, or monetary loss on account of alleged malpractice by any medical or osteopathic physician, podiatrist, hospital or health maintenance organization against whom he believes there is a reasonable basis for a claim shall submit such claim to an appropriate medical liability mediation panel before that claim may be filed in any court of this state.

FLA. STAT. § 768.44 (1)(a) (1977).

18. *Id.* § 768.44(1)(b).

19. *Id.* § 768.44(1)(c).

20. *Id.*

21. *Id.* § 768.44(2).

22. *Id.*

23. *Id.* § 768.44(2)(a).

ble, to be divided according to medical specialties.²⁴ A list of qualified attorneys is also to be prepared by the chief judge, who is authorized to accept the recommendation of "recognized professional legal societies."²⁵ No provision is made for limiting the attorneys so qualified to those with expertise in medical malpractice law. A physician or an attorney selected to be on a particular hearing panel may disqualify himself or may be challenged for cause.²⁶ The plaintiff is responsible for a filing fee not to exceed twenty-five dollars to defray incidental expenses incurred by the panel.²⁷ In addition, each nonjudicial panelist is to be paid \$100.00 for expenses for each day or partial day spent on the mediation panel. These expenses are to be assessed equally to both parties by the court.²⁸

Within thirty days after service of process, the parties are to file with the clerk a document designating the type of medical specialist who should be on their panel. In the event that the parties are unable to agree on the specialty to be represented, the determination is made by the judicial referee.²⁹ If the parties are able to agree on a particular attorney or physician to sit on the mediation panel, they may so stipulate.³⁰ In the absence of an agreement, the clerk is to mail the parties the names of five attorneys and five physicians of the designated specialty, selected at random from the mediation panel lists. In the event that it is impractical to designate a specialty, the five physicians are to be randomly selected without regard to specialty.³¹ The potential panel members have ten days to disqualify themselves, and the parties have the same period of time in which to challenge them for cause. Decisions or challenges for cause are to be made by agreement or by the judicial referee.³² In the event of disqualifications or challenges, additional panel members are to be added to the list of five, as required.³³ Thereafter, the parties are to agree on one attorney and one physician from the lists. In the event that no agreement can be reached, "each side shall then strike names alternately from the attorneys' list and from the physicians' list separately, with the claimant striking first, until each side

24. *Id.*

25. *Id.* § 768.44(2)(b).

26. *Id.* § 768.44(2)(d).

27. *Id.* § 768.44(2)(e).

28. *Id.* § 768.44(2)(i).

29. *Id.* § 768.44(2)(f).

30. *Id.* § 768.44(2)(g).

31. *Id.*

32. *Id.*

33. *Id.*

has stricken two names from each list. The remaining attorney and physician shall serve on the hearing panel."³⁴

Once the panel members have been selected, "the judicial referee and either party may question the physician and attorney to determine if either of them has a state of mind regarding the subject matter at issue, the case at hand, or any parties . . . involved . . . , that will prevent him from acting with impartiality."³⁵ If the judicial referee determines that the panelist cannot serve impartially, he is removed.³⁶

The panel must hold its hearing within 120 days of the date of the filing of the claim, unless the time is extended for good cause. In any event, the extension is not to exceed six months from the date of the filing of the claim.³⁷ If no hearing is held within ten months of the filing of the claim, the jurisdiction of the panel terminates and the parties are free to proceed in accordance with the law.³⁸

The parties to the mediation panel are permitted to utilize any discovery procedure provided by the Florida Rules of Civil Procedure. The judicial referee has discretion, however, to make reasonable limitations in the scope of such discovery.³⁹ The claim must be submitted to the panel in accordance with the Florida Rules of Medical Mediation Procedure,⁴⁰ but "strict adherence to the rules of procedure and evidence applicable in civil cases" is not required.⁴¹ Witnesses may be called and their testimony taken under oath, either orally or by deposition. Copies of records, x-rays and other documents may be presented to, and considered by, the panel. The right to subpoena witnesses and records applies as in other proceedings in the circuit court.⁴² The right of cross-examination obtains as to those witnesses who testify in person.⁴³ Each party is entitled to make an opening and closing statement.⁴⁴

While no transcript or record of the proceedings is required, either party may have the proceedings transcribed or recorded.⁴⁵ The judicial referee presiding at the hearing is not permitted to

34. *Id.*

35. *Id.* § 768.44(2)(h).

36. *Id.*

37. *Id.* § 768.44(3).

38. *Id.*

39. *Id.* § 768.44(5).

40. *In re The Florida Bar*, 348 So. 2d 547 (Fla. 1977).

41. FLA. STAT. § 768.44(6).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

preside at any trial subsequently arising out of the claim, nor is any other panel member permitted to participate in such a trial, either as counsel or as witness.⁴⁶

Within thirty days after the completion of a hearing, the panel is required to file a written decision only on the issue of liability, stating its conclusion in words substantially conforming to the statutory language.⁴⁷ Any panel member is permitted to file a written concurring or dissenting opinion.⁴⁸ After a finding of liability, if the adverse parties agree, the panel may continue mediation with a view to assisting the parties in reaching a settlement. In such an event, the panel is to make a recommendation as to a reasonable range of damages.⁴⁹

In the event that either party rejects the finding of the mediation panel, the claimant may commence litigation based upon his claim.⁵⁰ The conclusion of the mediation panel as to the issue of liability is admissible, however, in any subsequent trial, although any specific findings of fact made by the panel are not admissible.⁵¹ The parties may comment on the panel's conclusion in their opening statements and in their arguments to the court or jury.⁵² In the event of a non-unanimous panel finding, the numerical vote is admissible.⁵³ The jury is to be instructed that the mediation panel's conclusion is not binding but is to be given the weight they choose to ascribe to it. Panel members may not, moreover, be called to testify as to the merits of the case.⁵⁴ As has been noted, panel members may not participate in a subsequent trial in any manner.⁵⁵ The statute thus prevents either party from calling a panelist to testify as to the manner in which the panel's conclusion was reached.

III. JUDICIAL VALIDATION IN *Carter v. Sparkman*

The Florida Medical Malpractice Reform Act has spawned a

46. *Id.*

47. *Id.* § 768.44(7). The pertinent language of this section is as follows:

8(a) "We find the defendant was actionably negligent in his care or treatment of the patient and we, therefore, find for the plaintiff"; or

(b) "We find the defendant was not actionably negligent in his care or treatment of the patient and we, therefore, find for the defendant."

48. *Id.*

49. *Id.* § 768.44(8).

50. *Id.* § 768.47(1).

51. *Id.* § 768.47(2).

52. *Id.*

53. *Id.*

54. *Id.*

55. See text accompanying note 46 *supra*.

great deal of litigation in its brief history, most of which is due to uncertainty in the meaning of key provisions. Courts have disagreed, for example, on whether the ten month jurisdictional period may be extended under any circumstances.⁵⁶ Controversy also exists as to the time within which a mediation panel hearing must be commenced.⁵⁷ In addition, parties have raised other questions regarding procedures under the Act.⁵⁸

56. See, e.g., *Aldana v. Holub*, 354 So. 2d 1272 (Fla. 1st DCA 1978), wherein the court, in determining that the 10-month period cannot be extended for any reason by the judicial referee, noted that a "clear conflict between the decisions of the Second and Third District Courts of Appeal and those of the Fourth District Court of Appeal" exist regarding this issue. *Id.* at 1273. More specifically, in at least three instances the Second and Third District Courts of Appeal extended the time limits described in § 768.44(3) because the mediation process was suspended pending determination by the Supreme Court of Florida as to the constitutionality of the review panels. See *State ex rel. Lund v. Keough*, 352 So. 2d 572 (Fla. 2d DCA 1977); *State ex rel. McGuirk v. Cowart*, 344 So. 2d 624 (Fla. 3d DCA 1977); *State ex rel. Mercy Hosp., Inc. v. Vann*, 342 So. 2d 1073 (Fla. 3d DCA 1977). In addition, the District Court of Appeal, Third District, held that where a claimant's failure to follow proper procedures in timely fashion was inadvertent, a subsequent court action could be stayed pending a medical mediation proceeding. *Richards v. Foulk*, 345 So. 2d 402 (Fla. 3d DCA 1977).

At other times, however, § 768.44(3) has been construed more rigidly, particularly by the District Court of Appeal, Fourth District. See, e.g., *Ludwig v. Glover*, 357 So. 2d 233 (Fla. 1st DCA 1978) (order of judicial referee purportedly terminating jurisdiction of mediation panel does not operate to extend the 10-month jurisdictional period); *Kirschgessner v. Miami Int'l Hosp.*, 356 So. 2d 11 (Fla. 4th DCA 1977) (statutory 10-month period for holding of medical mediation procedure hearing requires that final hearing on the merits be concluded within the 10-month period); *Cole v. Wallace*, 354 So. 2d 885 (Fla. 4th DCA 1977) (jurisdiction of medical mediation panel terminates as a matter of law at expiration of 10-month period and issuance of unauthorized order by judicial referee in no way mitigates such expiration); *Perkins v. Pare*, 352 So. 2d 64 (Fla. 4th DCA 1977) (failure to observe the 10-month period results in automatic cessation of the jurisdiction of the medical mediation panel); *Mercy Hosp., Inc. v. Badia*, 348 So. 2d 631 (Fla. 3d DCA 1977) (no extension of 120-day period as statute must be strictly construed since it places an impediment on a plaintiff's right to seek legal redress). *Accord*, *Scherer v. Liberto*, 353 So. 2d 1224 (Fla. 4th DCA 1977) (20-day period in which to answer is jurisdictional and failure to file timely prevents defendant from receiving benefits of medical mediation proceedings).

57. In the District Courts of Appeal, Second and Fourth Districts, if no hearing is commenced within six months from the date the claim was filed, the panel loses jurisdiction and the claimant may avail himself of his common law rights. *Raedel v. Watson Clinic Foundation, Inc.*, 360 So. 2d 12 (Fla. 2d DCA 1978); *Stanton v. Community Hosp.*, 359 So. 2d 37 (Fla. 4th DCA 1978); see FLA. R. MED. P. 20.190(c). In the District Court of Appeal, Third District, it is arguable that a full 10 months exists in which to commence a hearing, notwithstanding rule 20.190. *State ex rel. Love v. Jacobson*, 343 So. 2d 1328 (Fla. 3d DCA), *cert. denied*, 352 So. 2d 172 (Fla. 1977). It should be noted, however, that the decision in *Love* was handed down prior to the effective date of rule 20.190(c).

58. See, e.g., *Fisher v. Herrera*, 367 So. 2d 204 (Fla. 1978), where the Supreme Court of Florida concluded that a plaintiff is not required to present evidence in support of his claim at the mediation hearing as a condition precedent to a right to sue. The *Fisher* court also stated that the panel may only reach a single finding of either actionable negligence or no actionable negligence, and therefore the phrase "because the claimants chose not to present any evidence" may not be used to qualify a finding in favor of the defendant.

When challenged on constitutional grounds, the Act was upheld by the Supreme Court of Florida in *Carter v. Sparkman*.⁵⁹ In *Carter*, the court limited its construction of the Act to a resolution of the equal protection issue raised by the plaintiff.⁶⁰ The court noted that emphasis has been placed on the contention that a physician has the "best of two worlds" in that, unlike the claimant, he has a choice between participating or not participating in the mediation panel proceeding. If both parties participate in the proceeding, the plaintiff accurately pointed out that the result is admissible at a subsequent trial, yet the statute is silent as to the admissibility of a physician's nonparticipation.⁶¹ The court agreed that such an arrangement would violate the equal protection clause of both the Florida and United States Constitutions and accordingly construed the Act to mean that a physician's failure to participate in the mediation panel proceedings is admissible at a subsequent trial.⁶²

The court in *Carter* gave only passing attention to the plaintiff's due process argument that the Act restricted her access to the courts. It noted the crisis atmosphere in which the legislature had acted and found that the Act constituted a legitimate exercise of state police power because it attempted to reduce the cost of medical malpractice insurance and ultimately the cost of medical services.⁶³ Therefore, despite the fact that this prelitigation burden imposed on the claimant "reaches the outer limits of constitutional tolerance," the court refused to strike down the Act as unconstitutional.⁶⁴

The *Carter* decision has not received favorable commentary.⁶⁵ Even Justice England, in concurring with the majority, found it

In *Koota v. Parkway Gen. Hosp., Inc.*, 346 So. 2d 124 (Fla. 3d DCA 1977), the question of whether a party can be ordered to participate in the selection of mediation panel members was raised. The court remanded the case, holding that the judicial referee had no authority to certify the question to the district court of appeal. Other procedural issues were raised in *Drs. Howarth & Scott, P.A. v. Edwards*, 353 So. 2d 175 (Fla. 4th DCA 1977) (circuit judge sitting as judicial referee had no authority to grant summary judgment) and in *Floyd v. Goss*, 352 So. 2d 1189 (Fla. 4th DCA 1977) (judicial referee has no authority to enter judgment on the pleadings).

59. 335 So. 2d 802 (Fla. 1976), *cert. denied*, 429 U.S. 1041 (1977).

60. *Id.* at 805.

61. *Id.*

62. *Id.*

63. *Id.* at 806.

64. *Id.*

65. As one commentator has pointed out, the court's failure to give attention to each argument in *Carter* substantially reduces the value of its opinion. Comment, *Testing the Constitutionality of Medical Malpractice Legislation: The Wisconsin Medical Malpractice Act of 1975*, 1977 Wis. L. Rev. 838, 855 [hereinafter cited as *Wisconsin Medical Malpractice*].

necessary to analyze in greater detail the arguments raised against the validity of the Act.⁶⁶ Consequently, as the remainder of this article examines the constitutional shortcomings of the Florida Medical Malpractice Reform Act, particular emphasis will be placed on those contentions which the court in *Carter* left unaddressed.

IV. EQUAL PROTECTION

The fourteenth amendment to the Constitution of the United States declares that no state shall "deny to any person . . . the equal protection of the laws."⁶⁷ The Supreme Court of the United States has interpreted this clause to mean that all persons "should have like access to the courts of the country for the protection of their persons and property, [and] the prevention and redress of wrongs"⁶⁸ In the instant case, the malpractice claimant is clearly receiving different treatment than the regular tort claimant, due to the Medical Malpractice Reform Act, in that he is forced to go through the additional burden of medical mediation.⁶⁹ The issue in this context is whether the classification serves to deny to malpractice claimants the equal protection of the laws.

Traditionally, courts have utilized an equal protection analysis

66. 335 So. 2d at 807-09. According to Justice England, the plaintiff argued that the Act violated both the privileges and immunities clause and the due process clause of the fourteenth amendment to the Constitution of the United States because her "privilege" to select a judicial forum, rather than a mediation panel had been denied. *Id.* at 807. The plaintiff also argued that she was denied liberty without due process of law because of the necessity of review of malpractice suits before civil litigation can be commenced in a court of law. *Id.* Furthermore, the plaintiff argued that she was denied access to the courts in violation of article I, section 21 of the Constitution of the State of Florida. *Id.* at 807-08. In addition, she raised the contention that judges may not serve on mediation panels by reason of article V, section 13 of the Constitution of the State of Florida directing that judges shall devote their full time to their judicial responsibilities. *Id.* at 808. Finally, it was argued that the rules of procedure set out in the statute violate the provision of the state constitution directing the supreme court to formulate such rules. *Id.* at 808-09.

67. U.S. CONST. amend. XIV, § 1.

68. *Barbier v. Connolly*, 113 U.S. 27, 31 (1884). *But see* *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 552 (1949).

69. In addition to the burden of time, energy and money, medical malpractice claimants suffer disadvantages in the civil litigation process itself. As a commentator on the Massachusetts mediation panel legislation has noted:

By compelling the claimant in an action for medical negligence to demonstrate the validity of his case prior to trial, the legislation bestows a corresponding advantage on the defendant health-care provider, granting him a type of statutory shield against the traditional judicial process in civil litigation. The unequal treatment resulting from this classification violates traditional concepts of equal protection.

Mass. Medical Malpractice, *supra* note 12, at 1296 (footnote omitted).

which consists of a two-tier approach.⁷⁰ The first tier, the so called "rational basis" test, holds that a state may classify and thus may discriminate if there is a rational relationship between the means chosen and a legitimate state objective.⁷¹ Under this test, the mere existence of discrimination does not in and of itself violate equal protection.⁷²

The second level of analysis, strict scrutiny, comes into play when a fundamental right⁷³ or a "suspect classification"⁷⁴ is affected. In these instances, the court will strictly scrutinize the statutory classification. The classification will be struck down unless it can be justified by a compelling state interest, and the court will, nevertheless, examine the means employed in the legislation to see if a less restrictive alternative exists which could otherwise accomplish the state objective.⁷⁵

Given the rigidity of this "either/or" approach, the Supreme Court has developed a new level of equal protection analysis, falling between the existing liberal and strict standards. This "intermediate scrutiny" focuses on the relationship between the subject legislation and the purpose to be served by that legislation.⁷⁶

70. For a discussion of the "rational basis" and "strict scrutiny" levels of analysis, see *Shapiro v. Thompson*, 394 U.S. 618 (1969). See generally Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

71. See, e.g., *Lindsley v. Normet*, 405 U.S. 56 (1972).

72. *Dandridge v. Williams*, 397 U.S. 471, 484 (1970). Furthermore, "the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955) (citation omitted).

73. See, e.g., *Roe v. Wade*, 410 U.S. 133 (1973) (right to privacy); *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621 (1969) (right to vote); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to travel); *NAACP v. Alabama*, 357 U.S. 499 (1958) (freedom of association).

74. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (racial classifications as a suspect classification which demand the "most rigid scrutiny").

75. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969) (no compelling state interest); *Korematsu v. United States*, 323 U.S. 214 (1944) (compelling state interest and no less restrictive alternative).

In point of fact, the strict scrutiny test is conclusory. In all but one instance, when this level of analysis was used, the Court has struck down the classification. The sole exception was *Korematsu*, which occurred during wartime and which evoked a strong dissent.

76. See *Craig v. Boren*, 429 U.S. 190 (1976); *Reed v. Reed*, 404 U.S. 71 (1971); *Jones v. State Bd. of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976), cert. denied, 431 U.S. 914 (1977).

Justice Marshall, the most forceful advocate of the intermediate scrutiny test, set forth the justification for this test in his dissent in *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973). He strongly disagreed with the attempt to categorize all equal protection cases as falling "into one of two neat categories which dictate the appropriate standard of review. . . ." *Id.* at 98. Instead, the Court should apply a spectrum of standards, depending on the value of the interest involved. "As the nexus between the specific constitu-

While not requiring a compelling state interest as in strict scrutiny analysis, the objective served by the challenged statute must further an "important" or "substantial" governmental goal. Furthermore, the classification must be "substantially related" to the achievement of that important goal. Intermediate scrutiny has been triggered when important, although not necessarily fundamental, rights are at stake⁷⁷ and when sensitive, although not necessarily suspect, classifications are employed.⁷⁸

Ohio courts have, in the area of medical mediation, used the strict scrutiny standard and have required a showing of a compelling state interest in order to uphold their medical mediation statute.⁷⁹ One court reviewed an Ohio statutory requirement that any complaint setting forth a medical claim list all benefits, of any kind, payable to the plaintiff as a result of the incident giving rise to the claim. By the requirement that such collateral benefits be listed only in medical claims, the court noted, the legislature had ordained differential treatment for claimants in one particular type of tort action while conferring benefits on the medical malpractice defendant not available to other defendants in tort actions. The court concluded:

There is no satisfactory reason for this separate and unequal treatment. There obviously is "no compelling governmental interest" unless it be argued that any segment of the public in financial distress be at least partly relieved of financial accountability for its negligence. To articulate the requirement is to demonstrate its absurdity, for at one time or another every type of profession or business undergoes difficult times, and it is not the business of government to manipulate the law so as to provide succor to one class, the medical, by depriving another, the malpracticed patients, of the equal protection mandated by the constitution.⁸⁰

tional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied . . . must be adjusted accordingly." *Id.* at 102-03.

77. *E.g.*, *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976); *Vlandis v. Kline*, 412 U.S. 441 (1973); see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1089-90 (1978).

78. *E.g.*, *Frontiero v. Richardson*, 411 U.S. 677 (1973). See L. TRIBE, *supra* note 77, at 1090.

79. *Graley v. Satayatham*, 74 Ohio Op. 2d 316, 343 N.E.2d 832 (C.P. 1976).

80. *Id.* at 320, 343 N.E.2d at 837. See also *Simon v. St. Elizabeth Medical Center*, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (C.P. 1976), where the court agreed with the holding in *Graley* that the Ohio Medical Malpractice Act denied plaintiffs equal protection. The court found nothing to add to the analysis in *Graley*, and therefore applied it to the compulsory arbitration provisions of the Ohio Act.

Thus, at least one jurisdiction has required the showing of a compelling state interest to uphold legislation similar to Florida's Medical Malpractice Reform Act.⁸¹ In addition, a number of courts have applied the intermediate scrutiny analysis to malpractice reform statutes. In *Jones v. State Board of Medicine*,⁸² for example, the Supreme Court of Idaho noted the new standard of equal protection analysis, focusing upon the relationship between the subject legislation and the object or purpose to be served by that legislation. The court stated that this "new intermediate standard of equal protection review has been described as 'means-focus' because it tests whether the legislative means substantially furthers some specifically identifiable legislative end."⁸³ The court pointed out that this intermediate test has been applied only in cases where the discriminatory nature of a challenged statutory classification is apparent on its face and where there is also a patent indication of a lack of relationship between the classification and the declared purpose of the statute.⁸⁴

In *Jones*, the court found that the Idaho Hospital-Medical Liability Act⁸⁵ created a discriminatory classification which conferred an advantage on doctors and hospitals at the expense of the more seriously injured and damaged victims.⁸⁶ The court examined the purposes of the Idaho Act and the relationship of the Act to those purposes and concluded that there was no factual basis on the record for understanding the nature and scope of the alleged malpractice insurance crisis, which had been raised as the Act's underlying purpose.⁸⁷

In *Carter v. Sparkman*,⁸⁸ the Supreme Court of Florida employed the rational basis standard to hold the statutory classifica-

81. *But see* *Comiskey v. Arlen*, 55 App. Div. 2d 304, 390 N.Y.S.2d 122 (1976), where the court rejected the argument, that access to the courts was a fundamental right, basing its decision on *United States v. Kras*, 409 U.S. 434 (1973).

It is submitted, however, that if access to courts is a fundamental value under a substantive due process analysis, then access to courts should be a fundamental right under equal protection analysis. See notes 111-115 and accompanying text *infra*.

82. 97 Idaho 859, 555 P.2d 399 (1976).

83. *Id.* at 867, 555 P.2d at 407.

84. *Id.* The court applied the intermediate standard of review and remanded to find a statewide concern, whether there is a health and welfare benefit and whether adoption of the act is reasonably related to solution of the problem. *Id.* at 871, 555 P.2d at 417.

85. IDAHO CODE §§ 39-4201 to -4213 (1978).

86. 97 Idaho at 871, 555 P.2d at 417.

87. Under the intermediate test employed in *Jones*, the court will inquire as to whether a crisis in fact exists. Under the more traditional standard, the court simply accepts the legislative finding of a crisis. See Redish, *Legislative Response to the Medical Malpractice Insurance Crises: Constitutional Implications*, 55 Tex. L. Rev. 759, 769 (1977).

88. 335 So. 2d at 902.

tion of the Medical Malpractice Reform Act a valid exercise of the state's police power.⁸⁹ The court stated that although it "reaches the outer limits of constitutional tolerance,"⁹⁰ the screening panel is a valid attempt by the legislature to remedy "medical malpractice" and it has the permissible purpose of protecting the health and welfare of the citizens of Florida.⁹¹ Furthermore, the panel was created at a time when Florida citizens were threatened with a drastic reduction in the availability of medical care because of the high cost of malpractice insurance.⁹²

According to *Carter*, the legislature sought to remove patently frivolous and unmeritorious cases from the courts, thereby reducing the cost to the insurers.⁹³ There was thus a rational relationship between the legislation and the legitimate goal of ensuring the availability of medical care for all citizens, and this made the increased cost to claimants who proceed to trial insufficient to invalidate the legislation.⁹⁴

While states have broad discretion in exercising their police powers in a manner that tends to restrict access to the courts,⁹⁵ neither the strict scrutiny nor the intermediate scrutiny standards can be lightly dismissed when the constitutionality of medical malpractice "reform" legislation is challenged on equal protection grounds. There is convincing precedent for the use of either level of scrutiny.

Even when the rational basis test is employed, substantial questions are raised as to the constitutionality of the Medical Malpractice Reform Act due to the change in circumstances between 1975 and the present. Using the rational basis test, courts have generally upheld such legislation as a legitimate response to the legislative objective of preventing a decline in the availability and quality of health care as a result of the malpractice insurance "crisis."⁹⁶ Whatever validity this rationale may have had in the

89. *Id.* at 805.

90. *Id.* at 806.

91. *Id.* at 805-06; *accord*, *Eastin v. Broomfield*, 116 Ariz. 576, 570 P.2d 744 (1977).

92. 335 So. 2d at 805. Courts in other jurisdictions have also dismissed equal protection challenges to medical mediation statutes using the "crisis" as a justification. They have applied the "traditional" equal protection test, under which a classification is permissible if it has a rational basis.

93. 335 So. 2d at 806.

94. *Id.* at 807-08 (England, J. concurring).

95. *See, e.g.*, *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949); *Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151 (1931); *Jones v. Union Guano Co.*, 264 U.S. 171 (1924).

96. *See* note 92 *supra*.

emotion-charged atmosphere of 1975, a reexamination in light of present conditions demonstrates that the "crisis," if it ever existed, is past.⁹⁷ Thus, the rational relationship between this legislation and the state objective is, at best, questionable.⁹⁸ At a time when the medical profession has responded to this "crisis" by amassing more than sufficient funds to insure itself, it can no longer be claimed that there is a legitimate purpose to be served by conferring benefits on the medical profession at the expense of malpractice claimants.⁹⁹ An objective assessment under even the loosest standard discloses that the legislative objective for the Act has disappeared.

V. DUE PROCESS

A. *Substantive Due Process*

The due process clause of the fourteenth amendment requires that the state legislature exercise its police power in a nonarbitrary manner and that the laws bear a reasonable relationship to a legitimate objective.¹⁰⁰ While the doctrine of substantive due process has been rejected in the economic sphere,¹⁰¹ in that it is beyond the scope of the judiciary to substitute its own judgment for that of the legislature, the Supreme Court of the United States has been reluctant to defer to legislative judgment when there are fundamental values at issue.¹⁰² Thus, the amount of substance given to a due process analysis is reflective of the value placed on the interest involved.

97. See notes 12-14 and accompanying text *supra*.

98. While a classification need not be drawn with "precise mathematical nicety," it must bear at least a rational relationship to a legitimate state objective. See *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) (striking down provision of food stamp program as "wholly without any rational basis").

99. The fading of the malpractice insurance "crisis" also exposes the Florida Act to challenge on special legislation grounds. In *Butler v. Flint-Goodridge Hosp. of Dillard Univ.*, 354 So. 2d 1070 (La. App. 1978), the court noted that a constitutional challenge to a statute on the grounds that it confers special benefits on a given class—and thus constitutes special legislation—is closely related to the equal protection challenge. In *Butler*, the court remarked that "we are not delighted by the prospect of unusual procedures or unusual protections being accorded to any specified group, be they health care providers or not." *Id.* at 1074. Notwithstanding its concern, the court dismissed the special legislation challenge, deferring to the legislatively perceived need to keep health care services flowing. Again, in the absence of such a justification, the conferring of special benefits upon physicians and health care providers becomes constitutionally intolerable.

100. *Mugler v. Kansas*, 123 U.S. 623 (1887). Justice Harlan, in delivering the opinion of the Court, stated that not "every statute enacted ostensibly for the promotion of [public health] is to be accepted as a legitimate exertion of the police powers of the state." *Id.* at 661.

101. *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

102. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

In *Carter v. Sparkman*, the Supreme Court of Florida reversed the lower court which had held that the Medical Malpractice Reform Act restrained the plaintiff from timely access to the courts in violation of article I, section 21 of the Constitution of the State of Florida.¹⁰³ The majority opinion stated that "although courts are generally opposed to any burden being placed on the rights of aggrieved persons to enter the courts because of the constitutional guarantee of access, there may be reasonable restrictions prescribed by law,"¹⁰⁴ particularly when the state concern of public health and welfare is involved.¹⁰⁵ The *Carter* court held that the Act is not void because it deals with matters directly related to public health and has as its purpose an effort to mediate malpractice claims, thereby reducing medical malpractice insurance and ultimately medical expenses.¹⁰⁶

Further examination, however, leads to the conclusion that the restrictions on access to the courts imposed by the Act merit more concern than was given by the court in *Carter*. The Supreme Court of Missouri has held that the Missouri Professional Liability Review Board Act,¹⁰⁷ which requires that medical malpractice claims be referred to a board for a hearing and recommendations prior to filing a court action, violates Missouri's state constitutional guarantee of access to the courts.¹⁰⁸ The court distinguished a New York case, *Comiskey v. Arlen*,¹⁰⁹ which held that a statute providing for a medical malpractice panel did not deny the fundamental right of access to the courts on the basis that the New York screening panel is convened after the court proceedings are commenced.¹¹⁰

In light of earlier decisions by the Supreme Court of Florida, the right of access to the courts must be viewed as a fundamental value which cannot be denied by the legislature. In *Kluger v.*

103. 335 So. 2d at 802.

104. *Id.* at 805. Examples of such restrictions cited by the court are statute of limitations, payment of reasonable court deposits, pursuit of certain administrative relief, or requirements that newspapers have an opportunity to retract before a libel action may be filed. *Id.*

105. *Id.*; accord, *Everett v. Goldman*, 359 So. 2d 1256 (La. 1978); *Comiskey v. Arlen*, 55 App. Div. 2d 304, 390 N.Y.S.2d 122 (1976). The court in *Comiskey* rejected a substantive due process attack based on access to courts stating that, "where a statute is challenged on nonprocedural grounds as violative of due process of law we have consistently asked the question whether there is 'some fair, just and reasonable connection' between it and the promotion of the health, comfort, safety and welfare of society." *Id.* at 310, 390 N.Y.S.2d at 128, (quoting *Montgomery v. Daniels*, 38 N.Y.2d 41, 54, 340 N.E.2d 444, 451, 378 N.Y.S.2d 1, 11 (1975)).

106. 335 So. 2d at 806.

107. Mo. ANN. STAT. §§ 538.010-.080 (Vernon Supp. 1979).

108. *State ex rel. Cardinal Glennon Hosp. for Children v. Gaertner*, 583 S.W.2d 107 (Mo. 1979) (en banc).

109. 55 App. Div. 2d 304, 390 N.Y.S.2d 122 (1976).

110. Accord, *Carter v. Sparkman*, 335 So. 2d at 807 (England, J., concurring).

White,¹¹¹ for example, the supreme court construed article I, section 21 of the Constitution of the State of Florida to mean that the legislature is without power to abolish a right of access to the courts without providing some reasonable alternative to protect a plaintiff's right to redress unless the legislature can show an overpowering public necessity for the abolishment of such right and no alternative method for meeting such necessity can be shown.¹¹² The holding in *Kluger* raises questions of whether the Medical Malpractice Reform Act has, in effect, abolished a malpractice claimant's right to proceed in court by forcing him to mediate his claim first,¹¹³ whether the mediation procedure provides a reasonable alternative to a civil action¹¹⁴ and whether no other method for dealing with the alleged malpractice insurance "crisis" can be shown.¹¹⁵

The two features of the Florida Act which raise the access problem are the time and expense consumed by the mediation panel

111. 281 So. 2d 1 (Fla. 1973).

112. *Id.* at 4.

113. Although *Kluger* involved an express abolition of a tort action, the case may stand for the proposition that a "practical" as well as an actual abolition of a cause of action is unconstitutional. *Cf.* *North Laramie Land Co. v. Hoffman*, 268 U.S. 276 (1925) (state statute providing for notice and opportunity to be heard in a proceeding for a proposed establishment of a road not violative of the Constitution of the United States unless it is a denial of fundamental rights of citizens in its practical effect). It should be noted here that this is not a procedural due process argument in that it is unfair to force a medical malpractice plaintiff burdens, but that the cost and delay involved in mediation arbitrarily prohibits plaintiff's right to proceed to trial. For a procedural due process argument, see notes 142-50 and accompanying text *infra*.

114. It may be argued that the mediation procedure is not a reasonable alternative to a civil action. Long delays between filing and final disposition result in unreasonable delays for compensation of valid claims. Problems may exist in obtaining medical experts to assist in case preparation and testifying. Mediation also contributes to high costs for case preparation, including expert fees. See Note, *Medical-Legal Screening Panels as an Alternative Approach to Medical Malpractice Claims*, 13 WM. & MARY L. REV. 695, 709-10 (1972).

115. See, e.g., Note, *Malicious Prosecution: An Effective Attack On Spurious Medical Malpractice Claims?*, 26 CASE W. RES. L. REV. 653 (1976). Another alternative to full blown mediation may be the establishment of a pretrial screening procedure. This would consist of a minihearing, not to determine the merits of the case, but to determine if the case is meritorious and should proceed to trial or if the case is clearly spurious and should be dismissed. The time and delay of a full evidentiary hearing as well as the danger of prejudicing the jury with a finding on the merits will be eliminated. Fairness mandates that the judge who conducts this minihearing should not be the judge which conducts the full trial. *But cf.* *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), where the Court stated that there was "nothing in either the language or the history of rule 23 'that gave a court the authority' to conduct a preliminary inquiry into the merits of a suit in order to determine whether it could be maintained as a class action." *Id.* at 177. The Court noted that such a preliminary minihearing may result in substantial prejudice to a defendant as it is not accompanied by traditional procedural safeguards and could color the subsequent proceedings. *Id.* at 178. This case, however, is clearly distinguishable from the issue at bar in that the decision was based solely on statutory interpretation—rule 23—and did not involve constitutional interpretation.

proceeding. These problems are compounded by the fact that the panel's findings are admissible at a subsequent trial.¹¹⁶ Thus, the claimant is forced to incur substantial costs and to spend up to ten months in the prelitigation stage. That the panel proceeding is time consuming is well illustrated by the volume of litigation involving the availability of extensions of the statutory time limits.¹¹⁷

Aside from the fact that the plaintiff must wait up to ten months to obtain access to the courts and to pursue relief through litigation, that Act imposes substantial costs. The Act allows extensive discovery, and both oral and documentary evidence may be introduced at the hearing.¹¹⁸ Clearly, the claimant who hopes to avoid the nearly insurmountable burden of a negative finding must utilize these tools fully. He is, in effect, put to the expense of two full trials.¹¹⁹

Nor are the plaintiff's additional expenses limited to those required for the development of his evidence. The plaintiff is solely responsible for a filing fee to defray the mediation panel's "incidental expenses."¹²⁰ In addition, each nonjudicial panelist earns one hundred dollars a day for each day or partial day spent serving on the panel.¹²¹ The Act says only that the court shall assess both parties equally for the payment of such expenses.¹²² It does not specify whether the assessing court is the circuit court, which ad-

116. The American Bar Association's Commission on Medical Professional Liability has questioned the value of a panel whose findings are admissible at a later trial, noting that "much of the settlement value of a more informal, insulated procedure may be lost, and the panel may become a costly and time-consuming 'minitrial.'" ABA REPORT, *supra* note 10, at 47.

117. See note 56 and accompanying text *supra*.

118. FLA. STAT. § 768.44(5)-(6) (1977).

119. See Harlan, *Virginia's New Medical Malpractice Review Panel and Some Questions it Raised*, 11 U. RICH. L. REV. 51 (1976), in which it is observed that the Virginia panel "seems to be more than a 'screening panel.'" Because of the far reaching consequences of its opinion, coupled with the high cost of utilizing the panel, the effect may be to chill the ardor of those persons contemplating using it." *Id.* at 68. Cf. *Boddie v. Connecticut*, 401 U.S. 371 (1971) (filing fee for divorce proceedings unconstitutional as a restriction on access to courts for indigent claimants). *But see Ortwein v. Schwab*, 410 U.S. 656 (1973) and *United States v. Kras*, 409 U.S. 434 (1973), where the Court made it clear that not every financial impediment restricting access to the courts was sufficient to invalidate the law; it must be shown that "a fundamental interest . . . is gained or lost depending on the availability" of the relief sought by appellants. *Id.* at 445. See also *Mass. Medical Malpractice*, *supra* note 12, at 1317, where the author notes that because the Massachusetts malpractice screening panel statute "provides no aid to the malpractice victim in exchange for his additional expense and delay, the tribunal process is an inadequate and unreasonable substitute for traditional trial procedure." *Id.*

120. FLA. STAT. § 768.44(2)(e) (1977).

121. *Id.* § 768.44(2)(i).

122. *Id.*

ministers the mediation panel, or the court which subsequently hears the plaintiff's claim if he rejects the panel's finding. The possibility thus arises that the plaintiff who does elect to pursue his claim in civil litigation may, as a prerequisite, be required to pay his share of the panelists' expenses.¹²³

In terms of additional expense and delay, then, a medical malpractice plaintiff's access to the courts has been substantially impeded by the Act. Moreover, the entire mediation panel procedure is likely to result in a disincentive to the plaintiff to pursue further relief. Statistics indicate that panels predominantly favor defendants and that plaintiffs saddled with negative findings are extremely unlikely to continue on to court.¹²⁴ A negative panel finding, therefore, not only deprives a plaintiff of a fair hearing, but also has the effect of dissuading him from seeking such a trial at all and, thus, effectively denies him access to the courts.¹²⁵

Although access to state civil court proceedings is primarily an issue of state concern and state legislatures have great latitude in formulating their own procedures for access to their courts,¹²⁶ a state may not completely abolish access for a particular cause of action.¹²⁷ Medical mediation statutes may be valid exercises of the state's police power in the area of public health and welfare, but such power is not without limit. The state interest of providing adequate health care by lowering malpractice premiums must be weighed against the burdens imposed by the Act on a claimant's ability to seek access to the courts to redress alleged injuries. However strong the state interest may have been in 1975, at the time of the alleged

123. The court in *Carter* glossed over the problem raised by the Act's expense provisions, remarking that while "[w]e realize that certain items of expense in relation to the mediation attempts will be incurred, . . . it would naturally follow that such expenses to the extent of reasonableness would become a part of the costs of the judicial proceedings, taxable against the losing party." 335 So. 2d at 805. Justice England, in his concurring opinion, expressed concern over the Act's harshness in submitting plaintiffs to additional expense. His concerns, however, were "assuaged by the Court's determination that expenses incurred in the mediation panel proceeding, including the expert witness fees and travel expenses which are so costly in this type of litigation, are to be taxable costs on later trial if the plaintiff prevails." *Id.* at 808, n.5.

The Act, of course, makes no such provision. The court has simply sought to save the constitutionality of the Act by reading these provisions into it. Indeed, in the case of the panelists' expenses, the Act expressly provides that the costs are to be *split* between the parties, rather than being taxed against the losing party. The court's construction, then, is totally unfounded.

124. See notes 161-169 and accompanying text *infra*.

125. See Harlan, *supra* note 119, at 69.

126. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 551-52 (1949).

127. See notes 111-115 and accompanying text *supra*.

crisis,¹²⁸ it is clear that the crisis has now passed and the substantial obstacles placed in the way of a claimant's access to the courts must be reexamined in light of present circumstances.

B. *Procedural Due Process*

Article I, section 22 of the Constitution of the State of Florida states that the right to trial by jury shall be "secure to all and remain inviolate."¹²⁹ Thus, given this entitlement,¹³⁰ certain procedural safeguards are required by the due process clause of the fourteenth amendment. The issue in this context is whether the burden of mandatory screening panels as a condition precedent to a jury trial is violative of the due process protection guaranteed by the fourteenth amendment.¹³¹

In *Carter v. Sparkman*,¹³² the Supreme Court of Florida failed to give consideration to the impact of the Medical Malpractice Reform Act on a claimant's right to trial by jury.¹³³ The court did not consider whether the provision rendering the mediation panel's decision admissible in a subsequent trial¹³⁴ discourages a claimant from electing to bring his case to trial. A report by the American Bar Association on medical malpractice legislation noted that the admissibility of the panel's decision at a later date "may effectively dissuade the losing party from continuing on to court, for a negative decision by the panel is bound to carry some weight with the jury and lessen the losing party's chances of success."¹³⁵ Commentators have also noted the dangers raised by making a mediation panel's recommendation admissible at a subsequent trial. As one commentator has pointed out:

Many screening panel arrangements [like Florida's] do not require a stenographic record of the hearing; due to the informal nature of the review, and the possibility that either party may be

128. See notes 1-11 and accompanying text *supra*.

129. FLA. CONST. art. 1, § 22.

130. An entitlement is a substantive right derived "from an independent source such as state law." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The modern Court has used the search for an entitlement as a threshold question in due process analysis. See, e.g., *Bishop v. Wood*, 426 U.S. 341 (1976). Once the Court determines that an entitlement exists, as in the instant case, inquiry is made into how much process is due.

131. Comment, *The Constitutional Considerations of Medical Malpractice Screening Panels*, *supra* note 1, at 172.

132. 335 So. 2d at 802.

133. See note 60 and accompanying text *supra*.

134. FLA. STAT. § 768.47(2) (1977); see text accompanying note 51 *supra*.

135. ABA REPORT OF THE COMMISSION ON MEDICAL PROFESSIONAL LIABILITY 44 (1977). The report cited, *inter alia*, Florida's statute as an example of a statute raising the problem of influence on a jury's decision.

able to admit the panel's recommendation into evidence at trial, there is a great danger of prejudice. Statutes vary as to whether panel members may be called as witnesses at trial; the tendency is to admit the panel's conclusion but to disallow any participation by panel members. Where applicable, the jury should be instructed that the finding of the panel is not binding. *Despite these attempted safeguards, it is highly likely that a jury of lay people will accord great weight to such findings.*¹³⁶

Some of the statutes providing for the admissibility of a mediation panel's findings have not been upheld by the courts. In Ohio, for example, a lower court found that such a provision violates a medical malpractice plaintiff's right to a jury trial.¹³⁷ The Ohio statute provides for the compulsory submission of medical malpractice claims to a three member "arbitration board."¹³⁸ The board's decision, subject to review by the trial judge, is admissible at trial.¹³⁹ Despite the fact that the Ohio statute provides safeguards by subjecting the panel's decision to review and by permitting panel members to be cross-examined at the trial, the court found the statute to be constitutionally deficient.¹⁴⁰ The court explained that the introduction of the panel's finding placed an additional burden upon the plaintiff to persuade the jury that the decision of the arbitrators was incorrect. "The right to trial by jury is thus substantially re-

136. Comment, *Michigan's Medical Malpractice Legislation—Prognosis: Curable Defects*, 55 J. URN. L. 309, 313-14 (1978) (emphasis added). See also Harlan, *supra* note 119, at 61. A constitutional attack based on a right to a jury trial, however, was rejected in the case of *In re Smith*, 381 Pa. 223, 112 A.2d 625 (1955), *appeal dismissed sub nom.*, *Smith v. Wissler*, 350 U.S. 858 (1955). The Supreme Court of Pennsylvania upheld a mandatory screening panel on the theory that while the jury trial is delayed, it is not denied. *Id.* at 231, 111 A.2d at 629.

137. *Simon v. St. Elizabeth Medical Center*, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (Comm. Pl. 1976).

138. OHIO REV. CODE ANN. § 2711.21(A) (Page Supp. 1978).

139. *Id.* § 2711.21(C).

140. The court noted that:

The Plaintiff identifies the unusual burden the party who loses in arbitration must overcome at trial in order to counter the introduction into evidence of the arbitrator's decision and the testimony of the individual arbitrators. While it is true that the findings of the arbitrators are not findings in a subsequent jury trial and, therefore, the right to trial by jury guaranteed by Article I, Section 5 of the Ohio Constitution is not violated in that respect, the fact that an additional burden and additional restrictions are created by the compulsory arbitration procedure of R.C. Section 2711.21, which place added pressure and expense upon a Plaintiff or Defendant who loses at arbitration and which, of course, is entirely unique to medical malpractice claims, does raise, as pointed out above, both equal protection problems and the question of the right guaranteed to all litigants to trial by jury.

3 Ohio Op. 3d at 168, 355 N.E.2d at 907 (footnote omitted).

duced in terms of the value of that right to a party who desires to challenge the decision of the arbitrators."¹⁴¹

The basis of the problem in the procedural due process context is the composition of the panel and the nature of its finding. The membership of the panel "stacks the deck" against the plaintiff in a number of ways. First, the fact that one member of the Florida mediation panel is a circuit judge cannot fail to have an impact on the jury.¹⁴² Given the respect which a jury of laymen normally accords to a judge, the protection allegedly afforded by the Florida statute—by directing that the panel finding is to be given only such weight as the jury chooses to ascribe to it—is simply illusory.

Second, the participation of a physician in the mediation panel proceedings raises obvious problems for a plaintiff. The Supreme Court of the United States has placed tremendous emphasis on securing neutrality in court proceedings.¹⁴³ Because "the appearance of evenhanded justice . . . is at the core of due process,"¹⁴⁴ the Court has declared that decisionmakers will be disqualified even if they have no actual bias so long as they might reasonably appear to be biased.¹⁴⁵

In *Gibson v. Berryhill*,¹⁴⁶ the Supreme Court of the United States held that procedural due process was violated on neutrality

141. *Id.* at 169, 355 N.E.2d at 908. The court then added:

While the right to proceed to a jury trial still exists under R.C. Section 2711.21, it is clearly not a free and unfettered right as was certainly intended by the framers of Article I, Section 5 of the Ohio Constitution. Therefore, the arbitration provisions under R.C. Section 2711.21, which permit the introduction into evidence and exposure to the jury of the arbitrator's decision, are a violation of the right to trial by jury.

Id. See also *Wright v. Central Du Page Hosp. Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976) (because Illinois' statute is unconstitutional on the ground that it vests mediation panels with judicial functions, it follows that mediation panel procedure is an invalid restriction on the right to jury trial).

142. This point was raised with respect to the Wisconsin statute in *Wisconsin Medical Malpractice*, *supra* note 65, where it was observed that "participation of the judge in the panel clothes the panel finding with respectability and renders the finding very persuasive evidence When there is a judge serving on the panel there are sound reasons for leaning in the direction of over-protection of the claimant who proceeds to trial." *Id.* at 854. See also the comments on the Virginia statute in Aldrich, *Alternatives to the Medical Malpractice Phenomenon: Damage Limitations, Malpractice Review Panels and Countersuits*, 34 WASH. & LEE L. REV. 1179 (1977).

143. See *Arnett v. Kennedy*, 416 U.S. 134 (1974), where Justice White, concurring and dissenting in part, stated that "the right to an impartial decision-maker is required by due process." *Id.* at 197.

144. *Mayberry v. Pennsylvania*, 400 U.S. 455, 469 (1971) (Harlan, J., concurring).

145. *Morrissey v. Brewer*, 408 U.S. 471, 485-86 (1972). See *American Cyanamid Co. v. FTC*, 363 F.2d 757 (6th Cir. 1966), where the Sixth Circuit stated that "both unfairness and the appearance of unfairness should be avoided." *Id.* at 767.

146. 411 U.S. 564 (1973).

grounds when a state board of optometry revoked the licenses of all optometrists who were employed by business corporations.¹⁴⁷ The Court considered it important that the licenses that were revoked accounted for half of all the optometrists practicing in the state, that the board was composed of optometrists in private practice for their own account, and that "success in the Board's efforts" could "rebound to the personal benefit of members of the board."¹⁴⁸ At least the last two factors considered in *Berryhill* are equally applicable to the composition of the Florida mediation panel. The Court further held that "those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes."¹⁴⁹ As one commentator has pointed out:

The requirement that one member of the tribunal be a practicing physician or other healthcare provider is per se prejudicial in favor of the defendant because no corresponding member represents the interests of the plaintiff. The physician member invariably experiences some conflict between his concern for maintaining high standards in his profession and his awareness of his own potential as a malpractice defendant, and it is probable that this conflict results in partiality toward fellow physicians in some cases. Obviously present for the practical purposes of interpreting the standard of care applicable to a particular medical procedure, and to assist the other panel members in reviewing medical records and reports, the physician nevertheless threatens the right of the plaintiff to an impartial determination of the facts.¹⁵⁰

The problem of partiality toward fellow members of the profession is compounded in Florida by the fact that, in many cases, a

147. *Id.* at 578-79.

148. *Id.* at 578.

149. *Id.* at 599 (citing *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Tumey v. Ohio*, 273 U.S. 510 (1927)). This indicates that a financial stake need not be as direct or positive as it appeared to be in *Tumey*. It should be noted that this due process argument comprehends that to have a biased decisionmaker is unfair, not that there is an absolute denial to a fair trial, which is more in the way of a substantive due process argument. Florida cases are in accord. See, e.g., *Power v. Chillingworth*, 93 Fla. 1030, 113 So. 280 (1927) where the Supreme Court of Florida stated:

Disqualification to adjudicate a cause rests on the ancient maxim that no man should sit as a judge in his own case. This maxim is applicable to all classes of cases and in all courts, and appeals so strongly to one's sense of justice that it was said by Lord Coke to be a natural right, so inflexible that an act of Parliament seeking to subvert it would be declared void.

Id. at 1032, 113 So. at 281; accord, *State ex rel. Central Farmers' Trust Co. v. Chillingworth*, 107 Fla. 747, 143 So. 294 (1932); *State ex rel. Mickle v. Rowe*, 100 Fla. 1382, 131 So. 331 (1931); *State ex rel. First Am. Bank & Trust Co. v. Chillingworth*, 95 Fla. 699, 116 So. 633 (1928).

150. *Mass. Medical Malpractice*, *supra* note 12, at 1305 (footnote omitted).

portion of the plaintiff's ultimate recovery may come from a patient's compensation fund to which the physician panel member himself has contributed.¹⁵¹ The physician member's impartiality, then, may be affected not only by the fact that he is being asked to rule on the liability of a fellow health care provider but also by the fact that a finding of liability may result in increased assessments against him personally.¹⁵² Under these circumstances, a medical malpractice plaintiff is faced with overcoming persuasive evidence which is, from the outset, tainted by partiality and prejudice.

The influence of the judicial referee and the presumptive partiality of the physician member raise two substantial obstacles to a fair jury trial for the plaintiff. In addition, the Florida malpractice claimant cannot look to the attorney panel member for protection of his interests. While the Act makes explicit provision for the physician or health care provider member to be a specialist in the medical field involved,¹⁵³ no such provision is made for the attorney member, who is required only to be a "qualified attorney."¹⁵⁴ There is no requirement that he be a specialist in the medical malpractice field. Thus, only one panel member can be expected to have any expertise in the issues upon which the panel must make its finding. Given this imbalance in expertise, it follows that both the judicial referee and the attorney panel member may be unduly swayed by the opinion of the physician or health care provider member.

The danger of prejudice to the plaintiff, however, is not limited

151. See FLA. STAT. § 768.54 (1977).

152. See *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 261 N.W.2d 434 (1978), where Justice Abrahamson, dissenting in part, observed:

A central element of justice is impartial decision-making. A decision maker who has an interest in the outcome of the litigation cannot fairly adjudicate the case. It is not possible to define with precision the degree or type of pecuniary interest which will disqualify a decision maker. . . .

The financial interest need not be direct; an indirect financial benefit may also be prejudicial.

Id. at 536, 261 N.W.2d at 455 (citation omitted). The issue upon which Justice Abrahamson was commenting was whether the annual assessment against the medical members of a mediation panel was an extra element of unfairness, making the panel suspect. While the majority of the court had found that any financial interest on the part of the medical panel members was too remote and speculative, Justice Abrahamson disagreed, finding no sufficient factual basis for this holding. He stated that he would have held that the financial bias of the panel members, if any, should be allowed to be shown and commented upon, both by the parties in arguments and by the presentation of witnesses. *Id.* at 537, 261 N.W.2d at 456.

153. See text accompanying notes 23-24 *supra*.

154. FLA. STAT. § 768.44(2)(b) (1977). One study has concluded that the attorney-member of a mediation panel should always be an experienced medical malpractice practitioner. See INSTITUTE OF JUDICIAL ADMINISTRATION, MEDICAL MALPRACTICE PANELS IN FOUR STATES 42 (1977) [hereinafter cited as I.J.A. STUDY].

to the panel's composition. The nature of the finding which the jury is permitted to consider also raises a number of dangers. At least one court has pointed out that juries traditionally accord greater weight to the testimony of experts.¹⁵⁵ In this and other regards, medical malpractice mediation panel findings have been characterized as "no different from any other expert testimony received at a trial."¹⁵⁶ Under the Florida Act, however, the mediation panel's finding on liability is indeed accorded different treatment from other expert testimony. Traditionally, expert opinion evidence is admissible at trial only if all the facts upon which the opinion is based are stated.¹⁵⁷ The Florida Act, in contrast, allows the admission of only the panel's finding. No transcript of the hearing is required. Nor may the panel members be called to explain the basis of their finding.¹⁵⁸

The Florida Act, therefore, permits the jury to consider a naked opinion without providing the parties with a means to challenge that opinion. Even in jurisdictions in which mediation panel statutes have been upheld against jury trial attacks, the courts have recognized that a statute which provides no such safeguards would be constitutionally infirm.¹⁵⁹ Clearly, a malpractice plaintiff in Flor-

155. *Simon v. St. Elizabeth Medical Center*, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (C.P. 1976).

156. *Prendergast v. Nelson*, 199 Neb. 97, 105, 256 N.W.2d 657, 665 (1977).

157. See Note, *Medical Malpractice Mediation Panels: A Constitutional Analysis*, 46 *FORDHAM L. REV.* 322 (1977), where the author suggests that if a panel decision is admissible, the parties should be allowed to call the panelists at the trial to question them concerning their decision on any area of their expertise. *Id.* at 348. Harlan, *supra* note 119, at 63-64. See also *Tarkoff v. Schmunk*, 117 So. 2d 442 (Fla. 2d DCA 1959) (medical testimony not admissible in actions for damages unless proper predicate for such testimony was laid).

158. See notes 45-46 and accompanying text *supra*. The admissibility of the panel's decision as to liability also violates a traditional rule of evidence in that it "permits an opinion to be submitted to the jury as evidence on the ultimate issue of liability." Comment, *supra* note 1, at 180. The same commentator remarks that the judge and attorney panel members are not medical experts and their opinion as to medical issues would not be admissible under traditional evidence rules. *Id.* at 181.

Although under the analysis of *Simon v. St. Elizabeth Medical Center*, 3 Ohio Op. 3d at 164, 355 N.E.2d 903 (C.P. 1976), the fact that panelists were allowed to be called to testify was one of the factors which made the Act unconstitutional, the important point of the case was that the decision of the panelists were admitted in the first place. It is suggested that the admission of the panel finding by itself is what sways the jury and produces an undue influence.

159. The New York decisions on this point are instructive. Under the New York statute, the finding of the three member panel is admissible only if unanimous. N.Y. *JUD. LAW* § 148-a(8) (McKinney Supp. 1978). If the recommendation is read to the jury, the doctor member or the attorney member of the panel, or both, may be called by any party with regards to the basis for it. *Id.* The value of the latter provision has been recognized repeatedly in the New York courts. See *Marrico v. Misericordia Hosp.*, 59 App. Div. 2d 680, 398 N.Y.S.2d 660 (Sup. Ct. 1977) (statute allows counsel to explore alleged underlying weakness in panel's determination at the trial); *Comiskey v. Arlen*, 55 App. Div. 2d 304, 390 N.Y.S.2d 122 (1976) (two of

ida runs a substantial risk when he submits his claim to a mediation panel. If he chooses to proceed to a civil action once the panel has made a finding of no liability, he must contend with the fact that the jury will give the panel's finding a great deal of weight, based on its respect for the judicial referee and the physician panel member as well as the weight accorded to expert opinions.¹⁶⁰ The plaintiff's only weapon against this obstacle is the comment permitted in his opening and closing statements. Without incurring the cost of a transcript, the plaintiff has no means of attacking the basis of the panel's finding since he is not permitted to call the members themselves as witnesses. Unquestionably, such procedures fly in the face of our traditional notions of fair play and substantial justice. When we look at the interest involved, the right to a fair and impartial trial, it becomes evident that the amount of process provided falls far short of the amount of process due.

It is not mere speculation that the composition of the panel contributes to a greater number of adverse findings for the claimant. Statistics compiled since the introduction of mediation panels in a number of jurisdictions, including Florida, demonstrate the likeli-

three members of panel can be called by either party, thus giving further assistance to jury). See also *Kletnieks v. Brookhaven Memorial Ass'n, Inc.*, 53 App. Div. 2d 169, 385 N.Y.S.2d 575 (Sup. Ct. 1976). *Contra*, *Eastin v. Broomfield*, 116 Ariz. 576, 570 P.2d 744 (1977) (en banc), where the Supreme Court of Arizona rejected the contention that the panel members should be able to testify at trial stating that the procedure would enable "the prevailing party to bolster the panel's decision by testimony at trial" *Id.* at 581, 570 P.2d at 749.

Statutes in other jurisdictions provide similar safeguards for the parties. In Louisiana, for example, the mediation panel's opinion is admissible, though not binding, and the members of the panel may be called at a subsequent trial. *Everett v. Goldman*, 359 So. 2d 1256 (La. 1978). See also *Butler v. Flint-Goodridge Hosp. of Dillard Univ.*, 354 So. 2d 1070 (La. App. 1978), where the court commented:

An additional safeguard is provided by allowing the members of the panel to be called as witnesses in a subsequent judicial proceeding, thereby assuring a litigant the right to demonstrate the basis for the panel's opinion and to expose any impropriety which may have formed part of the opinion reaching process.

Id. at 1073.

Protection of a different type is afforded by the Maryland statute, which provides that any contention that an award by a medical malpractice arbitration panel should be vacated on the ground of corruption, fraud, partiality or the like is to be decided by the court prior to trial. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(C) (Supp. 1971). Only if the award is not vacated is it admissible at the trial. If the award is vacated, trial of the case proceeds as if there had been no award. *Id.* § 3-2A-06(E). A similar provision is found in the Ohio statute. OHIO REV. CODE § 27.11.21(C)(1)-(3) (Supp. 1978).

160. It has been suggested that in view of the weight juries have traditionally given to expert testimony, it is more likely that an unfair decision of the panel will be carried over into a jury verdict. See Note, *Recent Medical Malpractice Legislation — A First Checkup*, 50 TUL. L. REV. 655, 681 (1976); Note, *Ohio's Rx for the Medical Malpractice Crisis: The Patient Pays*, 45 U. CIN. L. REV. 90, 102 (1976) ("jury may give undue weight to the findings . . . of the panel").

hood of a finding of no liability. In Florida, for example, figures compiled as of June 1, 1978 show that the odds against a plaintiff in the mediation panel procedure are substantial.¹⁶¹ Where the case is processed through the hearing stage, the figures indicate that over eighty-one percent of the panel findings statewide are in favor of the defendant.¹⁶² Thus, a noteworthy percentage of potential Florida malpractice plaintiffs must make the decision on whether to seek a jury trial in light of a negative panel decision, which will be extremely difficult to overcome.

Statistics compiled in other jurisdictions present substantially the same evidence. In New York, while no formal statewide records on medical mediation panels are available, some clerks and judges have prepared data on the panels.¹⁶³ In New York County, only fourteen percent of the panels which reached unanimous decisions—a prerequisite for admissibility at trial¹⁶⁴—found liability, while fifty-one percent found for the defendant.¹⁶⁵ In Nassau County, eleven percent of the panels making unanimous findings found liability, while twenty-six percent found in favor of the defendant.¹⁶⁶

In New Mexico, which has the most comprehensive statewide data on the use of panels and their findings, the proportion of find-

161. Approximate figures as of June 1, 1978:

UPDATED EVALUATION OF MEDICAL MALPRACTICE MEDIATION
PANEL CASES COMPILED BY J. B. SPENCE

COUNTY	NO. CASES FILED SINCE NEW LAW	NO. CASES PROCESSED THROUGH HEARING STAGE	NO. CASES RESOLVED IN FAVOR OF DEFENDANT	NO. CASES RESOLVED IN FAVOR OF PLAINTIFF
DADE	701	194	179	15
BROWARD	371	115	69	19
BREVARD	47	12	8	1
PINELLAS	149	34	28	4
HILLSBOROUGH	232	60	47	13
ESCAMBIA	56	23	17	6
PALM BEACH	131	64	43	8
ORANGE	131	38	31	8
POLK	65	--	20	4
TOTALS:	1,883	541	442	78

162. See figures as cited in note 161 *supra*. In Dade County, the defendant prevailed in 92% of the panel hearings.

163. I.J.A. STUDY, *supra* note 154, at 15.

164. N.Y. JUD. LAW § 148-a(8) (McKinney Supp. 1978).

165. I.J.A. STUDY, *supra* note 154, at 16.

166. *Id.*

ings for the plaintiff has decreased as the panel's caseload has risen.¹⁶⁷ In New Jersey, statistics were compiled showing the performance of panels, established by court rule, which may be invoked by plaintiffs on a voluntary basis. The panels consist of two physicians, two attorneys and a retired judge.¹⁶⁸ In 1975, of the cases in which panel hearings were completed, ninety-three percent resulted in findings of no liability.¹⁶⁹

These available statistics make it clear that a panel composed of physicians, lawyers and an impartial referee is far more likely to saddle a plaintiff with a negative finding. Since juries tend to agree with panel findings,¹⁷⁰ a plaintiff may be effectively dissuaded from bringing his claim before a jury¹⁷¹ when the finding is admissible at a later trial. The experience in New Mexico is illustrative. Seventy-three percent of the plaintiffs who had lost before hearing panels did not pursue their claim.¹⁷² The Florida Act is particularly discouraging to the plaintiff in that he has no effective means of challenging the panel's conclusion.

The Florida Medical Malpractice Reform Act has effectively burdened a substantial number of potential malpractice plaintiffs with an unjustified obstacle to an impartial jury verdict. Not only is there serious doubt as to the ability of the mediation panel to render an impartial decision, but it also appears that the subsequent trial is tainted by the effects of the panel's decision to the point of losing its neutral character. The right to due process protection under the fourteenth amendment, triggered by the Florida constitutional guarantee of a right to trial by jury, demands far more procedural protection for malpractice plaintiffs than is currently provided.

VI. CONCLUSION

The constitutional deficiencies of the Florida Medical Malpractice Reform Act, as presented and analyzed in this article, were not

167. *Id.* at 26. The New Mexico panel consists of three health care providers and three attorneys, each with one vote, and a chairperson attorney who votes only in the event of a tie. In 1976, of cases actually heard by a panel, 83% resulted in findings for the defendant. In only 17% of the cases was the plaintiff successful. *Id.* at 27. Data on the impact of panel decisions on subsequent litigation is equally startling. Of the 56 cases where the panel found no negligence, 73% were subsequently dropped or dismissed. *Id.* at 28.

168. *Id.* at 29.

169. *Id.* at 31.

170. "Juries generally agree with panel findings, although it is not clear whether it is because they are impressed with the panel's findings or because they view the evidence similarly." *Id.* at 15.

171. See text accompanying notes 135-136 *supra*.

172. I.J.A. STUDY, *supra* note 154, at 26.

adequately addressed by the Supreme Court of Florida in *Carter v. Sparkman*.¹⁷³ Instead, the court limited its consideration to the equal protection issue. While the court should, when possible, "resolve all doubts as to the validity of a statute in favor of its constitutional validity,"¹⁷⁴ it is beyond the scope of the court to give undue deference to a legislative judgment when that judgment is violative of basic constitutional protections.

A reexamination of these constitutional issues, as well as other policy considerations, is now necessary. In light of new circumstances which have arisen since 1975, the reason for the Act has ceased to exist. It is therefore submitted that the legislature itself should repeal the Act if the supreme court is unwilling to declare it unconstitutional.

173. 335 So. 2d 802 (Fla. 1976).

174. *Id.* at 805.