Missouri Law Review

Volume 45
Issue 2 *Spring 1980*

Article 6

Spring 1980

Constitutional Law: Statutorily Required Mediation as a Precondition to Lawsuit Denies Access to the Courts

Martin M. Loring

A father, either presumptive or putative, must have an opportunity to litigate the paternity of a child whom he is compelled to support. Any proceeding that establishes paternity, to be res judicata, must be predicated on personal service.

JEAN E. GOLDSTEIN

CONSTITUTIONAL LAW: STATUTORILY REQUIRED MEDIATION AS A PRECONDITION TO LAWSUIT DENIES ACCESS TO THE COURTS

State ex rel. Cardinal Glennon Memorial Hospital v. Gaertner[1]

Cardinal Glennon Memorial Hospital for Children was sued as one of several defendants to a medical malpractice claim. It filed a motion to dismiss[2] on the ground that the plaintiffs had failed to comply with Mo. Rev. Stat. chapter 538 which required that all such malpractice claims against

---

within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. . . ." The usual plaintiffs are the child and his mother as next friend. The action also may be brought by a person who alleges he is the father of a child even if the mother disagrees. *See* David v. Cindy, 565 S.W.2d 803 (Mo. App., D. Spr. 1978), in which custody of the illegitimate child was awarded to the putative father after he had brought a declaratory judgment action to establish himself as the natural father. It is interesting to note that the child was not joined. Presumably, at a later date, the child could challenge the paternity findings. *See* notes 35 & 36 and accompanying text *supra.*

The standard of proof required to establish paternity of an illegitimate child is preponderance of the evidence. Much deference is given to the trial court's opportunity to judge credibility. This is important since the only evidence may be an accusation and a denial. In T.A.L.S. v. R.D.B., 539 S.W.2d 737 (Mo. App., D. St. L. 1976), the mother stated that the defendant was the father of her child and that she had not had intercourse with anyone else. In addition, the child was present during the trial for comparison of features. The verdict for the mother was upheld. In S__J__B__ v. S__F__S__, 504 S.W.2d 233 (Mo. App., D.K.C. 1973), there was conflicting testimony by the mother and the putative father. Judgment was upheld for the defendant father because of the trial court's opportunity to judge the credibility of the witnesses.

In addition to liability for support of the child, the putative father also has been held liable for the child's and mother's attorneys' fees. The court in Stegemann v. Fauk, 571 S.W.2d 697 (Mo. App., D. St. L. 1978), found its authority in RSMo § 452.355 (1978) and in its power to exercise equitable jurisdiction to care and provide for minor children.

1. 583 S.W.2d 107 (Mo. En Banc 1979).
2. *See* Mo. R. Civ. P. 55.27.

health care providers be submitted to a Professional Liability Review Board[3] prior to the filing of a petition in court. The trial court found the statute to be unconstitutional and overruled the motion to dismiss. The Missouri Supreme Court, on the hospital's petition, issued a provisional rule in prohibition and a show cause order against the circuit judge.[4] This rule was later quashed when the court found chapter 538 to be unconstitutional.[5]

The court held that the requirements of chapter 538 violated article I, section 14 of the Missouri Constitution by denying access to the courts to plaintiffs.[6] Article I, section 14, provides that "the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay." Chapter 538, which became effective January 1, 1977, established a prerequisite to the filing of a medical malpractice lawsuit: a review board, composed of a circuit judge,[7] two attorneys, two health care providers, and one layperson,[8] must hear evidence on the claim and make recommendations as to liability and damages.[9] These recommendations were not binding on any of the parties,[10] and were not admissible at any subsequent trial of the lawsuit.[11] The parties retained the express right to reject the recommendations and to file a petition in court,[12] and were limited in such right only by the statute of limitations applicable to the tort.[13] The maximum time allowed between the plaintiff's initiation of the cause with the Board and the issuance of recommendations was 150 days.[14]

The *Gaertner* court's principal authority for its decision was *People ex rel. Christiansen v. Connell.*[15] In that case, the Illinois Supreme Court struck down a statute which required the filing of notice with the circuit court sixty days prior to filing a petition for divorce.[16] That sixty day delay was found to deny access to the courts in violation of a provision of the

3. *See* notes 7-14 and accompanying text *infra.*
4. 583 S.W.2d at 108.
5. *Id.* at 111.
6. *Id.* at 110.
7. The presence of a circuit judge on the panel created a separation of powers problem. *Id.* at 111-12 (Simeone, J., concurring). *See also* notes 63-68 and accompanying text *infra.*
8. RSMo § 538.025 (1978).
9. RSMo § 538.045 (1978).
10. RSMo § 538.050 (1978).
11. *Id.*
12. *Id.*
13. RSMo § 538.020(2) (1978). The limitation period for medical malpractice actions is two years. RSMo § 516.105 (1978).
14. RSMo §§ 538.035(1), .045 (1978). The hearing was required to be concluded within 90 days of filing with the Board. The Board then had 30 days to issue its recommendations with an extension of 30 days available if needed.
15. 2 Ill. 2d 332, 118 N.E.2d 262 (1954).
16. 1953 Ill. Laws at 284.

Illinois Constitution[17] which closely resembled article I, section 14 of the Missouri Constitution.

The *Gaertner* court distinguished *Comiskey v. Arlen*,[18] a 1976 New York Supreme Court case which dismissed a denial of access to the courts challenge to a statute similar to Missouri's chapter 538, on the ground that the New York statute[19] provided for the review panel to convene *after* the filing of a petition. This distinction, combined with the subsequent legislation and case law in Illinois,[20] indicates a dissatisfaction by the Missouri Supreme Court with the requirement that the review board's hearing had to occur *prior* to filing of the petition and, more importantly, prior to acquisition of personal jurisdiction over the defendant.[21]

A strong dissent by Chief Justice Morgan in *Gaertner*[22] points out the presence of a substantial body of recent case law at the federal and state levels dealing with access to the courts in general and with medical malpractice review boards in particular.[23] He would have upheld the constitutionality of chapter 538, a view consistent with that adopted by the majority of jurisdictions which have decided this issue.

---

17. ILL. CONST. of 1870, art. II, § 19 (current version at ILL. CONST. art. I, § 12) provided:

> Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation; he ought to obtain, by law, right and justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay.

18. 55 A.D.2d 304, 390 N.Y.S.2d 122 (1976).

19. N.Y. JUD. LAW § 148-a(1) (McKinney Supp. 1979).

20. After *Christiansen* was decided, the Illinois legislature amended the statute so that the 60-day delay came after the filing of a praecipe for summons which, when served on the defendant, gave the court personal jurisdiction over him. The Illinois Supreme Court found this amendment (1955 Ill. Laws at 2114) to be satisfactory and upheld the new statute. People *ex rel.* Doty v. Connell, 9 Ill. 2d 390, 137 N.E.2d 849 (1956).

21. Logic dictates that immediate acquisition of jurisdiction over the defendant will be far more crucial to the plaintiff and to the court when the defendant is an estranged spouse than when the defendant is a hospital or a practicing physician. The relative dangers of a defendant eluding service of process are obvious. Despite this distinction, the *Gaertner* majority appears to have viewed this delay in service of process as significant.

22. 583 S.W.2d at 112.

23. *See, e.g.*, Hines v. Elkhart Gen. Hosp., 465 F. Supp. 421 (N.D. Ind. 1979); Eastin v. Broomfield, 116 Ariz. 576, 570 P.2d 744 (1977); Carter v. Sparkman, 335 So. 2d 802 (Fla. 1976); Wright v. Central DuPage Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976); Everett v. Goldman, 359 So. 2d 1256 (La. 1978); Attorney Gen. v. Johnson, 282 Md. 274, 385 A.2d 57 (1978); Paro v. Longwood Hosp., 369 N.E.2d 985 (Mass. 1977); Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977); Comiskey v. Arlen, 55 A.D.2d 304, 390 N.Y.S.2d 122 (1976); Parker v. Children's Hosp., 483 Pa. 106, 394 A.2d 932 (1978); State *ex rel.* Strykowski v. Wilkie, 81 Wis. 2d 491, 261 N.W.2d 434 (1977). *See also* Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399 (1976) (discussion of access to the courts question, but holding did not rest on that ground); Simon v. St. Elizabeth Medical Center, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (Ct. Common Pleas 1976).

Most state constitutions contain a clause similar or identical to that of Missouri's article I, section 14.[24] Those jurisdictions for the most part have developed case law which interprets and construes those sections in a haphazard and non-definitive fashion.[25] In recent years, though, there has been a movement toward adoption of statutes which establish a pre-litigation process similar to Missouri's chapter 538.[26] As those statutes have been subjected to judicial scrutiny under these constitutional provisions, the courts have begun to employ standard constitutional tests. Most frequently, the level of protection which the courts will afford the constitutional provision depends on the nature of the substantive right being asserted in the underlying claim. If the substantive right is deemed to be "fundamental," statutory restrictions will be examined very closely under the strict scrutiny test;[27] only the presence of a compelling state interest will justify the restriction or denial of access to the courts. If, on the other hand, the substantive right being asserted is not the subject of a specific constitutional

---

24. *See, e.g.,* ARIZ. CONST. art. II, § 11; FLA. CONST. art. I, § 21; ILL. CONST. art. I, § 12; IND. CONST. art. I, § 12; LA. CONST. art. I, § 22; MD. CONST. Declaration of Rights, art. 19; MASS. CONST. pt. I, art. 11; MINN. CONST. art. I, § 8; NEB. CONST. art. I, § 13; OHIO CONST. art. I, § 16; PA. CONST. art. I, § 11; UTAH CONST. art. I, § 11; WIS. CONST. art. I, § 9.

25. *See, e.g.,* Welch v. Davis, 342 Ill. App. 69, 95 N.E.2d 108 (1950), *rev'd on other grounds,* 410 Ill. 130, 101 N.E.2d 547 (1952); Pullen v. Novak, 169 Neb. 211, 99 N.W.2d 16 (1959). *See generally* annotated constitutional sections, *supra* note 24, and cases compiled thereunder.

The Missouri Supreme Court has not enunciated any consistent rules of law in its interpretation of MO. CONST. art. I, § 14, although a variety of fact situations have been found to deny or not to deny access to the courts. *See, e.g.,* Glenn v. Department of Corrections, 434 S.W.2d 473 (Mo. 1968) (sovereign immunity upheld); State v. Aubuchon, 381 S.W.2d 807 (Mo. 1964) (reasonable court costs and fees upheld); Kreuger v. Schmiechen, 364 Mo. 568, 264 S.W.2d 311 (1954) (charitable immunity upheld); State *ex rel.* National Ref. Co. v. Seehorn, 344 Mo. 547, 127 S.W.2d 418 (1939) (common law rule that damages in tort do not survive death of wronged or wrongdoer upheld); State *ex rel.* Kennedy v. Remmers, 340 Mo. 126, 101 S.W.2d 70 (1937) (municipal administrative rule requiring policemen to obtain permission before retaining legal counsel and filing civil action struck down); DeMay v. Liberty Foundry Co., 327 Mo. 495, 37 S.W.2d 640 (1931) (workmen's compensation statute upheld). *But see* Kyger v. Koerper, 355 Mo. 772, 207 S.W.2d 46 (1948); Kristanik v. Chevrolet Motor Co., 335 Mo. 60, 68, 70 S.W.2d 890, 894 (1934) (legislature could not impose a delay upon the administration of justice which was "unreasonable" and "unnecessary"). These terms appear to be used purely in a descriptive fashion, however, and not to delineate any precise standards of analysis.

26. *See, e.g.,* ARK. STAT. ANN. § 34-2602 (Supp. 1979); FLA. STAT. ANN. § 768.44 (West Supp. 1979); IND. CODE ANN. §§ 16-9.5-9-1 to -10 (Burns Supp. 1979); LA. REV. STAT. ANN. § 40:1299.47 (West 1977); N.Y. JUD. LAWS § 148-a (McKinney Supp. 1979-80); PA. STAT. ANN. tit. 40, §§ 1301.301-.606 (Purdon Supp. 1979-80); WIS. STAT. ANN. §§ 655.02-.21 (West Supp. 1979).

27. *Cf.* Parker v. Children's Hosp., 483 Pa. 106, 120-21, 394 A.2d 932, 939-40 (1978) (Pennsylvania court does not declare the right to be a fundamental one, but nevertheless rejects the claim on the ground of a compelling state interest). It is not clear whether this court considers the strict scrutiny test to be necessary and appropriate or if it merely describes the supporting interest as compelling in order to summarily dispense with the issue.

protection and is therefore not fundamental,[28] then the rational basis test provides that access to the courts may be restricted if a rational or reasonable basis for the restriction is shown.[29]

The Washington Supreme Court took a different approach in *Carter v. University of Washington*[30] and held that the presence of a specific constitutional provision guaranteeing access to the courts made that right of access itself fundamental. Thus, the right of access was subject to the strict scrutiny test regardless of the substantive right being asserted.[31] This position is distinctly in the minority but is nonetheless well-reasoned. The equal protection and due process clauses of the Federal[32] and Washington Constitutions[33] were construed to mean that only a compelling state interest will justify a denial of equal protection or due process when the substantive right being asserted is fundamental. Among fundamental rights are those specifically guaranteed by the terms of the constitution. When access to the courts is so guaranteed, the Washington court reasoned, it is a fundamental right and any attempted restriction will be subjected to strict scrutiny.[34] While the logic of this argument is convincing, it has not been expressly adopted by any other jurisdiction.[35]

---

28. A few rights have been deemed fundamental though they are not specifically guaranteed in the language of the Constitution. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971) (right to divorce); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to privacy).

29. *See* Carter v. Sparkman, 335 So. 2d 802, 805-06 (Fla. 1976); Everett v. Goldman, 359 So. 2d 1256, 1268-69 (La. 1978). The *Carter* court admitted that "the pre-litigation burden cast upon the claimant reaches the outer limits of constitutional tolerance." 335 So. 2d at 806. *Cf.* State v. Massey, 275 N.W.2d 436 (Iowa 1979) (applied the rational basis test to an access to the courts question, which did not involve a constitutional provision similar to that in Mo. CONST. art. I, § 14). *See also* Jenkins v. Washington, 85 Wash. 2d 883, 540 P.2d 1363 (1975).

30. 85 Wash. 2d 391, 536 P.2d 618 (1975).

31. *Id.* at 398-99, 536 P.2d at 623. The *Carter* court found the right of access to the courts to be inherent in the constitutional provision preserving the right to petition for grievances. WASH. CONST. art. 1, § 4. The court made no mention of WASH. CONST. art. I, § 10, which declares that "justice in all cases shall be administered openly and without unnecessary delay." This clause seems to provide a much stronger case for the fundamental nature of the right than does the "petition for grievances" clause.

32. U.S. CONST. amend. XIV.

33. WASH. CONST. art. I, §§ 3 & 12.

34. *Carter* was overruled in Housing Auth. v. Saylors, 87 Wash. 2d 732, 557 P.2d 321 (1977). The *Saylors* court held that the "petition for grievances" clause of the Washington Constitution, *see* note 31 *supra*, did not create a right of access to the courts, and that the right was therefore not fundamental. 87 Wash. 2d at 742, 557 P.2d at 327. Once again, the court ignored the constitutional provision similar to that in Mo. CONST. art. I, § 14, which strongly supports the argument as to the fundamental nature of the right. It is important to note that the *Saylors* court did not hold that access to the courts could not be fundamental, only that the "petition for grievances" clause did not make it fundamental. 87 Wash. 2d at 742, 557 P.2d at 327.

35. There is at least one good reason why courts have been reluctant to declare access to the courts to be a fundamental right in and of itself. Such a holding could make vulnerable some well-established judicial and legislative corner-

In ruling that the right of access to the courts is not a fundamental right, the majority of state courts have relied on authority stemming from the United States Supreme Court. The Supreme Court has held in civil cases that the rational basis test is to be applied unless the underlying substantive right being asserted is fundamental.[36] Although the status of the right of access to the courts is less clear in the area of criminal law,[37] the question seems reasonably well-settled as it pertains to the civil law. While most state constitutions specifically guarantee the right of access to the courts,[38] the United States Constitution does not.[39] Thus, the *Carter* argument that access to the courts is a fundamental right in and of itself is not as readily available to the United States Supreme Court.[40]

---

stones to actions based on a theory of access to the courts. Those areas could include, for example: statutes of limitations, Williams v. Brown Mfg. Co., 45 Ill. 2d 418, 261 N.E.2d 305 (1970); Forest v. Parmalee, 402 Mich. 348, 262 N.W.2d 653 (1978); the requirement of exhaustion of administrative remedies, West Penn. Power Co. v. Train, 522 F.2d 302 (3d Cir. 1975); requirements of court costs and filing fees, Ortwein v. Schwab, 410 U.S. 656 (1973); United States v. Kras, 409 U.S. 434 (1973); and agencies of so-called "primary jurisdiction," *e.g.*, the Missouri Public Service Commission, *see generally* Davis, *The Missouri Public Service Commission*, 42 U.M.K.C. L. REV. 279 (1974). While it is far from certain that any of these would fail that test, it is quite possible that the courts prefer a case-by-case analysis of the *Gaertner* variety to such a potentially painful and far-reaching judicial reconsideration.

36. Ortwein v. Schwab, 410 U.S. 656 (1973); United States v. Kras, 409 U.S. 434 (1973); Boddie v. Connecticut, 401 U.S. 371 (1971).

37. *See* Bounds v. Smith, 430 U.S. 817 (1977), in which the Court held that "the fundamental constitutional right of access to the courts requires prison authorities" to provide inmates with either adequate law libraries or trained legal counsel to assist in the preparation and filing of legal papers. *Id.* at 828. Although the word "fundamental" is used here to describe the right of access to the courts, no express mention is made of strict scrutiny or compelling state interest. It seems possible, then, that the Court intended the term "fundamental" merely to describe the right in this particular context and not to convey a constitutional status. Mr. Justice Rehnquist noted in his vigorous dissent that the right of access to the courts is found nowhere in the Constitution. *Id.* at 839. Of course, that does not mean that it cannot be a fundamental right. *See* note 28 *supra*.

38. *See* note 24 *supra*.

39. Although not explicitly guaranteed by the terms of the United States Constitution, equality of access to the courts has long been protected under the fourteenth amendment. *See, e.g.*, Barbier v. Connally, 113 U.S. 27, 31 (1885), where the Court declared that the fourteenth amendment intended that all persons "should have like access to the courts of the country for the protection of their persons and property."

40. The anomaly presented by all this is that the United States Supreme Court decisions, *see* note 36 *supra*, are the principal authority used by many of the state courts in their determination that the rational basis test applies. Those federal cases, however, are based in part on the fact that the United States Constitution does not contain a specific guarantee of access to the courts. Without that guarantee, it is much easier to find the right not to be fundamental. Unquestioned reliance on that authority by a state court would seem unjustified when the state constitution specifically guarantees access to the courts. Consideration should be given to the possibility that the state constitution makes the right fundamental. Only the Washington court, however, has made such an examination. *See* notes 30-35 and accompanying text *supra*.

Assuming that access to the courts is not inherently a fundamental right, an evaluation must be made of the underlying substantive claim being asserted in the malpractice review board cases: the tort action for medical negligence. Since that claim does not encompass a fundamental right,[41] the statutes are subjected to the rational basis test. When that test has been applied, the statutes have been upheld.

The *Gaertner* court apparently did not apply the rational basis test since chapter 538 easily would have passed the constitutional demands of that test. As the dissent noted, a medical malpractice crisis has arisen in this state as well as in the nation.[42] The plethora of large malpractice verdicts has caused malpractice insurance premiums to increase dramatically. Those increases have been passed on to the general public in the form of rapidly increasing patient costs. This skyrocketing cost of health care, coupled with extensive publicity giving rise to public awareness of medical negligence, may have caused in some sectors of the public a decline in trust and confidence in the medical profession. Chapter 538 might have been a legislative attempt to alleviate this problem and could be justified on the rational basis that it was reasonably well-calculated to have a positive impact on it. Frivolous claims would be discouraged, while the settlement of meritorious claims would be encouraged.

In failing to apply the rational basis test, the *Gaertner* court either ignored or rejected without comment a significant group of cases from the supreme courts of other states which did apply that test to virtually identical situations.[43] Typical of those cases is *Attorney General v. Johnson,*[44] where the Maryland Supreme Court rejected an access to the courts claim which was based on a constitutional clause similar to Missouri's article I, section 14.[45] The Maryland statute challenged in *Johnson* was far more restrictive of the parties' rights than was Mo. Rev. Stat. chapter 538. It required that both notice of rejection of the panel's findings and an action to nullify those findings be filed in the circuit court within ninety days of the panel's decision. Failure to timely file would cause the findings to become final at that time and subject to entry into judgment.[46] Furthermore, the findings were admissible into evidence and presumed to

41. Everett v. Goldman, 359 So. 2d 1256, 1266 (La. 1978).

42. *See generally* AMERICAN MEDICAL ASSOCIATION, MALPRACTICE IN FOCUS 12-13 (1975); LIBRARY OF CONGRESS CONGRESSIONAL RESEARCH SERVICE, MEDICAL MALPRACTICE: A SURVEY OF ASSOCIATED PROBLEMS AND PROPOSED REMEDIES 7-8 (1975); DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE 5-10 (1973), *cited in* Comment, *The Constitutional Considerations of Medical Malpractice Screening Panels,* 27 AM. U.L. REV. 161 n.2 (1977). *See also* Mechanic, *Some Social Aspects of the Medical Malpractice Dilemma,* 1975 DUKE L.J. 1179; Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications,* 55 TEX. L. REV. 759 (1977).

43. *See* notes 44-56 and accompanying text *infra.*

44. 282 Md. 274, 385 A.2d 57 (1978).

45. MD. CONST. Declaration of Rights, art. 19.

46. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06 (a), (b) (Supp. 1978).

be correct. The party rejecting them had the burden of proving them wrong.[47] The Maryland court held that the terms of this statute did not violate the right of access to the courts. The right was admittedly restricted, but as long as the restrictions were "reasonable," they were not constitutionally offensive.[48]

The supreme courts of Florida,[49] Louisiana,[50] and Wisconsin[51] also have applied the rational basis test to their respective state constitutions and statutes, and have concluded that malpractice mediation panels identical to or more restrictive than Missouri's[52] did not deny access to the courts.[53] All of those states have constitutional provisions similar to Missouri's article I, section 14.[54] All have statutes which require mediation of medical malpractice claims prior to the filing of a lawsuit[55] and which allow admission of the panel's findings into evidence.[56] Yet all of them rejected the claim that the statute denied access to the courts.

The Missouri Supreme Court has taken a conspicuous minority position on this point. Despite the nearly unanimous authority of other state courts, the rational basis test will not be the standard in Missouri for evaluating the assertion that the right of access to the courts has been violated by mandatory pre-litigation arbitration of claims involving non-fundamental rights. It is unclear what standard, if any, will be applied, but it apparently will not be the rational basis test.

The *Gaertner* decision effectively has thrown the medical malpractice crisis back into the laps of the Missouri legislature. The need for some kind of pre-litigation screening process is once again of paramount concern. In order to withstand judicial scrutiny, however, the designers of new legislation must provide for certain basic rights of the parties. More than just the resolution of the medical malpractice crisis is at stake. The state's interest must be brought into better balance with and, if necessary, subordinated to, the interests of the parties.

One change which appears to be essential is that the panel convene

47. *Id.* § 3-2A-06 (d).
48. 282 Md. 274, 299-300, 385 A.2d 57, 72 (1978).
49. Carter v. Sparkman, 335 So. 2d 802 (Fla. 1976).
50. Everett v. Goldman, 359 So. 2d 1256 (La. 1978).
51. State *ex rel.* Strykowski v. Wilkie, 81 Wis. 2d 491, 261 N.W.2d 434 (1978).
52. *E.g.,* FLA. STAT. ANN. § 768.47 (West Supp. 1979), allows the panel's conclusions to be introduced into evidence at a subsequent trial, but forbids the admission of specific findings of fact; LA. REV. STAT. ANN. § 40:1299.47 (West Supp. 1979), makes the panel's findings admissible and also allows the panel members to be called as witnesses.
53. Hines v. Elkhart Gen. Hosp., 465 F. Supp. 421 (N.D. Ind. 1979), was decided approximately one month before *Gaertner,* and therefore was not cited or relied upon by the Missouri Supreme Court. Nevertheless, its facts cannot be distinguished from the facts of *Gaertner.*
54. *See* note 24 *supra.*
55. FLA. STAT. ANN. § 768.44 (1) (a) (West Supp. 1979); LA. REV. STAT. ANN. § 40:1299.47 (B) (West 1977); WIS. STAT. ANN. § 655.04 (1) (b) (West Supp. 1979).
56. FLA. STAT. ANN. § 768.47 (2) (West Supp. 1979); LA. REV. STAT. ANN. § 40.1299.47 (H) (West Supp. 1979); WIS. STAT. ANN. § 655.19 (1) (West Supp. 1979).

after the filing of plaintiff's petition and service of process on defendant.[57] The mediation procedure would no longer be a prerequisite to actual entry into the judicial process, but merely another procedural step within that process. The threshold delay in access to the courts would be removed. This change also would help lessen the possibility that the plaintiff would be unable to acquire personal jurisdiction over the defendant. Another of the principal dangers of chapter 538 would thereby vanish.

Facilitation of discovery, though mentioned only briefly by the concurrence in *Gaertner*,[58] is a modification which would further serve to shield the parties from prejudice and the statute from constitutional attack. Chapter 538's sole discovery provision authorized the panel to subpoena documents, records, or other evidence;[59] no provision was included for the parties to initiate any process of discovery.[60] The right to discovery is essential to a party's development of his case.[61] Postponement of the availability of discovery, such as was possible under the procedures of chapter 538, in some cases could vitiate the capacity to defend or prosecute: witnesses could die or disappear;[62] memories could grow dim. New legislation preserving these discovery rights would prevent these hypotheticals from becoming a reality.

Several other potential weaknesses of chapter 538-type legislation warrant mentioning. Most important is that noted in the concurring opinion: separation of powers.[63] The Missouri Constitution mandates separation of the powers of the executive, judicial, and legislative branches of the state government.[64] By imposing non-judicial functions on judicial personnel, or by imposing judicial functions on non-judicial personnel, chapter 538 may have violated that provision. The argument is that the circuit judge who chaired the review board was compelled to exercise executive or administrative functions,[65] and that the non-judicial members of the review

57. *See* notes 18-21 and accompanying text *supra*.
58. 583 S.W.2d at 112.
59. RSMo § 538.035 (2) (1978).
60. *See generally* FED. R. CIV. P. 26-37; MO. R. CIV. P. 56-61 (discovery provisions).
61. *See generally* 4, 4A J. MOORE, MOORE'S FEDERAL PRACTICE (Supp. 1978-79); C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS §§ 81-90 (3d ed. 1976); C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 2001-2300 (Supp. 1978); Frost, *The Ascertainment of Truth by Discovery*, 28 F.R.D. 37, 89-97 (1960); Wright, Wegner & Richardson, *The Practicing Attorney's View of the Utility of Discovery*, 12 F.R.D. 97 (1952).
62. *See generally* FED. R. CIV. P. 27; MO. R. CIV. P. 57.02 (depositions to perpetuate testimony).
63. 583 S.W.2d at 111-12.
64. MO. CONST. art. II, § 1.
65. This appears to be the principal concern of the concurring opinion. 583 S.W.2d at 111 (Simeone, J., concurring). *But see* Schwab v. St. Louis, 310 Mo. 116, 274 S.W. 1058 (1925). The *Schwab* court said that non-judicial duties may be performed by judicial officers unless the Missouri Constitution itself clearly delegates those duties to the executive or legislative branches. *See also* Parsons v. Harvey, 281 Mo. 413, 221 S.W. 21 (1920); State *ex rel.* Manning v. Higgins, 125 Mo. 364, 28 S.W. 638 (1894).

board were empowered to exercise judicial functions.[66] If a majority of the court is willing to accept this argument, the survival of any future legislation remains doubtful. The functions of the review board are either judicial or non-judicial. In either case an attack could be mounted. It is, however, significant that this separation of powers argument has met with success only once when used to attack a medical malpractice mediation statute.[67] Its failures are far more numerous.[68]

A trio of other constitutional claims can and probably will be directed at any future legislation. Due process,[69] equal protection,[70] and trial by jury[71] claims have been presented to every appellate court which has been called upon to pass judgment on a medical malpractice mediation statute.[72] Trial by jury has been successful once.[73] Due process and equal protection have been unanimously rejected,[74] as had been access to the courts prior to *Gaertner*.[75] The possibility that the Missouri Supreme Court would accept a previously unaccepted basis of attack therefore cannot be ruled out, although success on one of these theories seems unlikely. Chapter 538 was far less restrictive of and prejudicial to the rights of due process, equal protection, and trial by jury than were any of the approximately twelve statutes subjected to judicial evaluation in other states.[76] Unless future legislation in some way more seriously threatens these rights, it is improbable that an attack on these grounds would succeed.

The *Gaertner* decision ultimately does not give the legislature or the

66. In Wright v. Central DuPage Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976), the Illinois Supreme Court struck down a statute similar to RSMo ch. 538 on the ground that it empowered non-judicial members of the panel to exercise judicial functions. These two lines of attack could be made alternatively, depending on whether the functions of the board were found to be judicial or non-judicial. If the functions of the board were found to include both types, then the two theories could be presented concurrently.

67. Wright v. Central DuPage Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

68. *See, e.g.,* Eastin v. Broomfield, 116 Ariz. 576, 582, 570 P.2d 744, 750 (1977); Paro v. Longwood Hosp., 369 N.E.2d 985, 991-92 (Mass. 1977).

69. *See, e.g.,* Everett v. Goldman, 359 So. 2d 1256, 1267-68 (La. 1978).

70. *See, e.g.,* Hines v. Elkhart Gen. Hosp., 465 F. Supp. 421, 430-31 (N.D. Ind. 1979).

71. *See, e.g.,* Parker v. Children's Hosp., 483 Pa. 106, 124-26, 394 A.2d 932, 941-42 (1978).

72. *See* cases cited note 23 *supra.*

73. Wright v. Central DuPage Hosp. Ass'n, 63 Ill. 2d 313, 321-24, 347 N.E.2d 736, 740-41 (1976).

74. *See, e.g.,* cases cited in notes 69 & 70 *supra.*

75. *See* notes 44-56 and accompanying text *supra.*

76. ARIZ. REV. STAT. § 12-567 (West Supp. 1979); FLA. STAT. ANN. § 768.44 (West Supp. 1979); IDAHO SESS. LAWS ch. 278, at 953 (1976); ILL. ANN. STAT. ch. 110, §§ 58.3-.10 (Smith-Hurd Supp. 1979); IND. CODE ANN. §§ 16-9.5-9-1 to -10 (Burns Supp. 1979); LA. REV. STAT. ANN. § 40:1299.47 (West Supp. 1979); MD. CTS. & JUD. PROC. CODE ANN. §§ 3-2A-01 to -09 (Supp. 1978); MASS. GEN. LAWS ANN. ch. 231, § 60B (West Supp. 1979); NEB. REV. STAT. §§ 44-2801 to -2855 (1978); N.Y. JUD. LAWS § 148-a (McKinney Supp. 1979-80); PA. STAT. ANN. tit. 40, §§ 1301.301-.606 (Purdon Supp. 1979-80); WIS. STAT. ANN. §§ 655.02-.21 (West Supp. 1979).