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VIRGINIA'S NEW MEDICAL MALPRACTICE REVIEW PANEL AND SOME QUESTIONS IT RAISES

*Thomas J. Harlan, Jr.**

Historically, attorneys would claim that in potential medical malpractice cases, it was difficult, if not impossible, to proceed against a defendant doctor. The so-called "conspiracy of silence" existed, causing the refusal of other doctors to serve as expert medical witnesses to prove that the defendant fell below the standard of reasonable care. This has not been true in Virginia for some time. In 1962, by a joint effort of the Virginia State Bar and the Medical Society of Virginia, a "Joint Screening Panel" was established. Its two-fold purpose was (1) to prevent frivolous claims from being filed against physicians and (2) to assist in the disposition of claims which appeared to be reasonably well-founded.¹ Under the provisions of the Joint Screening Panel, a successful plaintiff would be given the names of three physicians who were experts in the same field as the defendant doctor. These physicians were urged by the Medical Society of Virginia to appear in court as expert witnesses for the plaintiff to testify against the defendant doctor if the panel found the claim to be of some merit.²

Several years ago, because the Virginia Joint Screening Panel felt that it was being used as a "fishing expedition" by some attorneys who would bring cases before it, suffer an adverse decision and then proceed to file suit against the defendant doctor, a rule was added requiring the plaintiff's attorney to withdraw from the case in the face of an adverse ruling. After the implementation of this rule, the Joint Screening Panel's caseload dropped to only a few cases per year.

Since 1970 the number of medical malpractice suits has increased tremendously.³ Likewise, the insurance rates for malpractice have

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1. JOINT MEDICAL-LEGAL PLAN FOR SCREENING MEDICAL MALPRACTICE CASES (1962). Virginia was among the states of Arizona, Colorado, Nevada, New Mexico, New Jersey and New York having such a panel, although the rules varied somewhat from state to state.

2. *Id.*

3. For a thorough discussion of the medical malpractice problem in general see *Symposium*

increased rapidly.⁴ Confronted with the growing malpractice crisis,⁵ the Virginia General Assembly enacted legislation in 1976 supposedly to deal with the problem. After considering several alternatives,⁶ the legislature decided to create medical malpractice review panels with extensive statutory power.⁷ The act drastically changed the previous concept and scope of the Joint Screening Panel. This article will first discuss the various aspects of these new statutes and then will address several problems posed by them.

I. PROVISIONS OF THE ACT

The Act covers all aspects of health care administered by the "health care provider" (HCP). These terms are liberally defined by the legislature to cover virtually all in the medical field.⁸ As a *condition precedent* to the bringing of a malpractice suit against an HCP, the claimant is required to notify the HCP in writing when the alleged malpractice occurred. The claimant must also describe the act or acts of the alleged malpractice.⁹ The written notice starts

on Medical Malpractice, 1975 DUKE L.J. 1177. In Virginia the number of claims per 100 doctors rose from 2.6 in 1969 to 7.2 in 1975. The average claim paid increased from \$4,182.03 in 1969 to \$10,190.66 in 1975. SCC, MEDICAL MALPRACTICE INSURANCE IN VIRGINIA: THE SCOPE AND SEVERITY OF THE PROBLEM AND ALTERNATIVE SOLUTIONS 19 (1975) [hereinafter cited as SCC REPORT]. Hospitals also experienced a similar increase. *Id.* at 23.

4. Approximately 80%, or about 4,100, of Virginia's doctors are insured by St. Paul Fire and Marine Insurance Company. In 1967, the average premiums for \$100,000/300,000 limits were \$93 for the lowest risk category of doctor and \$308 for the highest risk category. In 1975, the premiums for these categories were \$433 and \$2,728 respectively, an increase ranging from 366% for the former category to 786% for the latter. SCC REPORT, *supra* note 3, at 13-14.

5. It should be noted that part of the malpractice problem was created by the legislature itself when it restricted the charitable immunity of hospitals in negligence cases in 1974. VA. CODE ANN. § 8-629.2 (Repl. Vol. 1974). See 9 U. RICH. L. REV. 401 (1975). It is estimated that this statute has caused a 124% increase in the premiums of a charitable hospital, up from an estimated \$50 to \$75 per bed to \$112 per bed for the basic limits of \$25,000/75,000. SCC REPORT, *supra* note 3, at 7.

6. Among other suggestions were (1) a hospital- and/or physician-owned insurance company; (2) a state-managed fund; and (3) compelling insurance companies to provide regulated coverage with a provision for sharing losses or gains. SCC REPORT, *supra* note 3, at 36-44. This last alternative, known as a Joint Underwriters Association (JUA), has been adopted in approximately 15 states. *Id.* at 44.

7. VA. CODE ANN. §§ 8-911 to -922 (Cum. Supp. 1976). These statutes became effective on July 1, 1976.

8. VA. CODE ANN. § 8-911 (Cum. Supp. 1976). "Health care provider" includes doctors, dentists, nurses, physical therapy assistants, clinical psychologists and other related medical professions. *Id.*

9. VA. CODE ANN. § 8-912 (Cum. Supp. 1976).

a clock and the claimant or the HCP may thereafter file a written request within sixty days to the Chief Justice of the Supreme Court of Virginia that the case be reviewed by the Medical Review Panel. The claimant is prohibited from bringing a lawsuit within a ninety-day period after his original notification to the HCP. If there has been a request for review filed with the Chief Justice, the litigation cannot be brought during the pendency of that review.¹⁰ Once notice of a claim has been given, the applicable statute of limitations¹¹ is automatically tolled for 120 days.¹² If a review is requested, the tolling of the statute of limitations continues until sixty days after the issuance of an opinion by the review panel or for the full 120 days subsequent to the original notice to the HCP, whichever is later.¹³ Thus, there is no danger of losing a cause of action for malpractice under the provisions of the Act.

If neither the claimant nor the HCP requests a review panel within sixty days then the claimant may file suit and the case will proceed like any other suit for personal injuries. However, if either

10. *Id.* The request must be mailed to the Chief Justice by either registered or certified mail. VA. CODE ANN. § 8-919 (Cum. Supp. 1976). The statute is silent as to whether or not copies of the request for review directed to the Chief Justice should be mailed to the then-unrepresented HCP or to the attorney representing the claimant. Presumably the specifics of notification will be covered by the Rules of the Supreme Court which will be drafted to implement these statutes. See note 14 *infra* and accompanying text.

11. In Virginia an injured party must bring suit on a malpractice claim within two years after the act which causes the injury. VA. CODE ANN. § 8-24 (Cum. Supp. 1976). This is true even if the individual sues under the theory of breach of implied warranty which otherwise carries a three-year statute of limitations. *Friedman v. Peoples Serv. Drug Stores*, 208 Va. 700, 160 S.E.2d 563 (1968). Furthermore, it should be noted that, absent fraudulent concealment of the injury by the doctor, the statute of limitations starts to run when the wrong is done and not when it is subsequently discovered by the injured party. *Hawks v. DeHart*, 206 Va. 810, 146 S.E.2d 187 (1966) (cause of action accrued when pin was left in plaintiff's neck and not when subsequently discovered 16 years later by the plaintiff). The only exceptions to this rule are when the injured patient is insane or a minor at the time of the injury. VA. CODE ANN. § 8-30 (Repl. Vol. 1957). The statute starts to run against them only after the disability is removed (*i.e.*, he or she becomes sane or reaches majority), although no cause of action can exist more than twenty years after the injury accrues. *Id.* Medical malpractice claims by minors are not unusual. In the twelve months prior to September, 1975, St. Paul Fire and Marine Insurance Company had five claims filed against it involving minors not subject to the two-year statute of limitations, all of which resulted from incidents prior to 1966. SCC REPORT, *supra* note 3, at 26.

12. VA. CODE ANN. § 8-919 (Cum. Supp. 1976). Notice is deemed to be given when hand-delivered or mailed by registered or certified mail to the doctor's office, residence or last known address. *Id.*

13. *Id.*

party requests a review panel, then the primary function of the Act comes into play.¹⁴

The panel consists of three impartial attorneys and three impartial HCP's, licensed and actively practicing their professions in the congressional district where suit, based on proper venue, would be brought. The panel will have a circuit court judge, appointed by the Chief Justice, serving as chairman, who will have no vote unless the panel is deadlocked.¹⁵ The difficulty with this particular section is that the attorneys and the physicians who are called upon to sit on the panel will be from the *same* congressional district as the defendant doctor. There would seem to be greater difficulty as to impartiality than there would be if panel members were brought in from outside the defendant's area. Indeed, it may be simpler to import a panel than to try to find an impartial panel from the same district. However, the statutory construction seems merely to codify the case law in Virginia that the standard of due medical care of an HCP must be measured by the reasonable standard of care exercised by other HCP's in the same or similar locality.¹⁶ Naturally, those physicians who practice in the same congressional district as the defendant can best evaluate the local standard of care.

It is not necessary for the panel to hold a hearing, although either party may request one.¹⁷ Regardless of whether a hearing is held or not, each party must submit evidence to the panel which may consist of various medical data, excerpts from treatises and depositions of witnesses.¹⁸ Copies of the evidence must be submitted to each

14. Although the basic guidelines for proceeding with a malpractice claim are incorporated by the Act, the Chief Justice of the Virginia Supreme Court has been given the responsibility for promulgating all necessary rules and regulations for carrying out the provisions of the Act. VA. CODE ANN. § 8-921 (Cum. Supp. 1976). These rules will make the statutes functional.

15. VA. CODE ANN. § 8-913 (Cum. Supp. 1976). The panel is selected by the Chief Justice of the Supreme Court. The Chief Justice is to be given a list of HCP's by the State Board of Medicine and a list of attorneys by the Virginia State Bar. The statute specifically instructs the Chief Justice to give due consideration to the nature of the claim and the HCP's practice in selecting the panel. *Id.*

16. *Hunter v. Burroughs*, 123 Va. 113, 96 S.E. 360 (1918). *See also* *Bly v. Rhoads*, 216 Va. 645, 222 S.E.2d 783 (1976) (specialist from Philadelphia not competent to testify as to medical standards in Prince William County, Va.); *Little v. Cross*, 217 Va. 71, 225 S.E.2d 387 (1976) (specialist from Washington, D.C. incompetent to testify as to medical standards in Norfolk, Va.).

17. VA. CODE ANN. § 8-915 (Cum. Supp. 1976).

18. VA. CODE ANN. § 8-914 (Cum. Supp. 1976).

member of the panel, and both parties shall have access to all materials submitted.¹⁹

In a simple medical malpractice case, one that has a rather small medical record, this would certainly not be burdensome. However, many of the medical malpractice cases consist of two or three hundred pages of hospital records. To require that all of these be copied nine times (seven-member panel, plus two attorneys) could be prohibitively expensive. Indeed, many hospitals are now charging \$1.00 per page for reproducing hospital records. Coupled with the cost problem of reproducing evidence, the statute provides that each member of the panel be paid \$25.00 per diem as well as reimbursed for his out-of-pocket expenses.²⁰ The statute goes on to say that the per diem and expenses of the panel shall be borne by the parties in such proportions as may be determined by the chairman in his discretion. How does the panel get paid if the claimant loses and the chairman assesses costs against the claimant who is indigent? Also, consider the costs that might be involved in bringing a case before the panel if a medical record consisted of 200 pages and the reproduction cost of most hospitals is \$1.00 per page. With seven members on the panel, each having a copy, plus the \$150.00 per diem total cost for the six members of the panel (the judge is salaried), plus their out-of-pocket expenses, what this would cost the HCP or the claimant might be better spent in filing suit. In cases where the records are voluminous it may be necessary to lower the number of copies required, provided all members of the panel have access to them.²¹

While either party can request a hearing, it is within the panel's discretion to determine whether a hearing on the claim is warranted.²² If it determines that a hearing is warranted, the panel will conduct a hearing on the claim after due notification of the parties. The hearing is regulated by statute.²³ The panel may hear witnesses,

19. *Id.*

20. VA. CODE ANN. § 8-920 (Cum. Supp. 1976).

21. Actually there is some question as to which party should bear the cost of producing evidence. Should each party bear his own cost or should the proponent of the medical review panel bear the expense? Although section 8-920 could be construed so as to imply that the chairman can determine who should bear the costs, the question will hopefully be resolved by the rules drafted by the Virginia Supreme Court. See note 14 *supra*.

22. VA. CODE ANN. § 8-915 (Cum. Supp. 1976).

23. VA. CODE ANN. § 8-916 (Cum. Supp. 1976).

issue subpoenas, sanction depositions and gather other evidence as needed.²⁴ However, the two most important aspects of this hearing are that (1) the rules of evidence need *not* be observed and (2) a *majority* of the panel may render an opinion.²⁵

Upon receiving all the evidence, whether in a hearing or otherwise, the panel has thirty days to reach one or more of four possible conclusions.²⁶ The panel may decide (1) the claim is without merit; (2) the HCP failed to exercise the appropriate care needed and that the injuries to the claimant were a proximate result of the failure; (3) the HCP failed to exercise due care but that the injuries were *not* caused by such failure; or (4) there is a substantial question of fact on the question of liability which does not require expert opinion but should be tried before a judge or jury.²⁷ This last possibility covers the situation where the case involves a "swearing contest," wherein the claimant states the HCP did or did not do a certain thing, and the HCP disputes that contention. Here the panel need not conduct an extensive review before allowing the litigants to proceed to court over the questions of fact. The statute further states that if the panel finds negligence on the part of the HCP and that it is a proximate cause of the claimant's damages, then "the panel may determine whether the claimant suffered any disability or impairment and the degree and extent thereof."²⁸ The panel's finding is to be put into writing and shall be signed by all concurring panelists. Any member of the panel may note his dissent and the opinion shall be mailed to the claimant and the HCP within five days after it is rendered.²⁹

24. The wording of section 8-916 is somewhat ambiguous in that it does not definitely state whether a party can be called as a witness by the panel. Each party is allowed to be heard, but it is unclear whether the party can be cross-examined. The wording of the statute would seem to imply that there can be no cross-examination of a party. However, since the rules of evidence do not apply, it would seem that at least the *panel* could ask either party questions as it sees fit.

25. VA. CODE ANN. § 8-916 (Cum. Supp. 1976). For a discussion of potential problems with this result see notes 53-69 *infra* and accompanying text.

26. VA. CODE ANN. § 8-917.A. (Cum. Supp. 1976).

27. *Id.* The wording of the statute implies that the several listed potential opinions, together with the degree and extent of impairment, are the only opinions that the panel may render. No provision is made in this statute for the panel's opinion to elaborate as to the facts upon which its opinion is based.

28. VA. CODE ANN. § 8-917.B. (Cum. Supp. 1976).

29. VA. CODE ANN. § 8-917.C. (Cum. Supp. 1976).

Once the panel has rendered its decision, the claimant may then file his cause of action in the appropriate court if he still desires to do so. However, the most significant aspect of the Act comes into play at this point: *The panel's decision may be introduced into evidence at any subsequent action in a court of law.*³⁰ The opinion of the panel is not conclusive, and either party may call any member of the panel as a witness. If called, the statute mandates that the witness appear and testify.³¹ The impact of this section will be quite profound if the legislative enactment withstands the almost certain constitutional challenge which will be discussed later in this article.³² Although the trial is to proceed like any other civil action for personal injuries, the introduction of the panel's opinion into evidence and the calling of the panel's members as witnesses will undoubtedly affect the format. In addition to a change in trial tactics, there will also be a limit on how much one may recover from a malpractice claim. The legislature has placed a ceiling of \$750,000 for recovery on any injury or death resulting from an act of medical malpractice occurring after April 1, 1977.³³

As an alternative to the procedure just described above, the Act allows persons to proceed under section 8-503 *et seq.* of the Code³⁴ and arbitrate medical malpractice claims provided that the patient or claimant is allowed to withdraw by the terms of the arbitration agreement itself, if the *claimant* withdraws from the terms of the agreement within sixty days after the "termination of the health care."³⁵

Apparently this section will allow doctors, as a condition precedent to their treatment of patients, to ask the patient to sign an arbitration agreement which will be binding so long as there is a distinct provision in the arbitration agreement that the claimant may withdraw within sixty days after the termination of such care.

30. VA. CODE ANN. § 8-918 (Cum. Supp. 1976).

31. *Id.* The panelists will appear at the expense of the calling party and have absolute immunity from civil liability for all acts done within the scope of their duty under the Act. *Id.*

32. See notes 40-69 *infra* and accompanying text.

33. VA. CODE ANN. § 8-654.8 (Cum. Supp. 1976). For a discussion of potential problems with this section as well as a review of past recoveries in Virginia see notes 70-74 *infra* and accompanying text.

34. See VA. CODE ANN. § 8-503 *et seq.* (Cum. Supp. 1976).

35. VA. CODE ANN. § 8-922.A. (Cum. Supp. 1976).

If the patient signs the agreement and then does not withdraw from his agreement within the specified time, *he will be bound to arbitrate* any medical malpractice issues that subsequently arise.³⁶ This is a drastic change in the law of medical malpractice. It raises the question of whether the arbitration agreement usurps the court's jurisdiction to try medical malpractice cases where the claimant has failed to make a timely withdrawal from the terms of the arbitration agreement. If the parties choose to arbitrate, the matter may be heard by a panel appointed under the provisions of the Act.³⁷ Furthermore, an insurer of the HCP can be bound by the decision of the arbitration panel if the insurer agrees in advance to be so bound.³⁸

Although the true impact of this section of the Act cannot be measured at this time, if the medical malpractice review panels gain a high degree of respectability among the medical profession, it would seem that arbitration agreements would become more commonplace. On the other hand, plaintiffs can be expected to challenge the validity of the statute on the ground that it unconstitutionally usurps judicial power³⁹ or at least that the sixty-day time period is unreasonably short.

II. POTENTIAL PROBLEMS

While there may be a definite need for legislation of this type,⁴⁰ the present Act poses several problems. First, there is the general question of whether the legislature has unduly usurped judicial powers in violation of the Virginia Constitution. Second, the admissibility into evidence of the opinion of the panel raises several serious questions. Third, the limitation of the *ad damnum* in a medical malpractice case to \$750,000 raises constitutional issues. All three problems are somewhat interrelated as far as their constitutionality is concerned, while each poses different practical problems.

36. *Id.* The statute makes ample provision for the situation where the claimant is an infant or is insane. Also, death would appear to automatically terminate the agreement or at least cause the sixty-day period not to start running until a personal representative is appointed.

37. VA. CODE ANN. § 8-922.B. (Cum. Supp. 1976).

38. VA. CODE ANN. § 8-922.C. (Cum. Supp. 1976).

39. For a discussion of the constitutionality of this section see notes 40-74 *infra* and accompanying text.

40. For an analysis of laws in other states see Comment, *An Analysis of State Legislative Responses to the Medical Malpractice Crisis*, 1975 DUKE L.J. 1917.

The Constitution of Virginia clearly distinguishes between the judicial and legislative branches of government, stating in part:

The judicial power of the Commonwealth *shall be vested* in a Supreme Court and in such other courts of original or appellate jurisdiction subordinate to the Supreme Court as the General Assembly may from time to time establish⁴¹

The power of the legislature is also expressly limited in regard to judicial functions:

The General Assembly . . . shall not, by special legislation, grant relief in . . . cases of which courts . . . may have jurisdiction The General Assembly shall not enact any local, special or private law in the following cases: . . . (3) Regulating the practice in, or the jurisdiction of, or changing the rules of evidence in any judicial proceeding or inquiry before the courts or other tribunals⁴²

In creating the authority for the medical malpractice review panels, the legislature has seemingly pressed its power to its constitutional limits. Since the judicial power is vested in the courts of the Commonwealth, any legislation which substantially alters an individual's access to the courts to seek redress of a wrong such as a malpractice claim will certainly be scrutinized closely by those courts. Under the police power of the state, the legislature can take certain steps necessary to alleviate impending problems, but the constitutional separation of powers must be strictly followed in a constitutional society.

The first problem with the statute is that it has given judicial powers to nonjudicial individuals by empowering the panel to hear evidence and decide questions of law and fact.⁴³ Although the panel is supposedly conducting a preliminary review, the question it is addressing is the central issue of the case. As such, it is performing a judicial function which would seem to be in violation of the Constitution.⁴⁴ Indeed, the situation is somewhat similar to the problem

41. VA. CONST. art. VI, § 1 (emphasis added).

42. VA. CONST. art. IV, § 14.

43. See VA. CODE ANN. §§ 8-913 to -917 (Cum. Supp. 1976).

44. VA. CONST. art. VI, § 1.

in the probate of wills that arose in the early 1900's. The legislature had authorized clerks of the courts to probate wills.⁴⁵ The Supreme Court of Virginia threw out this statute as an unconstitutional invasion of the judicial powers.⁴⁶ The Constitution was subsequently amended so that clerks of courts can now probate wills,⁴⁷ but it took a constitutional mandate before this change was allowed. The same analysis would seem to apply here.

The Illinois Supreme Court adopted this same line of reasoning in striking down its medical malpractice statute.⁴⁸ The court noted that the application of legal principles is inherently a function of the judiciary and since the state constitution vested judicial power exclusively in the courts, the power given to the nonjudicial members of the panel rendered the statute unconstitutional.⁴⁹ The powers given to the nonjudicial members of the panel under the Virginia statutes are virtually identical to the Illinois statute.

The Supreme Court of Florida was faced with a similar statute and found it constitutional.⁵⁰ While not directly addressing the issue of whether judicial power had been usurped, the court held that submission of a medical malpractice case to a three-man panel, as a condition precedent to trial, was a proper exercise of the police power of the state in view of the problems created by the high cost of malpractice insurance. The court stated that the burden upon the claimant forced to go "to two trials," in effect, "reaches the outer limits of constitutional tolerance,"⁵¹ but does not go beyond them. Moreover, that court likened the medical malpractice review panel to a "mandatory pre-trial settlement conference."⁵² The Florida court based its decision on the police power of the state which is available in the area of public health and welfare and such statutes

45. VA. CODE ANN. § 2639a (1904) (now repealed).

46. *McCurdy v. Smith*, 107 Va. 757, 60 S.E. 78 (1908).

47. VA. CONST. art. VI, § 101 (as amended 1902) (replaced by the 1971 Constitution). *See Saunders v. Link*, 114 Va. 285, 76 S.E. 327 (1912) (upholding the new amendment).

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

49. *Id.*

50. *Carter v. Sparkman*, 335 So. 2d 802 (Fla. 1976).

51. *Id.* at 806.

52. Justice England pointed out in his concurring opinion that the legislature had already effectively diminished the judiciary's role by laws allowing "no-fault" divorces, "no-fault" insurance and by the adoption of the Uniform Probate Code. *Id.* at 808 (concurring opinion).

accordingly were an attempt by the legislature to regulate public health and welfare in view of the medical malpractice crisis.

The opposite reasoning of the Illinois and Florida courts indicates, perhaps, that the constitutionality of a statute regarding the infringement of judicial power depends somewhat on the deference given to the legislature. The obvious argument in favor of the statute's constitutionality on the issue of judicial infringement is that the claimant can eventually get to court so that he is not denied his right to judicial review; instead, it is merely postponed. Of course, the argument does not fare as well against the section of the Act regarding arbitration. Sixty days is a very short time period to discover an injury and withdraw from an arbitration agreement. Conceivably, the claimant may not discover an alleged action for medical malpractice until well after the time for withdrawal has passed. This could relegate the bulk of all medical malpractice claims to an arbitration process, preempting the court's jurisdiction thereby, which may or may not be constitutional. While an arbitration agreement is a contractual relationship, the subject matter is a tort in this case and the sixty-day limit seems unreasonably short, particularly in view of the average claimant's ignorance of the law at the time he would enter into such an agreement.

If the general thrust of the statute is upheld, the next problem would seem to be the section which allows the opinion of the panel to be introduced as evidence in a subsequent trial.⁵³ The impact of such an opinion raises many potential questions. The Virginia Constitution states

that in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred⁵⁴

Undoubtedly, the introduction of the panel's opinion will substantially influence the jury to such an extent as to be unconstitutional,⁵⁵ even though the opinion is not to be conclusive.⁵⁶ For exam-

53. VA. CODE ANN. § 8-918 (Cum. Supp. 1976).

54. VA. CONST. art. I, § 11.

55. It is interesting to note that the Illinois Supreme Court ruled that the creation of a medical malpractice panel was an unconstitutional invasion into the province of a trial by

ple, it is inconceivable that any instruction from the trial court could have the effect of making such opinion only advisory to the members of a medical malpractice jury when the composition of the panel includes in its membership a circuit court judge, a person held in high regard by jurors. Since a trial by jury "ought to be held sacred,"⁵⁷ it would seem that the introduction of the panel's opinion would be unconstitutional because of the undue influence it is bound to exert over the jurors.

There are two cases which have come out of the Supreme Court of Queens County of the State of New York which address this precise issue.⁵⁸ The cases were from different courts within the same division. The first case, *Halpern v. Gozan*,⁵⁹ held that the introduction into evidence of the panel's unanimous finding was *not* an invalid invasion of the jury's province.⁶⁰ However, the second court⁶¹ reached the opposite conclusion, stating:

The court believes that to anticipate anything less than a full and complete adoption by the jury of the panel's recommendation as to liability is unrealistic and strains credulity. To allow the panel's recommendation to be introduced into evidence would nullify plaintiff's constitutional right to a meaningful jury trial. That portion of the statute permitting introduction of the panel's recommendation at trial is unconstitutional.⁶²

Obviously this issue will require further litigation in New York and elsewhere, and the Virginia Supreme Court will undoubtedly have to decide it as well.

Even if the Supreme Court of Virginia does not feel that the Act is an unconstitutional infringement on the right to a jury trial, there are other problems with introducing the opinion into evidence. In-

jury, even though in Illinois the opinion could *not* be introduced at the subsequent trial. The court reasoned that to require a litigant to first go to a panel before going to trial was an impermissible restraint on the *right* to a jury trial. *Wright v. Central DuPage Hosp. Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

56. VA. CODE ANN. § 8-918 (Cum. Supp. 1976).

57. VA. CONST. art. I, § 11.

58. It should be noted that these decisions were not rendered by the highest court of New York, the Court of Appeals.

59. 381 N.Y.S.2d 744 (Sup. Ct. 1976).

60. *Id.*

61. *Comiskey v. Arlen*, 45 U.S.L.W. 2019 (N.Y. Sup. Ct. July 2, 1976).

62. *Id.* at 2020.

deed, the use of an opinion as evidence could be seen as changing the rules of evidence in a judicial proceeding by special legislation in violation of the Virginia Constitution.⁶³ For example, since the panel can make a determination *without* a hearing,⁶⁴ the net effect is to allow a naked opinion to be introduced at the trial of the case without the ability of the party who is adverse to the opinion to present evidence or cross-examine witnesses at the panel level.

The problem becomes even more complex when the panel holds a hearing where the rules of evidence do not apply.⁶⁵ It is understandable why the legislature would want to relax the rules of evidence, presumably because it does not want to make this a formal "trial." Should the panel's opinion be based on inadmissible evidence, it follows that the opinion itself would be inadmissible in the absence of these sanctioning statutes. Is this not changing the rules of evidence in a judicial proceeding? For example, under the modern "shop book" rule of evidence, a nurse making an entry in a hospital record that the ambulance driver informed her that the patient lost two pints of blood en route to the hospital would be inadmissible at trial.⁶⁶ In deciding whether the HCP was negligent in not transfusing the patient to prevent shock, the panel could very well consider such compound hearsay and base its opinion concerning negligence upon it. How is the cross-examiner to refute such an opinion before a jury? Will he ask a panel member before the jury whether or not their opinion was based on this nurse's conversation with the ambulance driver? Conversely, an HCP, writing a self-serving record and realizing it may go before the panel, could unduly influence the panel members under these relaxed rules of evidence. The absence of such rules will create more evils than it will cure, particularly since the opinion will be introduced into evidence.

Further difficulty arises over the fact that not only is a written opinion impossible to cross-examine, but it also apparently will not contain the facts upon which it is based.⁶⁷ Traditionally, expert opinion evidence is admissible at trial *only if* all of the facts upon

63. VA. CONST. art. IV, § 14(3). See text accompanying note 42 *supra* for the text of the constitutional provision.

64. VA. CODE ANN. § 8-914 (Cum. Supp. 1976).

65. VA. CODE ANN. § 8-916(iii) (Cum. Supp. 1976).

66. *Boone v. Commonwealth*, 213 Va. 695, 194 S.E.2d 689 (1973).

67. See note 27 *supra*.

which the opinion is based are stated. This gives the only ground-work for the cross-examiner to undercut that opinion. If the facts are not presented upon which the opinion is based, it is impossible to attack the opinion. It seems too idealistic to expect the panel members to fully explain everything if called as witnesses at the subsequent trial. As long as there are seven persons sitting on the panel rendering the same opinion, it would be highly unlikely that *each* of them would agree to *all* of the facts upon which their opinion was based. Moreover, to call the seven panel members to the trial of the case would be an administrative nightmare. For example, would the chairman/judge claim immunity under some concept of judicial immunity?⁶⁸ Suppose a lawyer/panelist dissents, and at trial is called as a witness. To what extent can the lawyer calling him ask that he express his "medical" opinion? In reality, what difference will it make to the jury that a lawyer dissented in a medical issue?

The last criticism of allowing the opinion of the panel to be introduced into evidence is the potential abuse of the true value of the opinion by one of the parties. Conceivably, in an opinion favoring the plaintiff, a majority vote could consist of the votes of the three lawyers with the chairman/judge breaking the deadlock. Thus, the curious anomaly of an opinion that an HCP violated a reasonable *medical* standard of care could be given by an all-lawyer majority. The counter-argument to this observation is that this is precisely what was happening on the Joint Screening Panels in the past.

68. Pursuant to VA. CODE ANN. § 19.2-271 (Repl. Vol. 1975), judges are not "competent to testify in any criminal or civil proceeding as to any matter which shall have come before him in the course of his official duties . . ." *Id.* At the moment, this statute has only been interpreted so as to protect the criminally accused from testimony by judges. *Baylor v. Commonwealth*, 190 Va. 116, 56 S.E.2d 77 (1949). However, the malpractice act implies that a judge could testify in the subsequent malpractice case, and unless section 19.2-271 is extended to civil cases, it would appear the judge would have to testify if called, or at least give a deposition to be used *de bene esse* since judges are generally excused from having to testify in court. *See* VA. CODE ANN. § 8-313 (Cum. Supp. 1976). Since the judge can only vote in the case of a deadlock among the rest of the panel, he may be spared from being called as a witness in most cases. However, the calling of the judge as a witness raises serious questions. As a practical matter, what attorney, practicing before that same judge, would be willing to enter into a vigorous cross-examination of His Honor? What impact would the fact that he is a judge in a circuit court of the Commonwealth of Virginia have upon the jury when he rendered an opinion that the defendant HCP was guilty or not guilty of malpractice? Surely a circuit judge would not relish the idea of being questioned as to why he voted a certain way.

However, this is not true. The Joint Screening Panel was comprised of three lawyers and three doctors and their opinion was determined by a majority vote. Therefore, in order to render an opinion, at least one physician must have held that the defendant HCP fell below the reasonable medical standard of care.

An argument could be made not to have lawyers on the panel at all. As a practical matter, the presence of lawyers on either panel is to ensure that the panel's opinion is not subject to criticism of being a "white-wash." This statement is not in any way a criticism of an all-physician panel; indeed, the physicians themselves have recognized the potential criticism that could be levied against an all-physician panel and, by their agreement with the Virginia State Bar structuring the Joint Screening Panel to be comprised of both lawyers and doctors, have freed themselves from such suspicion.

In any event, the panel should be comprised of an even number of members, equal both as to doctors and lawyers. This would ensure at least one physician being in the majority in holding against an HCP. So structured, the panel comprises an objective body of sophisticated members who could carefully screen the facts.

As a suggested alternative, rather than allowing the opinion of the panel to be introduced into evidence, would it not be better to require one of the three physician members who voted in favor of the claimant to testify on his behalf at the subsequent trial?

Furthermore, a claimant or HCP could "increase" or "diminish" a panel opinion of degree of disability before a jury by utilizing his countering expert twice—once before the panel and once at trial. For example, assume the hospital records show a 50% disability but this was countered by an expert for the HCP as being only 20%. It is very likely the panel will compromise between these two figures, rendering an opinion that the disability is 35%. Should the HCP, at trial, again call upon the same expert to express his same opinion of 20%, the result could very well be a second compromise that would be somewhat unfair. The reverse could also happen.

It should also be noted here that there may be a problem with the rule that a party can rise no higher than the evidence he offers.⁶⁹

69. See *Massie v. Firmstone*, 134 Va. 450, 114 S.E. 652 (1922).

May the person seeking to introduce the opinion bring in another witness either to raise or lower the amount of liability fixed by the panel, or is he bound by the opinion once having introduced it?

The last constitutional question regarding the legislature's attempt to alleviate the medical malpractice problem in Virginia is the recovery limitation of \$750,000.⁷⁰ Assuming that the \$750,000 limit on verdicts in medical malpractice cases is supposed to help the HCP's with their malpractice insurance premiums by limiting the amount of the plaintiff's recovery, it seems that this is an exercise in futility. Under the usual insurance rating practices, the bulk of the premium paid by an insured usually goes to the first one hundred thousand dollars worth of insurance coverage. The cost to insure for additional amounts over and above the first hundred thousand dollars or so of insurance coverage is relatively small when compared to the initial outlay for the basic coverage. Therefore, what is being accomplished by this limitation?⁷¹

The Supreme Court of Illinois has struck down a \$500,000 medical malpractice limitation as being "arbitrary and constituting a special law" in violation of the Illinois Constitution.⁷² In rendering this opinion, the Supreme Court of Illinois discussed the Workmen's Compensation Act and differentiated it from the proposed medical malpractice limitation of \$500,000. The Illinois court reasoned:

Defendants argue that there is a societal *quid pro quo* in that the loss of recovery potential to some malpractice victims is offset by 'lower insurance premiums and lower medical care costs for all recipients of medical care.' This *quid pro quo* does not extend to the seriously injured medical malpractice victim and does not serve to bring the limited recovery provision within the rationale of the cases upholding the constitutionality of the Workmen's Compensation Act.⁷³

70. VA. CODE ANN. § 8-654.8 (Cum. Supp. 1976).

71. It is interesting to note that in Virginia from 1970-75, no claim for medical malpractice was reported in excess of \$500,000 and only one claim was settled for \$250,000 (SCC REPORT, *supra* note 3, at 28), and that the average verdict against a physician in 1975 was approximately \$10,000 (*id.* at 19). However, in early 1976, a plaintiff obtained a verdict of \$725,000 against several HCP's jointly. *Baley v. Luthey*, No. 12229 (Hampton Cir. Ct., May 25, 1976).

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

73. *Id.* at 8. The United States Supreme Court upheld the limits imposed by a workman's compensation act, but there the injured party was entitled to recover *without a showing of*

The Illinois court also discussed and contrasted its wrongful death act and dram shop act (each of which contained a limitation on the amount of recovery) with a medical malpractice limitation and held that since the wrongful death act and the dram shop act of Illinois were both created by the legislature and did not exist as causes of action at common law, the legislature had the right to limit the plaintiff's recovery under those two acts. Such was not the case concerning medical malpractice. The right to recover damages for injuries arising from medical malpractice existed at common law and, hence, the legislature could not constitutionally limit the amount of damages, because such legislation would constitute "a special law."⁷⁴ Surely the Virginia Act constitutes special legislation if it affords no opportunity to recover damages in excess of a set amount even if the actual injuries are *clearly* above that amount. Undoubtedly, the *quid pro quo* of such an act leaves the claimant with no real gain. In exchange for his right to full recovery if his damages are in excess of the limit, the claimant gets nothing (although society theoretically benefits from supposedly lower rates).

Does not the Virginia statute's attempt to limit the common law right of recovery for medical malpractice to the sum of \$750,000 likewise constitute special legislation? In effect, does it not also attempt to "change the rules of evidence in a judicial proceeding" regarding the amount of damages that the plaintiff can recover in a medical malpractice suit?

III. CONCLUSION

There is no question that the Virginia legislature's solution to the medical malpractice problems poses many problems, both from a constitutional and practical point of view. It is inevitable that the law will be challenged and will probably undergo extensive changes.

As a practical matter, the greatest problem created by the legislation is the ability to admit into evidence the opinion of the panel. This could be unworkable in the actual day-to-day trial of cases. A better course of action might be for the panel to render its opinion

fault by the employer. *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917). See also *New York Cent. R.R. v. White*, 243 U.S. 188 (1917).

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

and *not* let the opinion be introduced per se into evidence, but rather allow the doctors on the panel to be subpoenaed by the claimant at the forthcoming trial of the case.

At the present time, the 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. The jointly sponsored medico-legal screening committee, now defunct, with some minor adaptations and perhaps partially funded by the state, has all of the attributes of the present malpractice review panel without its drawbacks.

In short, this appears to be "stop-gap" legislation, drafted hastily and without properly considering the consequences that flow therefrom. As such, its worth is inversely proportional to the haste with which it was drafted and enacted. It is doubtful that it will serve the purposes and needs of the medical community, nor is it likely to serve the needs of potential claimants who have been victims of negligence on the part of HCP's.