



University of Baltimore Law Review

Volume 10
Issue 1 Fall 1980

Article 3

1980

The Health Care Malpractice Claims Statute: Maryland's Response to the Medical Malpractice Crisis

Kevin G. Quinn
Wye River Group, Incorporated

Follow this and additional works at: <http://scholarworks.law.ubalt.edu/ublr>

 Part of the [Law Commons](#)

Recommended Citation

Quinn, Kevin G. (1980) "The Health Care Malpractice Claims Statute: Maryland's Response to the Medical Malpractice Crisis," *University of Baltimore Law Review*: Vol. 10: Iss. 1, Article 3.
Available at: <http://scholarworks.law.ubalt.edu/ublr/vol10/iss1/3>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Law Review by an authorized administrator of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.

THE HEALTH CARE MALPRACTICE CLAIMS STATUTE: MARYLAND'S RESPONSE TO THE MEDICAL MALPRACTICE CRISIS

Kevin G. Quinn†

Since the Maryland General Assembly adopted the Health Care Malpractice Claims Statute, that law has come under repeated attack in the courts and in legal and medical circles. This article traces the social backdrop against which the Assembly promulgated the statute and outlines the provisions of the new claims procedure. After describing the challenges the statute has already overcome, the author discusses the effectiveness of the procedure for resolving malpractice claims against health care providers in Maryland.

In recent years, the skyrocketing cost of medical malpractice insurance has generated great concern within the insurance industry and the legal and medical professions over the efficacy of procedures used in resolving malpractice claims. The traditional tort system, many believe, has developed so many shortcomings that it no longer provides a fair or efficient basis for the resolution of such claims. Its inadequacies are claimed to be the major cause of the high volume of malpractice litigation and the high amounts of damage awards and settlements. In turn, the high incidence and cost of medical malpractice litigation have been accused not only of causing considerable disruption to the malpractice insurance industry, but also of undermining the effective delivery of health care services to the public.

State legislatures throughout the nation have been responding to the so-called "medical malpractice crisis" in a variety of ways. Many, among those the Maryland General Assembly, have established non-judicial frameworks for the resolution of malpractice claims in the form of medical review panels, screening panels, or arbitration procedures. In an attempt to eliminate what it perceived to be some of the major disadvantages of the traditional claims resolution process, the Maryland legislature adopted the Health Care Malpractice Claims Statute in 1976.¹ This statute requires that medical malpractice litigants attempt to resolve their disputes by submitting them to an arbitration panel before resorting to court action.

Since its adoption over four years ago, Maryland's arbitration

† A.B., 1976, Loyola College of Maryland; M.B.A., 1979, University of Maryland; J.D., 1979, University of Maryland School of Law; Associate, Miles & Stockbridge, Baltimore, Maryland; Member, Maryland Bar.

1. Law of May 4, 1976, ch. 235, 1976 Md. Laws 496 (codified at MD. CTS. & JUD. PROC. CODE ANN. §§ 3-2A-01 to -09 (1980)).

process has been hampered by litigation attacking its constitutionality,² an unexpectedly high volume of malpractice claims, inadequate funding and administrative assistance, and lack of support from both the medical and legal professions.³ For these reasons, the controversy over the legislative efforts in Maryland to respond to the crisis in medical malpractice claims resolution continues. This article examines: (1) the causes and effects of the medical malpractice crisis; (2) how some state legislatures, particularly Maryland's, have attempted to remedy the problem; (3) why many advocate preserving the traditional tort system; and (4) the salient points and practical ramifications of the arbitration system now in effect in Maryland.

I. CRISIS OF MANY DIMENSIONS

In the area of medical costs, the effects of medical malpractice suits have attracted a great deal of public attention. Exorbitant premiums charged hospitals and physicians for malpractice insurance have been assertedly driving upward the cost of health care. As one analyst has observed, "Malpractice premium costs are passed on in the form of increased health care prices, and thus also affect health care insurance rates."⁴ Relevant statistics verify that a rising portion of the already growing cost of medical care is attributable to malpractice insurance, with premiums for some health care providers as much as doubling in any one year.⁵

In addition to the direct costs passed on to the consumer, another dimension of the crisis is represented by certain indirect costs which have not only an undesirable economic impact but potentially far-reaching consequences on the overall delivery of medical services. Doctors and other health care providers, fearful of suit and consequent higher premium rates, apparently are practicing defensive medicine more now than ever before.⁶ For instance, many physicians order batteries of diagnostic tests and engage in a variety of other procedures that may be medically unnecessary but serve to forestall the possibility of lawsuits as well as to provide a good legal defense in the event lawsuits are instituted. Moreover, some physicians have become increasingly reluctant to undertake treatment programs that entail a high degree of risk, even though such pro-

2. See, e.g., *Attorney General v. Johnson*, 282 Md. 274, 385 A.2d 57, *appeal dismissed*, 437 U.S. 117 (1978).

3. *The Sun* (Baltimore), Oct. 14, 1980, at D1, col. 5.

4. Robeson, *Medical Malpractice Insurance: An Economic View*, *BUS. HORIZONS*, Apr. 1976, at 75.

5. See, e.g., *NAT'L UNDERWRITER*, July 16, 1976, at 12-13 (Opinion-Editorial); *NAT'L UNDERWRITER*, Oct. 29, 1976, at 2 (Opinion-Editorial).

6. See Blant, *The Medical Malpractice Crisis — Its Causes and Future*, *INS. COUNSEL J.*, Jan. 1977, at 114, 115.

grams may be entirely appropriate and necessary for certain patients.⁷ The estimated cost of such defensive medicine has ranged from three to five billion dollars annually.⁸ The threat of malpractice liability unquestionably has had a detrimental effect on the professional decision-making of medical practitioners and the overall delivery of medical services.

A variety of factors figure into the recent growth in the number of malpractice claims, amounts of awards, and cost of liability insurance. These include a weakening of the doctor-patient relationship resulting from growing medical specialization, a loss of trust and confidence in the medical profession by consumers of health care, the general problem of economic inflation,⁹ and perhaps an increasingly litigious society.¹⁰ But no factor seems to have played more prominent a role in the growth of the medical malpractice crisis than the very system for the resolution of malpractice claims. The shortcomings of the traditional tort system, such as multi-year delays in claims resolution, the extensive and expensive use of pretrial discovery procedures and medical experts, and the inevitably high legal and administrative expenses, have contributed significantly to the overall costs associated with medical malpractice litigation. Worse, these costs have been consuming a greater portion of the malpractice insurance premium dollar than that recovered by the successful claimant.¹¹ Court-created modifications of malpractice law have expanded the group of persons entitled to recover damages and have facilitated the claimant's ability to prove his case, thereby making the traditional resolution process highly vulnerable to unmeritorious claims.¹² Not surprisingly, this situation and the resulting uncertainty experienced by insurance company risk managers led first to skyrocketing malpractice insurance premiums and then to an exodus of insurers from the medical malpractice underwriting field.¹³

7. See, e.g., NAT'L UNDERWRITER, Oct. 29, 1976, at 2 (Opinion-Editorial).

8. See, e.g., NAT'L UNDERWRITER, Jan. 23, 1976, at 8 (Opinion-Editorial).

9. Abraham, *Medical Malpractice Reform: A Preliminary Analysis*, 36 MD. L. REV. 489, 490 (1977) [hereinafter cited as Abraham].

10. The President of the American Trial Lawyers Association argues, however, that, notwithstanding the commonly cited causes of rising malpractice insurance, premiums charged to health care providers are far out of line with past and projected insurance payments. See Koskoff, *President's Page*, TRIAL, Dec. 1979, at 4.

11. See Abraham, *supra* note 9, at 491 n.9 and accompanying text.

12. One major medical malpractice liability insurer experienced a rise in frequency of claims of 139% between 1968 and 1974, with the overall amount paid to claimants in settlement or by judgment rising 117% during the same period. See Abraham, *supra* note 9, at 490 n.3. And yet, only about 16% of the malpractice suits actually brought to trial result in favorable verdicts for plaintiffs. 36 FACTS ON FILE 1016 (1976) (citing J. of Com., July 28, 1976).

13. See Comment, *The Constitutionality of Medical Malpractice Mediation Panels: A Maryland Perspective*, 9 U. BALT. L. REV. 75, 75 n.2 (1979) [hereinafter cited as *Mediation Panels*].

In 1974, Maryland's medical practitioners felt the full impact of growing claims and payouts on medical malpractice insurers. In the fall of that year, St. Paul Fire & Marine Insurance Company, Maryland's largest medical malpractice insurer, notified the some 3,600 physicians it insured that it would not renew their malpractice insurance coverage on January 1, 1975.¹⁴ In an explanation accompanying the notice, St. Paul summarized its unsuccessful efforts to offset rising losses and stated that it had incurred a deficit of almost ten million dollars in the line of malpractice insurance in Maryland. The Insurance Commissioner of Maryland issued an order to St. Paul requiring it to continue providing coverage for Maryland physicians at then applicable rates.¹⁵ The company challenged the order in the Baltimore City Court, but the trial judge affirmed the directive of the Insurance Commissioner. On appeal, the Court of Appeals of Maryland reversed the decision of the trial court, ruling that St. Paul could not be forced to continue writing malpractice insurance in Maryland.¹⁶

II. LEGISLATIVE RESPONSES TO THE MALPRACTICE DILEMMA

A. *The 1975 Maryland General Assembly*

The delay created by the litigation between the Insurance Commissioner and St. Paul Fire & Marine Insurance Company provided the Maryland legislature time to respond to the malpractice crisis with legislation designed to assure continued insurance coverage for Maryland medical practitioners. The General Assembly's most notable effort during the 1975 session was its institution of the Medical Mutual Liability Insurance Society to provide insurance against professional liability to physicians and indemnification of persons successfully claiming damages in malpractice suits.¹⁷ With special assistance from the legislature by way of exemption from certain insurance regulations and the levying of a special one-time tax of \$300 on Maryland's practicing physicians,¹⁸ the Society was quickly

14. *St. Paul Fire & Marine Ins. Co. v. Insurance Comm'r*, 275 Md. 130, 133-34, 339 A.2d 291, 293 (1975).

15. *Id.* at 135, 339 A.2d at 294.

16. *Id.* at 132, 339 A.2d at 292.

17. Law of April 29, 1975, ch. 544, 1975 Md. Laws 2604 (codified at MD. ANN. CODE art. 48A, §§ 548-556 (1979)). As a mutual rather than proprietary insurance company, the Medical Mutual Liability Insurance Society is wholly-owned and supported by the Maryland physicians to whom it extends coverage. Significantly, the Society has become an enormously profitable organization, having amassed more than \$60 million in assets and paying out less than \$1.4 million in claims as of April 1, 1980. The small payout in claims is largely due to the backlog of malpractice claims awaiting arbitration. See Weiser, *From Crisis to Riches*, Washington Post, April 2, 1980, § A, at 1, col. 1.

18. Law of April 29, 1975, ch. 544, 1975 Md. Laws 2604 (codified at MD. ANN. CODE art. 48A, § 552 (1979)).

able to fill the malpractice insurance void left by St. Paul.¹⁹ In addition, the General Assembly established the Maryland Professional Liability Pool in order to make available malpractice coverage at standard rates for doctors unable to obtain insurance in the regular market.²⁰

In what now appears to be a piecemeal approach to mitigating the effects of the malpractice problem in 1975, the legislature explored, endorsed, and adopted several other provisions relating to the quality of health care and the resolution of malpractice claims. In response to extensive testimony offered by representatives of insurance companies, the General Assembly shortened the statute of limitations for bringing malpractice claims. Under the new statute of limitations, a medical malpractice suit must be filed within five years of the injury or within three years from discovery of the injury, whichever time period is shorter.²¹ In an attempt to enhance the effectiveness of peer review programs and Maryland's Commission on Medical Discipline,²² the Assembly also passed a law protecting the integrity and confidentiality of disclosure regarding the qualifications, fitness, or character of physicians practicing in the state.²³

Two other measures considered by the General Assembly were aimed at more comprehensively restructuring the process of malpractice claims resolution. House Bill 829 proposed a Medical Injury Compensation Commission.²⁴ The Commission was designed to supplant the courts as a forum for malpractice claims and to remedy such alleged inadequacies of the traditional tort system as jury mis-

19. See *Attorney General v. Johnson*, 282 Md. 274, 280-81, 385 A.2d 57, 61, *appeal dismissed*, 437 U.S. 117 (1978).

20. Law of April 29, 1975, ch. 546, 1975 Md. Laws 2612 (codified at MD. ANN. CODE art. 48A, §§ 557-564 (1979)). The Liability Pool and the Medical Mutual Liability Insurance Society are not mutually exclusive insurance operations. While the Society, by charter, must write malpractice insurance for any doctor, the Liability Pool provides doctors an alternative market for insurance. General liability insurers can be required to participate in the pool as a condition of doing business in the state. MD. ANN. CODE art. 48A, § 560 (1979). To date, these two organizations remain the major insurers of medical practitioners in Maryland.

21. MD. CTS. & JUD. PROC. CODE ANN. § 5-109 (1980). It had been frequently argued that the "long tail" of incurred but undiscovered claims made it impossible for insurance actuaries to determine accurately the appropriate level of reserves. The uncertainty about the frequency and severity of future malpractice judgments required the companies to set high reserves and accordingly charge physicians much higher premiums. The longer the time period in which a malpractice suit could be brought, the higher loss estimates and hence insurance premiums had to be. By shortening the limitation period, insurers could set rates more efficiently and physicians would realize cost savings through lower premiums.

22. See MD. ANN. CODE art. 43, §§ 130, 134A (1980).

23. Law of April 22, 1975, ch. 423, 1975 Md. Laws 2347 (codified at MD. ANN. CODE art. 43, § 136C (1980)).

24. H.D. 829, 1975 Sess. § 2.

understanding of complex medical testimony and the law of negligence, jury emotionalism in awarding high damages particularly for pain and suffering, and the long delay in claims resolution resulting from crowded trial dockets and various dilatory tactics of attorneys.²⁵ The bill failed to pass but was reassigned for further consideration and ultimately rewritten by the Assembly Committee on Economic Matters. As amended, the proposed bill provided for mandatory arbitration of all medical malpractice claims with only limited judicial review of the determination of the arbitration panel. The proposed Reparations Act was adopted by the House of Delegates,²⁶ despite an Attorney General's Opinion which concluded that the bill unconstitutionally deprived a claimant of the right to trial by jury.²⁷ Relying on that same opinion, however, the State Senate defeated the proposal.

It had become clear that the legislature realized that the creation of new sources of malpractice insurance for the medical profession eliminated only a symptom of the crisis at hand. The real cause of the crisis was the traditional tort system, which failed to effect an overall balance of advantage between plaintiffs and defendants. The courts helped create this imbalance through the promulgation of liberal discovery rules and through decisions affecting substantive law. In Maryland, the "strict locality" rule had been rejected by the court of appeals in favor of permitting plaintiffs to import from other parts of the country expert witnesses,²⁸ many of whom devote a large portion of their careers to testifying on behalf of claimants in malpractice cases. Further, the doctrine of informed consent had been adopted.²⁹ The factor that most dramatically undermined the

25. McGuirk & Rafferty, *Medical Malpractice and the Maryland Legislature*, 6 MD. L.F. 9, 11 (1976).

26. *Id.*

27. 60 Op. Md. Att'y Gen. 101 (1975). The Attorney General's Office asserted: [W]e believe that House Bill 829 in the form presented to us violates the right to a trial by jury as guaranteed by the Maryland Constitution. This might well not be the case if the common law cause of action had been altered in some significant way, if a broad regulatory scheme had been established or if de novo appeal by a jury were provided.

Id. at 114.

28. See *Shilkret v. Annapolis Emergency Hosp. Ass'n*, 276 Md. 187, 349 A.2d 245 (1975). Locality rules determine the standard for judging the health care practitioner's duty to the patient. Under the strict locality rule, the practitioner's duty is that degree of care generally exercised by practitioners in the same community or locality in which the defendant practitioner works. *Id.* at 188, 349 A.2d at 246. For a critical view of the strict locality rule applied by Maryland courts before 1975, see Ellin, *The Law of Medical Malpractice in Maryland: A Plaintiff's Dilemma*, 3 U. BALT. L. REV. 207 (1974).

29. See *Sard v. Hardy*, 281 Md. 432, 379 A.2d 1014 (1977). Under the doctrine of informed consent, the treating physician must reveal to the patient all information regarding proposed treatment necessary for the patient to make an intelligent decision as to whether to consent to the treatment. *Id.* at 438-45. 379 A.2d at 1019-23.

efficiency and fairness of the traditional tort system appeared to be jury emotionalism in determining liability and damages. In the absence of remedial actions designed to correct this imbalance within the tort system, it seemed probable that the number and severity of damage awards and settlements would continue to grow.

B. Alternatives to the Traditional Tort System

By 1975, the search for viable alternatives to the traditional process of resolving malpractice claims was being conducted by legislatures throughout the country. Several dramatic alternatives to the traditional process were discussed but never seriously entertained by the legislatures. These included the employment of commissions similar in form and operation to Workmen's Compensation Boards, the adoption of "no-fault" legislation, and the implementation of a system of first-party accident insurance which covers the party injured as a result of malpractice.³⁰ Few legislatures, however, have appeared willing to abdicate the traditional fault system entirely, preferring to modify it by adopting measures to shorten the statute of limitations for malpractice suits, strike the use of ad damnum clauses, abolish the collateral source rule, limit the amount of recoveries and contingency fees, or increase the burden of proof by abandoning the doctrine of *res ipsa loquitur*.

Legislatures intent on effecting a more extensive alteration of their state's tort system have most frequently endorsed four varieties of arbitration or pretrial screening programs: arbitration by prior agreement between the parties, arbitration of an existing dispute by present agreement, voluntary binding arbitration,³¹ and compulsory non-binding pretrial screening.³² Private arbitration by prior or present agreement was used in certain areas of the country long before the onset of the malpractice crisis.³³ Since the early 1970's, however, voluntary binding arbitration and compulsory non-binding screening panels have been the two most widely adopted mechanisms for the resolution of malpractice disputes.³⁴ In design-

30. See D. LOISELL & H. WILLIAMS, 1 *MEDICAL MALPRACTICE* ¶ 1.07 (1979).

31. See Ladimer & Solomon, *Medical Malpractice Arbitration: Laws, Programs, Cases*, 653 *INS. L.J.* 335 (1977) [hereinafter cited as Ladimer & Solomon]. For a list and description of statutory provisions for voluntary binding arbitration of medical malpractice claims, see *id.* at 358-61 app. Puerto Rico has adopted a scheme of mandatory binding arbitration of malpractice claims. P.R. LAWS ANN. tit. 26, § 4101 (Supp. 1979).

32. See Abraham, *supra* note 9, at 513 n.59 (list of 19 state statutes creating screening panels).

33. See generally Heintz, *Arbitration of Medical Malpractice Claims: Is It Cost Effective?*, 36 *MD. L. REV.* 533 (1977). See also Ladimer & Solomon, *supra* note 31, at 362 app. (list of general state and federal arbitration statutes that regulate all arbitration by private agreement).

34. For a thorough analysis of the characteristics of screening panels and arbitration, see Abraham, *supra* note 9, at 513-20.

ing non-judicial systems which they believe most effectively address the medical malpractice problem in their states, legislatures have focused on such variables as binding effect, voluntary acceptance, composition of decision-making panel, jurisdictional limits, formality of proceedings, submitted issues (liability, damages, or both), evidentiary strength, and scope of judicial review.³⁵

C. *A New Framework for Claim Resolution in Maryland*

Responding to the continued pressure for a more effective mechanism in Maryland for resolving malpractice disputes, the Maryland General Assembly adopted the Health Care Malpractice Claims Statute in 1976.³⁶ The new statute modified the traditional resolution process in three fundamental ways. First, it created an exclusive procedure for all medical malpractice claims for damages in excess of \$5,000. This procedure entails the review of such claims by an arbitration panel prior to the filing of a court action.³⁷ Second, it provided that the panel's award would not be binding; any party to the action may reject the decision of the arbitration panel and take the claim to court.³⁸ The panel's decision is, however, admissible into evidence in a subsequent judicial proceeding and carries with it a presumption of correctness.³⁹ Finally, the statute created the Health Claims Arbitration Office to facilitate and expedite the resolution of malpractice claims.⁴⁰ The responsibilities of the Office include: assisting the parties in selecting an arbitration panel; providing a mechanism for the service of claims, pleadings, and subpoenas; performing a variety of administrative services for the arbitration panel;⁴¹ and filing in court for confirmation those panel decisions that are not challenged.⁴²

In effect, the statute imposes an additional procedural layer on the existing framework for tort claims resolution, which is applicable

35. See McGuirk & Rafferty, *Medical Malpractice and the Maryland Legislature*, 6 MD. L.F. 9, 14-19 (1976).

36. Law of May 4, 1976, ch. 235, 1976 Md. Laws 496 (codified at MD. CTS. & JUD. PROC. CODE ANN. §§ 3-2A-01 to -09 (1980)). The new system created by the statute was consciously designed to avoid the constitutional infirmities underlying the two programs proposed in the previous year's House Bill 829 (see text accompanying notes 24-27 *supra*) and has since withstood challenges to its constitutionality. *Attorney General v. Johnson*, 282 Md. 274, 385 A.2d 57, *appeal dismissed*, 437 U.S. 117 (1978). See 61 Op. Md. Att'y Gen. 175 (1976) in which the Attorney General approved the form, legal sufficiency, and constitutionality of the 1976 act.

37. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-02(a) (1980).

38. *Id.* § 3-2A-06(a)-(b).

39. *Id.* § 3-2A-06(d). The burden of rebutting the presumed correctness of an award rests on the party who rejects the panel's decision. *Id.* The combination of the right of de novo trial and the presumption of a correct panel decision makes Maryland's statute unique among similar legislation in other states.

40. *Id.* § 3-2A-03.

41. *Id.* § 3-2A-04.

42. *Id.* § 3-2A-05.

to all claims involving significant medically-related injuries. Under the statute, actions against a health care provider⁴³ involving damages over \$5,000 for injuries arising out of alleged malpractice must be filed with the Director of the Health Claims Arbitration Office.⁴⁴ The ad damnum clause in the initial pleading is disallowed and the claimant need only allege that his damages are in excess of the required jurisdictional amount.⁴⁵

Once a malpractice claim is filed, the Director serves a copy of the claim upon each health care provider involved.⁴⁶ The health care provider must file a response within the time provided in the Maryland Rules for filing a responsive pleading to a declaration.⁴⁷ Within twenty days after the time for filing the response, the Director is charged with providing all parties the names of fifteen prospective panelists together with a brief biographical statement about each.⁴⁸ Generally, the arbitration panel consists of three members: an attorney who serves as chairman and decides all prehearing matters including issues relating to discovery,⁴⁹ a health care provider, and a member of the general public.⁵⁰ Of primary concern is that the panelists selected have no personal or economic relationships with any party and, based on their backgrounds, appear capable of rendering a well-reasoned and fair decision.⁵¹ Once the arbitration panel

43. The statute defines "health care provider" broadly to include hospitals and related institutions, physicians, osteopaths, optometrists, chiropractors, nurses, dentists, podiatrists, and physical therapists. *Id.* § 3-2A-01(e) (1980). The definition, however, does not include pharmacists or pharmaceutical laboratories that do business with the medical profession.

44. *Id.* §§ 3-2A-02(a), 3-2A-04(a).

45. *Id.* § 3-2A-02(b); MD. R.P. 307(a), BY 4(b).

46. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-04 (1980).

47. *Id.* § 3-2A-04(a); see MD. R.P. 307 (allowing defendant 15 days after return day to file initial pleading). The statute also requires that appropriate third party claims be filed with the health care provider's response to the original claim. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-04(a) (1980).

48. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-04(b) (1980).

49. *Id.* § 3-2A-05(c).

50. *Id.* § 3-2A-03(c). The parties may, within the time prescribed for returning their list of panelists to the Director, agree to have a single arbitrator serve in place of the arbitration panel. *Id.* § 3-2A-04(e).

51. The statute and regulations promulgated pursuant to the statute include a procedure for determining any possible bases for disqualification of prospective panel members and afford the parties the right to disqualify a certain number of proposed panelists without cause. *Id.* § 3-2A-04(b)(c); COMAR § 01.03.01.07B-D (1976).

To date, the Health Claims Arbitration Office has gathered the names of some 3,000 prospective panel members and has developed a procedure whereby selection from the pool of volunteers is done completely at random. In addition, the Office has classified the prospective health care provider panelists according to their fields of specialty in order to increase the likelihood that the health care panelists ultimately selected will be assigned to claims involving their field of expertise. See MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-03(c) (1980).

In an apparent effort to encourage greater participation by members of the professions and the public, the Maryland General Assembly amended the statute in 1980 to provide that each arbitrator shall have immunity from suit for "any act or decision made during tenure and within the scope of designated authority," absent a showing of malice or bad faith. *Id.* § 3-2A-04(f).

is formed, it assumes responsibility for ruling on all issues of law and fact raised at the proceedings and exercises its authority by a majority.⁵²

The Maryland discovery rules⁵³ and certain provisions of the Maryland Uniform Arbitration Act⁵⁴ apply to the prehearing proceedings.⁵⁵ The arbitration panel may set the time period within which discovery and other procedural matters must be completed.⁵⁶ A prehearing conference with the chairman of the panel must be held at least thirty days before the hearings begin.⁵⁷ The arbitration panel sets the time and place for all hearings and must give the parties at least five days notice.⁵⁸

Each party has the right to be represented by an attorney at any phase of the proceedings and, at the hearing, each party has the right to be heard, to present evidence material to the controversy, and to cross-examine witnesses.⁵⁹ During the hearing, the panel is not bound by the technical rules of evidence.⁶⁰ The panel may issue subpoenas, which are subject to court enforcement, for the attendance of witnesses and for the production of records and other evidence.⁶¹ The panelists may also question witnesses and order the filing of briefs.⁶² All proceedings are preserved for the record on tape recordings.⁶³

In arriving at a decision on a claim, the panel first determines the issue of liability.⁶⁴ If they decide this threshold question in favor of the claimant, the panel proceeds to consider, assess, and apportion appropriate damages against each of the health care providers found

52. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-05(a) (1980).

53. MD. R.P. 400-425.

54. MD. CTS. & JUD. PROC. CODE ANN. §§ 3-212 to -217, 3-220 (1980).

55. *Id.* § 3-2A-05(b).

56. COMAR § 01.03.01.09C (1976).

57. *Id.* § 01.03.01.10B-C.

58. *Id.* § 01.03.01.11A-B. Unless all the parties agree otherwise, all hearings must be held in a county of proper venue and at a place as close as possible to the claimant's residence.

Id. § 01.03.01.11A.

59. *Id.* § 01.03.01.11E. Although a party may proceed without an attorney, the arbitration panel is charged with informing the party of the complexity of the health care claims procedure and the advisability of legal representation. *Id.*

60. *Id.* § 01.03.01.11D.

61. *Id.* § 01.03.01.11F.

62. *Id.* § 01.03.01.11G, I.

63. *Id.* § 01.03.01.11H.

64. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-05(d) (1980).

liable.⁶⁵ In addition to determining the amount of the award, if any, the arbitration panel is responsible for assessing the costs of the proceedings against either one or, by apportionment, all of the parties.⁶⁶ The panel is required to file its award, specifying the amounts of any damages awarded and costs assessed, with the Director of the Health Claims Arbitration Office within five days after the close of the hearing.⁶⁷ The statute does not require the panel to cite in its written decision the evidence or legal authority upon which it relied.

After the arbitration panel files the award with the Director, a party may attempt to have the award, if impaired by a technical defect, modified by the panel.⁶⁸ A party may also reject the panel's

65. *Id.* Advance payments from a medical malpractice liability insurer do not constitute an admission of liability, MD. ANN. CODE art. 48A, § 482A (1979), but, if the claimant has received any advance payments, evidence of the amount is admissible at this stage of the proceedings. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-08(a) (1980). In such event, the panel must make a finding of total damages and then adjust them by the amount of advance payments. *Id.* A successful claimant has the option of receiving his award in lump sum or in periodic payments. *Id.* § 3-2A-08(b).

Under the traditional tort system, the state's Uniform Contribution Among Tortfeasors Act, MD. ANN. CODE art. 50, §§ 16-24 (1979), holds responsible for contribution on a pro rata basis any party found liable to a claimant. The arbitration statute, however, permits the panel to apportion the damages if more than one health care provider is found liable. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-05(d) (1980). The reference to contribution is found in the section of the regulations governing adjustments of awards when total damages are less than the amount of advance payments. COMAR § 01.03.01.12C(3)-(4). Allowing the panel to apportion damages commendably provides the panel added flexibility in assessing damages against each health care provider involved.

66. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-05(e) (1980). These costs include the panelists' fees — \$60 per diem for the chairman and \$40 per diem for the other two arbitrators. COMAR § 01.03.01.12D(2) (1976). According to a recent opinion of the Attorney General of Maryland, arbitration costs also include deposition fees, but neither attorneys' fees nor expert witness' fees may be assessed against the losing party. 80 Op. Md. Att'y Gen. 52 (Aug. 6, 1980) (unpublished).

Under the statute, the panel must approve all attorneys' fees for services rendered in connection with the arbitration process. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-07 (1980). Similarly, attorneys' fees charged for services rendered during subsequent judicial proceedings are subject to the approval of the court. *Id.*

67. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-05(f) (1980); COMAR § 01.03.01.12E (1976).
 68. MD. CTS. & JUD. PROC. CODE ANN. §§ 3-2A-05(g), 3-222 (1980). Service of the award on the parties triggers a 20-day period within which any party may apply for a modification by the panel of its award. *Id.*; COMAR § 01.03.01.13A(1) (1976). Such an appeal may be premised only on the incorrect form of an award or an evident mistake or miscalculation not affecting the panel's determination on the merits of the claim. MD. CTS. & JUD. PROC. CODE ANN. §§ 3-222 to -223 (1980); COMAR § 01.03.01.13B (1976). Within 20 days after the referral of an appeal, the panel must respond in writing to the Director, indicating its determination and submitting any modification it deems appropriate. *Id.* § 01.03.01.13C(1). If a party misses the 20-day period for applying to the arbitration panel to modify or correct a technically defective award, he may still seek the modification or correction from the circuit court by way of an action to nullify. *See* MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(a) (1980); COMAR § 01.03.01.14 (1976).

decision by petitioning in circuit court⁶⁹ to nullify the award.⁷⁰ If appropriate, the court may correct⁷¹ or even vacate⁷² the award. If the award is vacated, the case proceeds through the court on its merits and as if there had been no award.⁷³ Unless vacated by the court, the arbitration award is admissible as evidence in an action to nullify.⁷⁴ In this case, the award is presumed correct and the burden is on the party rejecting it to prove by a preponderance of the evidence that the panel's award was improper. After the time for either rejecting or modifying the award has expired, the Director must file a copy of the award with the appropriate circuit court.⁷⁵ Upon confirmation by the court, the award constitutes a final judgment.

III. THE STATUTE ON TRIAL

A. *Constitutionality* — Attorney General v. Johnson

Shortly after the innovation of the malpractice claims process in 1976, medical malpractice claimants filed suit in the Baltimore City Court, seeking a declaratory judgment that the statute violated federal and state constitutional provisions and that the plaintiffs could pursue their claim in court without first submitting it to arbitration.⁷⁶ The trial court heard a variety of constitutional issues and

69. Venue for the action to nullify is determined in accordance with the Courts and Judicial Proceedings Code. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(f) (1980); *see id.* § 6-201.

70. *Id.* § 3-2A-06(a) (1980). A notice of such a rejection must be filed with the Director and the arbitration panel and served on the other parties or their counsel within 90 days of service of the panel's award or, if an application for modification or correction has been filed, within 30 days after disposition of the application by the panel. *Id.*; MD. R.P. BY 1-5. Within the same time period, the party rejecting the award must file an action in court to nullify the award. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(b) (1980). An action to nullify is governed by the Maryland Rules of Procedure. *Id.* Any party to this court proceeding may elect to have the case tried by a jury. *Id.*

The assessment of costs incurred in the judicial proceedings usually is subject to the court's discretion. *Id.* § 3-2A-06(e). However, if the trial verdict is less favorable to the rejecting party than the panel's award, the rejecting party is liable for all costs.

71. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(c) (1980); *see id.* § 3-223.

72. *Id.* § 3-2A-06(c). A party may petition the court to vacate the panel's award on such grounds as fraud, corruption, or partiality. *See id.* § 3-224. A petition of this kind must be made by pretrial preliminary motion, which is reviewed by the court without a jury. *Id.* § 3-2A-06(c). Failure to use the proper procedure constitutes a waiver of the defense. The court is empowered to vacate the award or to make any appropriate modifications or corrections. If the court modifies the award, the modified award is substituted for the panel's award for purposes of further judicial proceedings. *Id.*

73. *Id.*

74. *Id.* § 3-2A-06(d).

75. *Id.* § 3-2A-05(h).

76. Attorney General v. Johnson, 282 Md. 274, 278, 385 A.2d 57, 60, *appeal dismissed*, 437 U.S. 117 (1978).

entered judgment declaring the statute invalid. In its decision, the trial court held that the statute unconstitutionally vested judicial power in an administrative agency and imposed procedural and monetary impediments sufficiently substantial to deny malpractice claimants reasonable access to the courts and the attendant right to trial by jury. The Court of Appeals of Maryland granted certiorari to consider these important constitutional questions.⁷⁷

1. Improper Delegation of Judicial Power

The court of appeals in *Attorney General v. Johnson*⁷⁸ first considered whether the statute vests judicial power in an administrative agency contrary to the mandates of the Constitution of Maryland, which provide that judicial power be vested in enumerated courts,⁷⁹ that the powers of the three departments of government be "forever separate and distinct, and that no person exercising the functions of one branch may discharge the duties of another."⁸⁰ As a preliminary matter, the court disposed of the assertion that the statute impermissibly vests judicial power in an administrative agency by noting that the arbitration panel is not an agency in the traditional sense and that the Health Claims Arbitration Office, which is an agency, exercises no judicial function.⁸¹ In rejecting the contention that the statute violates the separation of powers doctrine, the court stated that the performance of certain judicial functions by a non-judicial body is not in and of itself dispositive.⁸² Otherwise, the court noted, "[N]o administrative agency performing an adjudicatory function could survive constitutional muster."⁸³ The court emphasized that two significant limitations on the arbitration procedure distinguish the panel from a court of law, which alone has the power to render and enforce a judgment. First, the parties are in no way bound by the award. Second, the panel cannot itself enforce the award.⁸⁴

77. The court of appeals granted certiorari before the Court of Special Appeals of Maryland reviewed the case. *Id.* See MD. CTS. & JUD. PROC. CODE ANN. § 12-203 (1980).

78. 282 Md. 274, 385 A.2d 57, *appeal dismissed*, 437 U.S. 117 (1978). For a thorough analysis of the *Johnson* decision, see *Mediation Panels*, *supra* note 13.

79. MD. CONST. art. IV, § 1.

80. MD. CONST., DECL. OF RIGHTS art. 8.

81. 282 Md. 274, 284, 385 A.2d 57, 63, *appeal dismissed*, 437 U.S. 117 (1978).

82. *Id.*

83. *Id.*

84. *Id.* The court concluded its treatment of this argument by citing extensively authority in other jurisdictions in accord with the proposition that a statutory requirement that disputes be subject to a non-judicial entity for determination prior to court action is not an unconstitutional delegation of judicial power. *Id.* Many of these cases involved review of legislation similar to Maryland's Health Care Malpractice Claims Statute. *E.g.*, *Eastin v. Broomfield*, 116 Ariz. 576, 582, 570 P.2d 744, 750 (1977); *Prendergast v. Nelson*, 199 Neb. 97, 110, 256 N.W.2d 657, 666-67 (1977); *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 520-22, 261 N.W.2d 434, 448-49 (1978); see also *Everett v. Goldman*, 359 So. 2d 1256 (La. 1978); *Paro v. Longwood Hosp.*, 373 Mass. 645, 396 N.E.2d 985 (1977); *Parker v. Children's Hosp. of Phil.*, 483 Pa. 106, 394 A.2d 932 (1978). *Contra* *Wright v. Central DuPage Hosp. Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978). See generally *Annot.*, 80 A.L.R.3d 583, 602-03 (1977).

2. Denial of Access to Courts and Right to Trial by Jury

The court of appeals next rejected arguments that the statute creates procedural and monetary impediments calculated to inhibit a claimant from pursuing court action in the face of an adverse award from an arbitration panel. The appellees alleged that the substantial expense of producing expert witnesses for a panel hearing, significant lengthening of time necessary to achieve a final judicial resolution of a claim, and necessity of overcoming the presumption of correctness of a panel decision at a subsequent trial "deny a claimant reasonable access to the courts and his attendant constitutional right to trial by jury."⁸⁵ Other infringements on these dual rights alleged by the appellees included the statute's failure to allow the claimant to attack the panel decision before the jury on the grounds that it was procured by corruption, fraud, undue means, or partiality, failure to allow voir dire of the arbitration panel, imposition of costs and fees before access to the courts can be gained, and court control of attorneys' fees. The court considered these allegations *seriatim*.

In response to attacks on the statutory provision allowing into evidence the findings of the arbitration panel, the court held that the provision is essentially a rule of evidence.⁸⁶ Not unlike existing rules in the state's law of evidence, the rule creates a presumption and, under certain circumstances, shifts the burden of proof. This result, according to the court, is perfectly permissible under state and federal case law.⁸⁷ The court noted that when the malpractice claimant appeals, the rule has no effect on his burden of proof with regard to primary negligence. Furthermore, the presiding judge, not the jury, has the discretion to exclude from evidence the panel's award when an adequate basis for exclusion is presented by preliminary motion.⁸⁸ Consequently, an attack on the panel's award on the basis that it was procured by fraud or corruption is an issue for the judge alone to resolve. The court concluded that, in any event, the rule does not remove any questions of fact from the judge or jury, nor does it deprive a party of the right to present fully his case to the jury.⁸⁹

The court also rejected the appellees' assertion that claimants are denied due process by the statute's failure to provide an opportunity to conduct a voir dire examination of prospective members of the arbitration panel so as to assure their freedom from bias and partiality.⁹⁰ Several features of the new procedure, including the

85. 282 Md. 274, 291, 385 A.2d 57, 67, *appeal dismissed*, 437 U.S. 117 (1978). See MD. CONST. art. XV, § 6; MD. CONST., DECL. OF RIGHTS arts. 5, 19, 23.

86. 282 Md. 274, 293-94, 385 A.2d 57, 68-69, *appeal dismissed*, 437 U.S. 117 (1978).

87. *Id.* at 294, 385 A.2d at 69.

88. *Id.* at 296, 385 A.2d at 70.

89. *Id.* at 294-95, 385 A.2d at 69 (citing *Meecker v. Lehigh Valley R. Co.*, 236 U.S. 412 (1915)).

90. 282 Md. 274, 296-97, 385 A.2d 57, 70, *appeal dismissed*, 437 U.S. 117 (1978).

random selection of panelists, the parties' right to strike panelists with or without cause, and the liberty to reject the arbitration award for any reason and have the claim tried by a jury, militate against this contention.⁹¹

The most formidable argument against the statute concerned the additional expense and delay inevitably incurred when a party rejects the decision of the arbitration panel and elects court proceedings.⁹² The *Johnson* appellees contended that these hindrances deny malpractice claimants access to the courts and the right to a jury trial guaranteed by Maryland's Declaration of Rights.⁹³ Dismissing these contentions, the court of appeals concurred with Wisconsin's highest court, which, in reviewing similar legislation, observed that "[s]tates are under no constitutional obligation to neutralize the economic disparities which inevitably make resort to the courts different for some plaintiffs than others."⁹⁴ The court of appeals noted that other state appellate courts have uniformly held that legislative attempts to reduce the cost of medical expenses by lowering malpractice insurance premiums are constitutional exercises of the state's police power.⁹⁵ It also noted that access to the courts and the right to a jury trial are subject to reasonable regulation. Based on its analysis of the effects and purpose of the new malpractice procedure,

91. *Id.* The court further noted that, as a general rule, voir dire examination is not provided in connection with panels, boards, or commissions. *Id.*

92. *Id.* at 297-98, 385 A.2d at 71. One commentator has suggested that the preparation prior to screening panel review in most cases functions merely as an accelerated form of discovery for the actual trial with practically the same effect in terms of expense and delay on litigants as the various discovery devices and pretrial hearings generally accepted as necessary facets of any claims resolution process. Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759, 796 (1977) [hereinafter cited as Redish].

93. 282 Md. 274, 297-98, 385 A.2d 57, 71, *appeal dismissed*, 437 U.S. 117 (1978). See MD. CONST., DECL. OF RIGHTS art. 19; MD. CONST. art. XV, § 6.

94. *Id.* at 298, 385 A.2d at 71 (quoting *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 511-12, 261 N.W.2d 434, 444 (1978)). See also *Carter v. Sparkman*, 335 So. 2d 802, 805-06 (Fla. 1976), *cert. denied*, 429 U.S. 1041 (1977); *Prendergast v. Nelson*, 199 Neb. 97, 110-15, 256 N.W.2d 657, 667-69 (1977).

95. 282 Md. 274, 298, 385 A.2d 57, 71, *appeal dismissed*, 437 U.S. 117 (1978) (citing *Carter v. Sparkman*, 335 So. 2d 802 (Fla. 1976), *cert. denied*, 429 U.S. 1041 (1977); *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 261 N.W.2d 434 (1978)). See Redish, *supra* note 92, at 796 ("If a legislature intends the screening panel procedure to function as an institutionalized attempt to encourage settlement, and the physical and financial burdens it imposes on potential plaintiffs [are] kept to a minimum, the constitutional obstacles should not prove insurmountable.").

the court concluded that the statute's regulation of these rights is reasonable.⁹⁶

Under the statute, attorneys' fees in connection with arbitration and judicial proceedings must be approved by the arbitration panel and the court respectively.⁹⁷ The appellees claimed that this provision violates the due process clauses of the Maryland and federal constitutions on the theory that the legislation unduly interferes with the right of parties to contract with an attorney.⁹⁸ To this contention the court responded that the applicable provision of the statute effects no deprivation of property or interference with the right to contract.⁹⁹ All contracts, it noted, are subject to reasonable regulation and there are several statutes, state and federal, that subject attorneys' fees to the approval of the court.¹⁰⁰

3. Denial of Equal Protection and Due Process

Lastly, the appellees asserted that the statute deprived them of the equal protection of the laws in violation of the fourteenth amendment and of the due process clause contained in the Maryland Declaration of Rights.¹⁰¹ The trial court had held that the statute violated neither of these provisions.¹⁰² Agreeing with the trial court on this point, the court of appeals reviewed the evidence introduced at trial upon which the lower court had relied: the existence of a medical malpractice insurance crisis in Maryland, the continued instability of the insurance market even after the creation of the Medical Mutual Liability Insurance Society,¹⁰³ the recommendation of the General

96. The court explained:

We find that our analysis of the reasonableness of this Act's regulation of the jury trial right — by virtue of its regulation of access to the courts generally — begins and ends with a proposition long ago announced by our predecessors as "fully established": that "where a law secures the trial by jury upon an appeal, it is *no violation of a constitutional provision for guarding that right*, although such law may provide for a primary trial without the intervention of a jury."

282 Md. 274, 301, 385 A.2d 57, 72-73, *appeal dismissed*, 437 U.S. 117 (1978) (emphasis in original) (quoting *Steuart v. Baltimore*, 7 Md. 500, 512 (1855)). In addition, the court noted that the essential ingredients of the right to jury trial are not lost under the new procedure. No court costs are imposed on the litigants as a precondition to the court proceeding or jury trial. Also, any delay caused by the procedure is not atypical of a variety of two-step proceedings in Maryland, notably the Workmen's Compensation claims procedure, the constitutionality of which is no longer in doubt.

97. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-07 (1980).

98. 282 Md. 274, 305, 385 A.2d 57, 75, *appeal dismissed*, 437 U.S. 117 (1978).

99. *Id.* at 305-06, 385 A.2d at 75.

100. *Id.* The court cited as examples Maryland's Workmen's Compensation Act, MD. ANN. CODE art. 101, § 57 (1979); the Unemployment Insurance Law, MD. ANN. CODE art. 95A, § 16(b) (1979); and the Federal Torts Claims Act, 28 U.S.C. § 2678 (1976). 282 Md. 274, 305-06, 385 A.2d 57, 75, *appeal dismissed*, 437 U.S. 117 (1978).

101. MD. CONST., DECL. OF RIGHTS art. 23.

102. 282 Md. 274, 308, 385 A.2d 57, 76-77, *appeal dismissed*, 437 U.S. 117 (1978).

103. See notes 14-20 and accompanying text *supra*.

Assembly's Medical Malpractice Insurance Study Committee to pass remedial legislation similar to the present statute, and the effects of the crisis on the consumer of medical services.¹⁰⁴ Based on these considerations and the belief that the statute bears a fair and substantial relation to its avowed purpose, the court held that the statute did not deny the plaintiffs their rights to due process or to equal protection of the law.¹⁰⁵ With its analysis and rejection of the various objections to the statute completed, the court of appeals upheld the constitutionality of the statute.¹⁰⁶

B. Further Challenges to the Statute

Since the court of appeals' decision in *Attorney General v. Johnson*, several malpractice claimants have attempted to avoid the requirements of the arbitration procedure and the effect of a panel award by resorting to loopholes in the language of the statute. In addition, another attack on the constitutionality of the statute has been mounted, this time because it is allegedly unconstitutional in its application.

In the case of *Davison v. Sinai Hospital of Baltimore*,¹⁰⁷ the claimants filed a medical malpractice suit in the United States District Court for the District of Maryland without first complying with the arbitration procedures under the statute. The plaintiffs alleged that the federal court had jurisdiction due to the diversity of citizenship of the parties.¹⁰⁸ They conceded that the statute requires arbitration as a prerequisite to such a suit in a Maryland state court, but argued that the statute, by its terms, excludes federal courts from its coverage because "court" is defined in the statute as "a circuit

104. 282 Md. 274, 306—08, 385 A.2d 57, 76, *appeal dismissed*, 437 U.S. 117 (1978).

105. *Id.* at 309, 385 A.2d at 77. The court discussed the appropriate standard to be applied to the statute under the equal protection clause. The appellees argued that the strict scrutiny test be utilized, asserting that the statute interfered with a fundamental right — the right to trial by jury — and, alternatively, that the statute allowed disparate treatment of a suspect class, presumably referring to malpractice claimants. Noting that it earlier rejected the contention that the statute unduly inhibits the right to jury trial and dismissing the contention of a suspect class, the court turned to consider the impact of the traditional rational basis test. *Id.* at 312, 385 A.2d at 78—79. Applying this test, the court concluded that the "distinction between malpractice claimants and other tort claimants is reasonably related to the legitimate purpose of the Act, namely the protection of the public health and welfare by assuring the availability of malpractice insurance at reasonable rates." *Id.* at 312, 385 A.2d at 78. In so holding, the court suggested that the application of the more onerous intermediate or "means-focused" test would produce the same result. The classification of malpractice claimants, the court reasoned, "rests upon a ground of difference bearing a 'fair and substantial relation' to the object of the legislation, to encourage the resolution of such claims without judicial proceedings, thus reducing their costs and consequently the cost of insurance." *Id.* at 312—13, 385 A.2d at 79.

106. *Id.* at 313—14, 385 A.2d at 80.

107. 462 F. Supp. 778 (D. Md. 1978), *aff'd*, 617 F.2d 361 (4th Cir. 1980).

108. *Id.* at 779.

court of a county or court of the Supreme Bench of Baltimore City having jurisdiction over actions at law."¹⁰⁹ In addition, the plaintiffs argued that the Malpractice Claims Act deprives claimants of the right to a jury trial guaranteed by the seventh amendment for civil suits in federal courts.¹¹⁰ The district court rejected both contentions.

Looking to the legislative history of the Act, the district court found no discussion of the role of federal courts in deciding Maryland medical malpractice cases, but resolved that the limited definition of "court" was intended to insure that claimants with suits for less than \$5,000 have immediate access to state district courts without first going through arbitration.¹¹¹ The court determined that the statute applies with equal force to federal courts, relying on *Erie Railroad v. Tompkins*¹¹² and its progeny for the proposition that the statute is substantive, not procedural, and therefore must be applied uniformly to all malpractice claims in order to avoid forum-shopping.¹¹³ Otherwise, reasoned the court, "[P]laintiffs who wished to avoid going through a preliminary arbitration proceeding might well be tempted to try to manufacture diversity of citizenship of parties in order to get into federal court."¹¹⁴ Responding to the plaintiff's constitutional argument, the court pointed out that the issue was satisfactorily resolved in *Attorney General v. Johnson*¹¹⁵ and agreed that the Act does not work a deprivation of malpractice claimants' right to a jury trial in Maryland.¹¹⁶ The United States Court of Appeals for the Fourth Circuit has affirmed the *Davison* decision.¹¹⁷

In *Bishop v. Holy Cross Hospital*,¹¹⁸ the appellant filed suit in the Circuit Court for Montgomery County alleging various acts of medical malpractice by the appellees, without first submitting the

109. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-01(c) (1980). Note also that the statute refers to "any court of this State." *Id.* § 3-2A-02(a).

110. 462 F. Supp. 778, 781 (D. Md. 1978), *aff'd*, 617 F.2d 361 (4th Cir. 1980).

111. *Id.* at 779.

112. 304 U.S. 64 (1938).

113. *Davison v. Sinai Hosp. of Baltimore*, 462 F. Supp. 778, 780 (D. Md. 1978), *aff'd*, 617 F.2d 361 (4th Cir. 1980).

114. *Id.* In regard to the plaintiff's contention that § 3-2A-09 indicates that the statute, by its very terms, is intended to be procedural, the court ruled that the provision was intended to indicate that the legislature was not attempting to create a new cause of action in passing the statute. *Id.* Most courts interpreting similar state statutes requiring parties to arbitrate malpractice claims have held that the *Erie* line of cases requires the result reached by this court. See *Woods v. Holy Cross Hosp.*, 591 F.2d 1164 (5th Cir. 1979); *Hines v. Elkhart Gen. Hosp.*, 465 F. Supp. 421 (N.D. Ind. 1979); *Wells v. McCarthy*, 432 F. Supp. 688 (E.D. Mo. 1977); *Marquez v. Hahnemann Medical College & Hosp.*, 435 F. Supp. 972 (E.D. Pa. 1976); *Flotemersch v. Bedford County Gen. Hosp.*, 69 F.R.D. 556 (E.D. Tenn. 1975). *But see Wheeler v. Shoemaker*, 78 F.R.D. 218, 221-22 (D.R.I. 1978).

115. 282 Md. 274, 385 A.2d 57, *appeal dismissed*, 437 U.S. 117 (1978).

116. 462 F. Supp. 778, 781 (D. Md. 1978), *aff'd*, 617 F.2d 361 (4th Cir. 1980).

117. 617 F.2d 361 (1980).

118. 44 Md. App. 688, 410 A.2d 630 (1980).

claim to the Health Claims Arbitration Office for arbitration. The circuit court ruled that it had no jurisdiction over the claim because the appellant had not exhausted all administrative remedies as required by section 3-2A-02 of the statute.¹¹⁹ On appeal, the appellant argued that the arbitration panel's power to assess "appropriate damages" as that term is used in section 3-2A-05(d) does not encompass punitive damages and that, consequently, the panel was without authority to hear the claim, which involved punitive as well as compensatory damages.¹²⁰ In affirming the judgment of the lower court, the Court of Special Appeals of Maryland correctly held that the plain meaning of the term "appropriate damages" is any kind of damages, including punitive damages, that the arbitration panel chooses to award.¹²¹ A contrary interpretation of the term would clearly have been inconsistent with the purpose of the statute, which is to encourage early settlement or voluntary dismissal of claims by first subjecting those claims to non-binding arbitration.

The alleged failure of the Health Claims Arbitration Office to schedule arbitration of claims on a timely basis has provoked the recent filing of a class action against the state, captioned *Walker v. Hughes*.¹²² The suit seeks a determination of whether the statute is being administered in an unconstitutional fashion due to the lack of funding and staff for the Office, the lack of qualified volunteer arbitrators, and the resulting backlog of claims.¹²³ In addition to a declaratory judgment, the plaintiffs also request that the court allow them to proceed with prosecuting their claims in court, issue a writ of mandamus compelling the state to take the necessary action to correct the malfunctioning of the arbitration procedure, and award damages for injuries sustained to date.

The filing of the *Walker* action is largely a result of the number of claims submitted to the Health Claims Arbitration Office, which has been hampered since its inception in 1976 in effectively performing its responsibilities under the statute. During the two-year period of the *Johnson*¹²⁴ litigation, only six claims were filed with the Office;¹²⁵ most plaintiffs apparently refrained from filing claims

119. *Id.* at 689, 410 A.2d at 631.

120. *Id.* at 690, 410 A.2d at 632.

121. *Id.* at 692, 410 A.2d at 632.

122. Civ. Docket No. 115, Folio 625, Case No. 104893 (Balt. City Ct., filed Feb. 26, 1980).

123. *Id.* The Supreme Court of Pennsylvania recently declared unconstitutional the provision of that commonwealth's Health Care Services Malpractice Act that granted arbitration panels original exclusive jurisdiction over medical malpractice claims. *Mattos v. Thompson*, ___ Pa. ___, 421 A.2d 190 (1980); see PA. STAT. ANN. tit. 40, § 1301.309 (Purdon Supp. 1980). The court, which had upheld the constitutionality of the Act on its face two years earlier in *Parker v. Children's Hosp. of Phil.*, 483 Pa. 106, 394 A.2d 932 (1978), found that the delay caused by the arbitration procedure made the parties' right to a jury trial practically unavailable. ___ Pa. at ___, 421 A.2d at 195-96.

124. 282 Md. 274, 385 A.2d 57, *appeal dismissed*, 437 U.S. 117 (1978).

125. Interview with Walter R. Tabler, Director of the Health Claims Arbitration Office, in Baltimore, Maryland (Oct. 14, 1980).

pending a determination of the statute's constitutionality. Since the *Johnson* decision in 1978, the Office has been deluged with claims. The large number of claims represents both a substantial backlog of claims that went unfiled during the pendency of the *Johnson* litigation and an unexpectedly high number of claims filed since the resolution of that case. As of January 1, 1981, approximately 715 claims for medically-related injuries had been filed with the Health Claims Arbitration Office. Of those 715 cases, approximately 107 were settled prior to an arbitration hearing and approximately 37 had gone through the entire arbitration procedure.¹²⁶ The nearly 600 cases remaining were either still in arbitration or only in the process of being scheduled for arbitration. In addition to the large number of claims, the substantial delay in scheduling and completing arbitration has been exacerbated by inadequate government funding and staffing of the Office and a lack of qualified volunteers for panelist positions in various regions of the state.

IV. AN ASSESSMENT OF MARYLAND'S ARBITRATION LAW

The many problems that have plagued the new arbitration procedure to date make it impossible to assess whether the procedure is really capable of reducing the inequities and substantial costs associated with the litigation of malpractice claims. Only further experience with a procedure unfettered by inadequate funding and manpower will tell. Nevertheless, some general observations about the potential efficacy of the procedure may be premised on past studies of similar screening programs and on a comparison of the major features of the old and new claims resolution processes in Maryland.

Systems to resolve disputes between parties, whether judicial, administrative, or contractual, should provide a just, speedy, and inexpensive determination. The following comments are made in the context of the perceived objectives of Maryland's new malpractice claims resolution system: rapid determination of claims, cost effectiveness, and, most importantly, substantial justice.

Cost savings and time savings represent substantially similar goals — the more rapidly a dispute is resolved, the lower the overall costs that will be incurred by all parties involved. Several analyses of alternative claims resolution mechanisms conducted in recent years suggest the possibility of substantial savings by using a procedure

126. *Id.* Of the 37 cases that had gone through the entire arbitration process, approximately 15 were resolved in favor of plaintiffs and approximately 22 were resolved in favor of defendants. Eleven of those 37 cases have been appealed on the merits, and 4 have been brought to trial. The panel's award has been sustained in each instance.

that deters further litigation in court after an initial resolution.¹²⁷ A study conducted in 1973 by the Secretary of Health, Education and Welfare's Commission on Medical Malpractice compared the performance of the traditional tort system with a variety of state and privately sponsored screening panels and arbitration boards.¹²⁸ Based on the Commission's findings, the study provides significant support for the claims of the efficiency and cost effectiveness potential of Maryland's new procedure.

The study compared all the important costs of prosecuting a claim through a non-judicial panel as opposed to a court, including attorneys' and expert witnesses' fees and costs of discovery. To the extent that these panels reached a decision with finality, the study determined that sizeable reductions in administrative costs could be realized.¹²⁹ De novo review, however, compounds these costs. Thus, in order to reduce the overall costs of Maryland's procedure, the panel decision must be the final decision frequently enough to recoup the compounded costs of de novo reviews.

Another major finding of the federal study was that the overall time involved in resolving a malpractice dispute was far shorter for screening panels than for ordinary litigation.¹³⁰ The average delay between filing a claim and the hearing was six months for a screening panel compared to eighteen months for a court action.¹³¹ Further, a hearing before a screening panel took less time than a trial before a court.¹³² In general, the screening panels appeared to offer speedy disposition and administrative efficiency unmatched by the courts.

Maryland's procedure, which includes several features not shared by any of the aforementioned screening panels, may serve to further reduce excessive expense and delay. First, the statute calls for extensive panel and court control over attorneys' fees and cost assessments.¹³³ Second, the regulations contain an express provision for incorporating settlement agreements into the panel's award.¹³⁴

127. *E.g.*, U.S. DEPT OF HEALTH, EDUCATION AND WELFARE, REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE (1973) [hereinafter cited as SECRETARY'S COMMISSION REPORT]; Heintz, *Arbitration of Medical Malpractice Claims: Is It Cost Effective?*, 36 MD. L. REV. 533 (1977).

128. See SECRETARY'S COMMISSION REPORT, *supra* note 127, at 214-314.

129. *Id.* at 276-79, 309-14.

130. *Id.* at 253-59.

131. *Id.* at 257.

132. *Id.* at 258.

133. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-07 (1980).

134. COMAR § 01.03.01.12F (1976).

Third, the panelists' fees are set at a relatively modest level¹³⁵ and the Health Claims Arbitration Office absorbs many of the administrative costs of the procedure. Finally, the statute mandates the mediation of all significant malpractice claims by the arbitration panel¹³⁶ and makes the decision of the panel admissible, with a presumption of correctness, in subsequent judicial proceedings.¹³⁷ These two features in particular are intended to encourage the early settlement of claims and discourage frivolous litigation. If one of the parties to a dispute decides to reject the panel's award and proceed to court, both parties are likely to incur costs and time delays not built into the traditional resolution process. The party seeking rejection of the panel's award, however, is dissuaded because he bears the added burden in court of rebutting the presumed correctness of the panel's award. Thus, the rule is an important cost-saving measure in that it encourages an early and thorough resolution of the claim at arbitration.

It is not clear from the decision in *Attorney General v. Johnson*¹³⁸ how thoroughly the court considered the combined effect of mandatory pretrial arbitration and the presumed correctness of panel awards on a losing party's decision to seek a de novo trial. The burden on the rejecting party of persuading the jury that the panel's decision is wrong is made somewhat onerous by several factors. First, in the absence of compelling evidence contrary to the panel's award, juries will probably place much credence in the presumption that the decision of the panel is correct.¹³⁹ Second, the panel, which

135. *Id.* § 01.03.01.12D(2). "The chairman of an arbitration panel is entitled to receive a \$60 per diem. Each other member of an arbitration panel is entitled to receive a \$40 per diem." *Id.* Panel members may also be reimbursed for expenses incurred in transacting the panel's business. *Id.* § 01.03.01.12D(4).

To date, the effort to save money by setting panelists' fees at such modest levels has been self-defeating. It appears that many professionals have avoided participating as panelists out of concern that they might become involved in protracted hearings for virtually nominal compensation. The Health Claims Arbitration Office has made attempts to increase the fees paid panelists, but it is doubtful whether such increases, unless substantial, will have a significant impact on the number of volunteers.

In light of the difficulty of obtaining professionals to participate as panelists, the lack of consistency in panel decisions which will inevitably flow from having a new panel assembled for each claim, and the problems inherent in not having written awards that outline the law and facts upon which they are premised, the General Assembly should investigate the establishment of a permanent panel or group of regional panels. Such a panel or panels could be composed of salaried arbitrators whose functions and powers would be similar to those of administrative law judges.

136. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-02 (1980).

137. *Id.* § 3-2A-06(d).

138. 282 Md. 274, 385 A.2d 57, *appeal dismissed*, 437 U.S. 117 (1978).

139. The Maryland legislature's failure to define "correctness" (i.e., "in accordance with the law?") under the statute has been criticized. Note, *Medical Malpractice Arbitration: A Comparative Analysis*, 62 VA. L. REV. 1285, 1305 (1976).

presides effectively as judge and jury at arbitration, does not issue a written decision citing the evidence and law upon which it relied.¹⁴⁰ Finally, it is widely believed that no member of the panel can be called to testify at trial, although the statute is silent on this point.¹⁴¹ The rejecting party, consequently, has no way to dispute the method used by the panel to arrive at its award. The Court of Appeals of Maryland suggested that "[w]hen the malpractice claimant is the party appealing, the statutory provision . . . has no effect whatever on his burden of proof in respect to primary negligence."¹⁴² Admittedly, the plaintiff must always prove his case by a preponderance of the evidence. But, practically speaking, it is hard to believe that an adverse panel decision would not impair the plaintiff's case. In the process of proving his case, the plaintiff must not only rebut by a preponderance of the evidence a panel decision that is considered "prima facie correct," he must also affirmatively prove his case by the same preponderance. A plaintiff's unsuccessful attack on a panel decision, about which he has little information, will necessarily undermine his case with respect to primary negligence, and juries are not likely to disregard entirely the evidence of the award unless the plaintiff satisfactorily establishes why it was incorrect.¹⁴³ Moreover, because the court has the power to alter a panel award and assess court costs,¹⁴⁴ the party, whether claimant or health care pro-

140. See COMAR §§ 01.03.01.11—.12 (1976). Although these regulations require the panel to record all proceedings and to submit a written award to the Director of the Health Claims Arbitration Office, no provision requires the panel to explain the reasoning behind the award. However, no compelling policy or evidentiary arguments prohibit the introduction of transcripts of the arbitration proceedings at a trial de novo. By introducing the transcript at trial, the party rejecting the panel's decision may try to persuade the jury that the panel had no basis for its decisions on liability or the amount of the award, thereby rebutting the presumption that the panel's decision was correct. The fact that the regulations under the statute require the recordation of these proceedings further suggests the permissibility of their use as evidence.

141. Arbitration statutes, in other states, that address this issue go both ways. Compare ARIZ. REV. STAT. ANN. § 12-567L (1980) (prohibits judge sitting as panelist from presiding at trial of same case and the participation in the trial of other panelists as witnesses) with N.Y. JUD. LAW § 148-a(8) (McKinney Supp. 1980) (allows either party to the suit to subpoena doctor or attorney member of arbitration board when written recommendation of board is entered into evidence at trial) and OHIO REV. CODE ANN. § 2711.21(D) (Page Supp. 1980) (allows party not offering board decision to subpoena and cross-examine board members). Cf. *Abrams v. Brooklyn Hosp.*, 91 Misc. 2d 380, 398 N.Y.S.2d 114 (1977) (to foreclose a member of a medical malpractice panel from testifying as to specific findings would negate mandate of legislature to have jury pass upon probative value or weight of panel finding).

142. *Attorney General v. Johnson*, 282 Md. 274, 293-94, 385 A.2d 57, 68-69, *appeal dismissed*, 437 U.S. 117 (1978).

143. For further insight into this problem, see *Mediation Panels*, *supra* note 13, at 92-97.

144. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(e) (1980).

vider, who desires a de novo trial faces the risk of receiving an even less favorable verdict in court as well as being assessed all the court costs. Thus, unless the rejecting party can persuade the court, sitting without a jury, to vacate the award, his prospects for success in a de novo trial may be hampered significantly by this presumption of correctness. Although this feature may enhance the efficiency and cost effectiveness of the new procedure, its fairness in application remains uncertain. In spite of the *Johnson* court's rejection of the argument that the presumption of correctness violates the right to a jury trial by deterring a party from appealing the panel decision, such deterrence undeniably imposes a burden on the right to a jury trial. Still, as one commentator on Maryland's statute noted, the intrusion on this right is relatively insignificant.¹⁴⁵ The commentators generally agree that the admissibility of a panel award does not deny the right to jury trial.¹⁴⁶

The presumption of correctness ascribed to panel decisions is not without merit. By discouraging further litigation of a claim, the presumption may encourage settlement, thus effecting a savings in legal, administrative, and court costs. In addition, assuming the impartiality of the panel, the award represents perhaps the most impartial evidence that will be introduced at trial. Finally, if panels prove to be effective and accurate in determining liability and damages, their awards, even if rejected by one of the parties, may enhance the quality of jury verdicts in subsequent proceedings.

Although one purpose of the statute is to protect plaintiffs from exorbitant legal fees, the potential impact of permitting panels and courts to review attorneys' fees¹⁴⁷ is less than certain. This statutory provision is an obvious response to the criticisms by the medical profession and others of contingent fee arrangements.¹⁴⁸ Critics of the

145. Note, *Medical Malpractice Arbitration: A Comparative Analysis*, 62 VA. L. REV. 1285 (1976), cited in *Attorney General v. Johnson*, 282 Md. 274, 292-93 n.17, 385 A.2d 57, 68 n.17, appeal dismissed, 437 U.S. 117 (1978). The author described the rationale behind allowing the award to be admitted at trials:

Admissibility is intended to discourage either party from failing to present a complete case at arbitration in hopes of vindication at trial. By encouraging thorough presentation of the case at arbitration the provision promotes final resolution of the claim in one stage (arbitration) rather than two (arbitration and trial). Resolution in a single stage would permit the parties to realize the cost savings attributable to arbitration. Such savings and the presumably fair results in most cases will cause most parties to conclude that a jury trial is not desirable. Only in the relatively rare case where there remains hope for a different verdict at trial will the admissibility of the award affect the jury's role, and in those cases the lawyer may be able to neutralize the effect of the award. Admissibility of the award thus plays an important part in making the entire plan work and results in only a relatively insignificant or possibly non-existent intrusion on the domain of the jury.

62 VA. L. REV., *supra*, at 1303-04 n.110.

146. See, e.g., Lenore, *Mandatory Medical Malpractice Mediation Panels - A Constitutional Examination*, 44 INS. COUNSEL J. 416, 422 (1977); Redish, *supra* note 92, at 793.

147. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-07 (1980).

148. See SECRETARY'S COMMISSION REPORT, *supra* note 127, at 113-20.

contingent fee system have frequently asserted, but never fully documented, that contingent fees prompt overzealous attorneys to accept non-meritorious cases and to magnify the nature of their clients' injuries in order to win high awards from sympathetic juries. The study by the Secretary of HEW's Commission of the contingent fee refutes this claim.¹⁴⁹ It also has been posited that the contingent fee arrangement allows plaintiff lawyers to charge excessive fees. The study, however, in a comparison of the effective hourly rate of plaintiff lawyers (\$63) with the average hourly rate of defense lawyers (\$50),¹⁵⁰ indicates that, although a difference in rates exists, it is not large enough to warrant the conclusion that plaintiff lawyers are earning unconscionably large fees in malpractice cases. This widespread misconception was found to be caused in part by the extensive publicity given the occasionally large verdict or settlement and the failure of many to realize that the contingent fee arrangement enables a claimant to obtain legal counsel at little or no cost if he loses the case and that the plaintiff attorney very often expends a large amount of time and money on lost cases for which he recovers no compensation.¹⁵¹

The Commission did find that the contingent fee system tends to discourage the acceptance of legally meritorious malpractice cases involving minor injury and relatively small potential recovery.¹⁵² In addition, the Commission found that after payment of hospital and medical bills and attorneys' fees, successful claimants' net recoveries were sometimes extremely low.¹⁵³ While the former problem may be resolved best by encouraging members of the bar to take such cases on a pro bono or slight fee-for-service basis, the latter problem may best be corrected with legislation requiring a uniform graduated scale of contingent fee rates in all malpractice litigation. The contingent fee scale should be one in which the fee rate decreases as the recovery amount increases, thus assuring the claimant the substantial portion of his recovery without depriving his attorney of just compensation for his services. Even though the Maryland statute assures some control over attorneys' fees in malpractice cases, there is no guarantee that the application of this control will be nearly as uniform or fair as a graduated scale of fee rates. Thus, the arbitration panels and courts should heed the economic realities of the contingent fee system and not act arbitrarily in regard to the fees of plaintiff attorneys.

The statutory provision setting the time for filing an appro-

149. *Id.* at 154. *See generally id.* at 98-101.

150. *Id.* at 115.

151. *Id.* at 116.

152. *Id.* at 117-18. On the other hand, the system does not encourage acceptance of non-meritorious claims with a large potential recovery.

153. *See id.* at 154.

priate third party claim may work an injustice on a defendant health care provider. A third party claim must be filed within the fifteen days provided in the Maryland Rules for filing a responsive pleading.¹⁵⁴ This deadline for filing a response to the initial claim would appear to preclude any later attempt by a health care provider to implead another party. The requirement thus imposes a heavy burden on the originally named health care provider and his attorney to determine within a very short period of time the other individuals or institutions who might share responsibility for the claimed medical injuries.

Another disturbing aspect of the statute is its silence concerning whether the panel must explain in writing the legal and factual bases supporting its decision and award. Aside from impairing the ability of a party to prove error, the statute's failure to require an explanatory opinion vests the panel with excessive power in two significant respects. First, the panel may determine questions of liability and damages without reference in a written decision to the rules of law governing those matters. Second, if the panel does not apply the law in an appropriate fashion, the lack of a published decision leaves no basis for holding the panel accountable to either the losing party or the public for its award.¹⁵⁵

A problem of discovery is also inherent in the new statute. An action to nullify a panel award is governed by the Maryland Rules.¹⁵⁶ Thus, there presumably could be a second round of discovery in the same malpractice claim if a panel's award is rejected. If this additional discovery is not duplicative or otherwise unduly burdensome, there would be no basis for objection. The Maryland Rules, however, are not nearly as strict as the statute and regulations with regard to discovery. Attorneys have substantially more latitude under the rules to engage in costly and time-consuming tactics. Thus, problems may arise from the opportunity for post-award discovery in malpractice cases which call for special limitation.

Although there has not yet been full opportunity for evaluation, some predictions regarding the efficacy of the Maryland procedure can be made by comparing the Health Claims Arbitration Act to the most successful system studied by the HEW Commission. The arbitration panel in Maryland is composed of an attorney, a health care provider, and a citizen who is not a member of the legal or medical profession.¹⁵⁷ The General Assembly apparently structured the arbi-

154. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-04(a) (1980); see MD. R.P. 308. Although the court may extend the time period for filing a responsive pleading, see MD. R.P. 309, it is not clear whether the statute vests the panel with similar discretion.

155. See Reynolds & Richman, *The Non-Precedential Precedent — Limited Publication and Non-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167 (1978).

156. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(b) (1980).

157. *Id.* §§ 3-2A-03 to -04.

tration panel with a concern for the appearance of fairness and for the existence of expertise in discussions on liability and on compensation to the negligently injured patient.¹⁵⁸ In the federal commission study, the device utilized for comparing the performance of courts with screening panels was a decision ratio which reflected the percentage of decisions favorable to plaintiffs.¹⁵⁹ The Commission found that screening panels generally find for the claimant in about the same ratio as do courts.¹⁶⁰ Of the various kinds of screening panels studied,¹⁶¹ the federal commission found the so-called medical-legal screening panel, which most closely resembles the Maryland panel in composition, to have the highest potential for success.¹⁶² The decision-making of the medical-legal panel was not found to be unfairly weighted or biased in favor of the physician.¹⁶³ In terms of impact on the docket loads of courts, this type of panel reduced claims by approximately 24.5%, significantly more than panels of different composition, and was determined to be among the least expensive to operate.¹⁶⁴ While this evidence is far from conclusive insofar as the Maryland arbitration panel is concerned, it furnishes some support for believing that the new procedure is capable of providing a fair and expeditious forum for the resolution of claims.

V. CONCLUSION

Many in Maryland believe there are serious functional and social flaws in resolving medical malpractice disputes through the traditional tort system. The new arbitration procedure represents an effort to improve upon the performance of the tort system by offering litigants a relatively quick, inexpensive, and equitable means of resolving their disputes without depriving them of their day in court. In this regard, the new system has the potential to accomplish several results. By a rapid resolution of claims, the injured party will

158. One commentator has noted: "The presence of an attorney on the panel means that the law of professional liability can be more accurately applied. The physician provides technical expertise, and the layperson serves as the panel's conscience — more or less the jury 'representative.'" Abraham, *supra* note 9, at 514.

159. SECRETARY'S COMMISSION REPORT, *supra* note 127, at 235, 245–53. One of the screening panels in the study was being conducted by the Medical Chirurgical Faculty of Maryland. None of these screening programs were mandatory, nor did their decisions carry a presumption of correctness in subsequent judicial proceedings. Despite the absence of these features, the results obtained by the study furnish some guidance on the general advantages and disadvantages of Maryland's arbitration panel.

160. *Id.* at 246. Moreover, the decision ratios for plaintiffs were consistent with the perception among both plaintiff and defense attorneys that about one-third of all malpractice claims are meritorious. *Id.* Unfortunately, a comparison of recovery amounts awarded by the various systems was not made.

161. *See id.* at 253–59.

162. *Id.* at 276, 296.

163. *Id.* at 296.

164. *Id.* at 297.

undergo a shorter waiting time for just compensation, the malpractice insurer will be aided in planning with greater actuarial certainty his undertaking to insure, and the falsely-accused health care providers will incur minimal embarrassment and damage to their reputations. Because it is less expensive overall than the traditional tort system, the arbitration procedure will effect a savings in court costs, the insurance coverage of health care providers, and perhaps the medical expenses of the consumer, without jeopardizing the damage award of the bona fide claimant. Also, by eliminating many of the drawbacks of the traditional tort system, the new procedure will provide a forum at least as equitable as the courts for claims resolution while deterring frivolous and costly litigation.

To date, the new system has not had the opportunity to operate under conditions in which its efficacy as an alternative to the traditional decisional process can be analyzed fairly. Until the problems that currently plague its operation are eliminated, the system cannot be subjected to fair and objective appraisal. Instead, Maryland's Health Care Malpractice Claims Arbitration System will only continue to enhance the costs, delays, and inequities that it initially was designed to remedy.