

---

## The Illinois Medical Malpractice Reform Act of 1985: A Constitutional Analysis of the Medical Review Panel Procedure

Stephen S. Morrill

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

---

### Recommended Citation

Stephen S. Morrill, *The Illinois Medical Malpractice Reform Act of 1985: A Constitutional Analysis of the Medical Review Panel Procedure*, 35 DePaul L. Rev. 345 (1986)

Available at: <https://via.library.depaul.edu/law-review/vol35/iss2/4>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact [digitalservices@depaul.edu](mailto:digitalservices@depaul.edu).

# THE ILLINOIS MEDICAL MALPRACTICE REFORM ACT OF 1985: A CONSTITUTIONAL ANALYSIS OF THE MEDICAL REVIEW PANEL PROCEDURE

Stephen S. Morrill\*

## I. INTRODUCTION: A CRISIS BREEDS LEGISLATION

In the early 1970's, Illinois<sup>1</sup> and the entire nation<sup>2</sup> experienced the beginning of what has since been termed a "crisis" in the medical malpractice insurance

---

\* Stephen S. Morrill, B.A., J.D., Northwestern University. Admitted to the Illinois bar, Mr. Morrill served as Parliamentarian of the Illinois Senate and staffed the Senate Judiciary I Committee during the 84th General Assembly. During the 1985 legislative session, he participated in the negotiation and drafting that led to the Medical Malpractice Reform Act. The views expressed in this article are his own.

1. See Illinois Insurance Laws Study Commission, *Final Report to the Governor and the 79th General Assembly* 47-60 (1970). In 1979, the Illinois Supreme Court wrote:

It is generally agreed that in the early 1970's what has been termed a medical malpractice insurance crisis existed in most jurisdictions in this country. The crisis resulted from the increasing reluctance of insurance companies to write medical malpractice insurance policies and the dramatic rise in premiums demanded by those companies which continued to issue policies. The difficulty in obtaining insurance at reasonable rates forced many health-care providers to curtail or cease to render their services. The legislative response to this crisis sought to reduce the cost of medical malpractice insurance and to insure its continued availability to providers of health care.

*Anderson v. Wagner*, 79 Ill. 2d 295, 301, 402 N.E.2d 560, 562 (1979). See also *Wright v. Central DuPage Hosp. Ass'n*, 63 Ill. 2d 313, 332, 347 N.E.2d 736, 746 (1976) (Underwood, J., concurring and dissenting).

2. Several governmental reports describe this crisis. See, e.g., American Bar Association, *Report of the Commission on Medical Professional Liability* (1977); All Indus. Medical Malpractice Ins. Comm., *The Problems of Insuring Medical Malpractice* (1975), reprinted in *Hearing on Examination of the Continuing Medical Malpractice Insurance Crisis Before the Subcomm. on Health of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 1st Sess. 184 (1975). Courts, too, have acknowledged the crisis. See, e.g., *DiAntonio v. Northampton-Accomack Memorial*, 628 F.2d 287, 290 (1980); *Eastin v. Broomfield*, 116 Ariz. 576, 583, 570 P.2d 744, 751 (1977); *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 158, 162, 695 P.2d 665, 680, 682, 211 Cal. Rptr. 368, 383, 385 (1985); *Beatty v. Akron City Hosp.*, 67 Ohio St. 2d 483, 494-95, 424 N.E.2d 586, 594 (1981). Finally, numerous commentators have written about the crisis. See, e.g., Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759 (1977); Comment, *Recent Medical Malpractice Legislation, First Checkup*, 50 TUL. L. REV. 655 (1976) [hereinafter cited as Comment, *First Checkup*].

At least one state supreme court, on the other hand, has questioned the existence within its own jurisdiction of any such crisis. *Jones v. State Bd. of Medicine*, 97 Idaho 859, 873-74, 555 P.2d 399, 412-13 (1976), cert. denied, 431 U.S. 914 (1977). The existence of a crisis was also debated in Nebraska. *Prendergast v. Nelson*, 199 Neb. 97, 127, 256 N.W.2d 657, 674 (1977) (White, J., dissenting).

market. An increasing number of judgments and lawsuits alleging malpractice against doctors, hospitals and other health care providers drove insurers to raise premiums substantially and sometimes even to deny malpractice insurance coverage altogether.<sup>3</sup> The situation threatened the delivery of health care services in two respects: first, fees charged to patients increased as physicians passed their ever-increasing insurance costs on to consumers;<sup>4</sup> and second, a maldistribution of medical care resulted as physicians avoided high-risk specialties<sup>5</sup> or relocated to areas with lower insurance rates.<sup>6</sup>

State legislatures responded to the crisis by enacting substantive and procedural measures intended to reduce the number of litigated claims and the size of jury awards.<sup>7</sup> One of the principal legislative enactments in many

---

3. In January of 1973, the Department of Health, Education and Welfare released a comprehensive study of medical malpractice in the United States which sought to identify and analyze the problems and recommend solutions. U.S. Dep't of Health, Educ. & Welfare, *Medical Malpractice: Report of the Secretary's Commission on Medical Malpractice* (1973) [hereinafter cited as HEW Report]. That report recognized an increase in both the number of malpractice claims and in the size of awards and settlements. *Id.* at 6, 10. It also observed that medical malpractice actions are more expensive to litigate and take longer to resolve than other personal injury actions. *Id.* at 11. *Accord* Mallor, *A Cure for Plaintiff's Ills?* 51 *IND. L.J.* 103, 104 (1975); Comment, *The Medical Malpractice Mediation Panel in the First Judicial Department of New York: An Alternative to Litigation*, 2 *HOFSTRA L. REV.* 261, 265 (1974).

Because of the high cost of increased litigation, medical malpractice insurers began raising premiums substantially. HEW Report, *supra*, at 13. Additionally, many carriers stopped writing medical malpractice insurance policies altogether. *Oregon Medical Ass'n v. Rawis*, No. 421-496, slip op. at 1 (Or. Cir. Ct. May 4, 1976), *rev'd on other grounds*, 276 Or. 1101, 557 P.2d 664 (1976) (finding that the number of national insurance carriers writing medical malpractice policies decreased from approximately 85 to 5). *But cf.* HEW Report, *supra*, at 38-39 (finding malpractice insurance currently available, but also recommending that insurance and medical groups develop contingency plans in the event that insurance becomes unavailable in the normal market); Comment, *First Checkup*, *supra* note 2, at 660-66 (noting that a majority of states have enacted legislation to provide for liability insurance in the event that it becomes unavailable in the open market). Increased litigation also has tempted some doctors to practice "defensive medicine." HEW Report, *supra*, at 14-15; Roth, *The Medical Malpractice Insurance Crisis: Its Causes, The Effects, and Proposed Solutions*, 44 *INS. COUNS. J.* 469, 474 (1977). Such practice consists of administering unnecessary diagnostic or therapeutic tests for the purpose of preventing or defending against malpractice claims. *Id.*

The causes of this increased number of malpractice claims are varied and complex. The prime cause, according to the HEW Report, is an increase in the number of patient injuries. HEW Report, *supra*, at 24. Other causes include a general breakdown of the traditional doctor-patient relationship, unrealistic expectations aroused by the media concerning the availability of cures for many illnesses, and greater litigiousness on the part of the public. *See generally* HEW Report, *supra*, at 25; Comment, *First Checkup*, *supra* note 2, at 655-60.

4. *See* HEW Report, *supra* note 3, at 12-13; Note, *Introduction: The Indiana Act in Context*, 51 *IND. L.J.* 91, 93 (1975) [hereinafter cited as Note, *Indiana Act*].

5. *See* Redish, *supra* note 2, at 760; Note, *Indiana Act*, *supra* note 4, at 93.

6. *See* Halpern v. Gozen, 85 Misc. 2d 753, 755, 381 N.Y.S.2d 744, 746 (Sup. Ct. 1976); Redish, *supra* note 2, at 760; Note, *Rx for New York's Medical Malpractice Crisis*, 11 *COLUM. J.L. & Soc. PROBS.* 467, 469-70 (1975).

7. Legislation aimed solely at medical malpractice claims has included imposition of ceilings

states<sup>8</sup> was the creation of extra-judicial pre-trial panels composed of doctors,

---

on the amount of collectible damages; elimination of the "collateral source rule," the doctrine which prevents deductions from damage awards of payments received by an injured patient from his own insurance or other collateral sources; clarification of the doctrine of "informed consent," a theory of liability based on a physician's failure to adequately disclose to the patient the risks of treatment; elimination of claims based on failure to achieve guaranteed results unless the promise was made in writing; restrictions on the use of *res ipsa loquitur* as a means of establishing negligence; reduction of the limitations period within which claims may be brought; prohibition in the pleadings of *ad damnum* clauses and imposition of ceilings on attorney's contingent fee arrangements.

8. Twenty-seven states currently have special medical malpractice statutes that create pre-trial screening panels. ALA. CODE § 6-5-485 (1985 Cum. Supp.) (voluntary binding arbitration authorized); ALASKA STAT. § 9.55.536 (1984) (court may appoint expert advisory panel to help screen case; findings admissible at trial; voluntary binding arbitration allowed); ARIZ. REV. STAT. ANN. § 12-567 (1985 Cum. Supp.) (review panel determination is non-binding but admissible at trial; panel may be waived by unanimous agreement of parties or where damages are agreed to be less than \$50,000) (constitutionality upheld, *Eastin v. Broomfield*, 116 Ariz. 576, 570 P.2d 744 (1977)); CAL. CIV. PROC. CODE § 12995 (Deering 1985 Cum. Supp.) (arbitration clauses in medical service contracts permitted); CONN. GEN. STAT. § 38-196-f (1985 Cum. Supp.) (voluntary non-binding panel authorized if all parties agree; findings admissible at trial); DEL. CODE ANN. tit. 18, §§ 6802-6814 (1984 Cum. Supp.) (any party may convene a screening panel); FLA. STAT. ANN. §§ 768.44, 768.47 (West 1982) (mandatory panels; conclusions are admissible while findings are not) (constitutionality upheld, *Carter v. Sparkman*, 335 So. 2d 802 (Fla. 1976)); HAWAII REV. STAT. §§ 671-11 to 671-19 (1984 Supp.) (mandatory panels; findings neither binding nor admissible); IDAHO CODE §§ 6-1001 to 6-1011 (1984 Cum. Supp.) (compulsory non-binding panels; results not admissible); ILL. REV. STAT. ch. 110, § 2-1013 *et seq.* (1983) (*see infra* notes 25-39 and accompanying text), ILL. REV. STAT. ch. 10, §§ 201-214 (1983) (voluntary arbitration agreements permitted in medical service contracts); IND. CODE §§ 16-9.5 - 9-2 (1981 Cum. Supp.) (mandatory panels; conclusions admissible) (constitutionality upheld, *Johnson v. St. Vincent Hosp.*, 273 Ind. 374, 404 N.E.2d 585 (1980)); KAN. STAT. ANN. §§ 65-4901 - 65-4908 (1984) (any party or judge may request panel; findings not admissible); LA. REV. STAT. ANN. §§ 40:1299.47 (West 1985) (mandatory panels; conclusions admissible) (constitutionality upheld, *Everett v. Goldman*, 359 So. 2d 1256 (La. 1978)); ME. REV. STAT. ANN. tit. 24, §§ 2801 - 2809 (1985 Cum. Supp.) (one party may request panel; findings inadmissible); MD. CTS. & JUD. PROC. CODE ANN. §§ 3-2A-03 - 3-2A-06 (1980) (mandatory non-binding panels; findings admissible; burden on party rejecting panel award) (constitutionality upheld, *Attorney General v. Johnson*, 282 Md. 274, 385 A. 2d 57, *appeal dismissed*, 439 U.S. 805 (1978)); MASS. ANN. LAWS ch. 231, § 60B (*Michie/Law. Co-op* 1980) (mandatory tribunal) (constitutionality upheld, *Paro v. Longwood Hosp.*, 373 Mass. 645, 369 N.E.2d 985 (1977)); MICH. COMP. LAWS ANN. § 500.3053 *et seq.* (West 1985 Cum. Supp.) (arbitration agreement must be offered to patient) (constitutionality upheld, *Morris v. Metriyakoal*, 107 Mich. App. 110, 309 N.W.2d 910 (1981)); MONT. CODE ANN. § 27-6-101 *et seq.* (1983) (mandatory non-binding panels; findings not admissible) (constitutionality upheld, *Linder v. Smith*, 629 P.2d 1187 (Mont. 1981)); NEB. REV. STAT. § 44-2840 (1984) (mandatory non-binding panels; findings admissible) (constitutionality upheld, *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977)); N.J. REV. STAT. § 17:30 D-3 *et seq.* (1984) (mandatory review panel; findings admissible at trial and not subject to cross-examination) (constitutionality upheld, *Suchit v. Baxt*, 176 N.J. Super. 407, 423 A.2d 670 (1980)); N.Y. JUD. LAW § 148-a (*McKinney* 1984) (mandatory panels; unanimous recommendations admissible at trial) (constitutionality upheld, *Comisky v. Arlen*, 43 N.Y.2d 696, 372 N.E.2d 34, 401 N.Y.S.2d 200 (1976)); OHIO REV. CODE ANN. § 2711.21 (*Page* 1984) (mandatory law arbitration board; opinion admissible) (constitutionality upheld, *Beatty v. Akron City Hosp.*, 67 Ohio St. 2d 483, 424

attorneys, judges and laymen for the consideration of medical malpractice claims. Such panels, variously termed screening, mediation, review, advisory, hearing or arbitration panels, informally determine before trial whether a plaintiff's claim has merit. The panels are intended to facilitate early settlement of meritorious claims and to discourage the prosecution of groundless suits. The desired result is a reduction in the time and expense associated with the litigation of medical malpractice actions in the courts.<sup>9</sup>

In 1975, the Illinois General Assembly enacted legislation requiring that, as a precondition to court trial, all medical malpractice claims must be

---

N.E.2d 586 (1981)), OHIO REV. CODE ANN. § 2711.24 (Page 1984) (arbitration agreement form with patient's right to cancel); 1301 PA. CONS. STAT. ANN. §§ 308, 309, 510 (Purdon 1985) (voluntary arbitration panels convened upon agreement of all parties; panel decision admissible) (constitutionality upheld, *Parker v. Children's Mem. Hosp. of Phil.*, 483 Pa. 106, 394 A.2d 932 (1978)); TENN. CODE ANN. §§ 29-26-104, 29-16-112 (1985 Supp.) (mandatory review board waivable if all parties agree; board decision admissible); 1985 Utah Laws 78-14-12 *et seq.* (mandatory non-binding informal panel); VT. STAT. ANN. tit. 12, § 7002 (1985 Cum. Supp.) (voluntary arbitration); VA. CODE § 8.01-581.2 *et seq.* (1985 Cum. Supp.) (optional panel; opinion admissible) (constitutionality upheld, *DeAntonio v. Northampton-Accomack Memorial*, 628 F.2d 287 (4th Cir. (1980))); WIS. STAT. § 655.02 *et seq.* (1985 Cum. Supp.) (mandatory panel; parties can stipulate that panels will be binding; formal panel opinion admissible, informal panel opinion not admissible) (constitutionality upheld, *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 261 N.W.2d 434 (1978)).

Three other states have recently repealed medical review panel acts. ARK. STAT. ANN. §§ 34-2603 - 2607 (1985 Cum. Supp.) (plaintiff may voluntarily bring claim before hearing panel; decision binding only if parties agree) (repealed by 1985 Ark. Acts, No. 8044, § 17); NEV. REV. STAT. § 41A.040 (1979) (mandatory panels) (repealed by 1981 Nev. Stat. 327); N.D. CENT. CODE § 32-29.1 (1985 Cum. Supp.) (review panels) (repealed by 1981 N.D. Sess. Laws, ch. 358, § 1).

Additionally, five review panel statutes have been found to be unconstitutional in whole or part. *Aldana v. Holub*, 381 So. 2d 231 (Fla. 1980) (certain provisions of panel statute unconstitutional on limited grounds relating to jurisdiction); *Wright v. Central DuPage Hosp. Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976) (panel statute unconstitutional); *Cardinal Glennon Mem. Hosp. v. Gaertner*, 583 S.W.2d 107 (Mo. 1979) (mandatory review board statute, with findings inadmissible, unconstitutional); *Mattos v. Thompson*, 491 Pa. 385, 421 A.2d 190 (1980) (provision giving arbitration panel original, exclusive jurisdiction over all medical malpractice cases held unconstitutional); *Boucher v. Sayeed*, 459 A.2d 87 (R.I. 1983) (preliminary hearing statute requiring judge to dismiss case if he finds injury "merely an unfortunate medical result" unconstitutional).

Finally, seventeen states have never enacted medical review panel legislation. The states are Colorado, Georgia, Iowa, Kentucky, Minnesota, Mississippi, New Hampshire, New Mexico, North Carolina, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Washington, West Virginia and Wyoming. See generally Comment, *An Analysis of State Legislative Responses to the Medical Malpractice Crisis*, 1975 DUKE L.J. 1417, 1418-55; Comment, *First Checkup*, *supra* note 2, at 666-79.

9. See HEW Report, *supra* note 3, at 91. Reductions in the overall frequency and costs of malpractice litigation should result in lower insurance premiums for health care providers and thereby help maintain the quality and quantity of health services. *Woods v. Holy Cross Hosp.*, 591 F.2d 1164, 1174 (5th Cir. 1979); Roth, *supra* note 3, at 497; Comment, *First Checkup*, *supra* note 2, at 679.

reviewed by a panel consisting of a judge, a lawyer and a physician.<sup>10</sup> Although similar legislation has been upheld in several jurisdictions,<sup>11</sup> mandatory review panels did not fare well in Illinois.<sup>12</sup> The Illinois Supreme Court declared the 1975 statute unconstitutional as constituting special legislation and as vesting judicial power in non-judges.<sup>13</sup> Shortly after that decision, the General Assembly established a doctor-owned "Illinois State Medical Inter-Insurance Exchange,"<sup>14</sup> which seemed to solve some of the

---

10. "An Act to revise the law in relation to medical malpractice," P.A. 79-960, 1975 Laws of Illinois 2888. The statute was codified at ILL. REV. STAT. ch. 110, §§ 58.2 - 58.10 (1975). Public Act 79-960 required all medical malpractice claims, as a condition precedent to court trial, to proceed before a medical review panel consisting of a judge, a lawyer and a physician; provided for a \$500,000 cap on recoveries in all medical malpractice suits; and required each medical malpractice insurer to renew coverage at rates it charged on June 10, 1975, unless the company could justify a proposed increase with information provided to the Director of Insurance and at a public hearing.

11. *Eastin v. Broomfield*, 116 Ariz. 576, 570 P.2d 744 (1977); *Gay v. Rabon*, 280 Ark. 5, 652 S.W.2d 836 (1983); *Carter v. Sparkman*, 335 So. 2d 802 (Fla. 1976); *McCarthy v. Mensch*, 412 So. 2d 343 (Fla. 1982); *Woods v. Holy Cross Hosp.*, 591 F.2d 1164 (5th Cir. 1979) (Florida statute); *Johnson v. St. Vincent Hosp.*, 273 Ind. 374, 404 N.E.2d 585 (1980); *Hines v. Elkhart Gen. Hosp.*, 465 F. Supp. 421 (D. Ind. 1979) (Indiana statute); *Everett v. Goldman*, 359 So. 2d 1256 (La. 1978); *Butler v. Flint-Goodridge Hosp. of Dillard Univ.*, 354 So. 2d 1070 (La. Ct. App. 1978); *Seoane v. Ortho Pharma., Inc.*, 660 F.2d 146 (5th Cir. 1981) (Louisiana statute); *Attorney General v. Johnson*, 282 Md. 274, 385 A.2d 57, *appeal dismissed*, 439 U.S. 805 (1978); *Paro v. Longwood Hosp.*, 373 Mass. 645, 369 N.E.2d 985 (1977); *Cardinal Glennon Mem. Hosp. v. Gaertner*, 583 S.W.2d 107 (Mo. 1979); *Linder v. Smith*, 629 P.2d 1187 (Mont. 1981); *Prennergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977); *Suchit v. Baxt*, 176 N.J. Super. 407, 423 A.2d 670 (1980); *Comiskey v. Arlen*, 55 A.D.2d 304, 390 N.Y.S.2d 122, *aff'd*, 43 N.Y.2d 696, 372 N.E.2d 34, 401 N.Y.S.2d 200 (1976); *Beatty v. Akron City Hosp.*, 67 Ohio St. 2d 483, 424 N.E.2d 586 (1981); *Parker v. Children's Hosp. of Phil.*, 483 Pa. 106, 394 A.2d 932 (1978); *DiAntonio v. Northampton-Accomack Memorial*, 628 F.2d 287 (4th Cir. 1980) (Virginia statute); *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 261 N.E.2d 434 (1978).

12. *Wright v. Central DuPage Hosp. Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976). In discussing its *Wright* decision, the Illinois Supreme Court acknowledged that "an overwhelming majority of courts have recognized the unique nature of medical malpractice and have upheld general medical malpractice statutes against numerous constitutional attacks." *Anderson v. Wagner*, 79 Ill. 2d 295, 303, 402 N.E.2d 560, 562 (1979).

13. *Wright v. Central DuPage Hosp. Ass'n*, 63 Ill. 2d 313, 332, 347 N.E.2d 736, 746 (1976).

14. See ILL. REV. STAT. ch. 73, § 1065.201 *et seq.* (1983). Since 1976, the General Assembly enacted three other measures to help mitigate medical malpractice problems. The first statute, ILL. REV. STAT. ch. 110, § 13-212 (1983), shortened the applicable statute of limitations, requiring a medical malpractice suit to be brought within two years after the victims knew or should have known about the harm and, more importantly, within four years after the act causing the harm, regardless of when discovered. There are two exceptions: (a) if the plaintiff is under 18 or otherwise under a legal disability, the statute does not begin to run until after the person's minority or other disability (ILL. REV. STAT. ch. 110, § 13-212 (1983)); and (b) if the person liable for medical malpractice fraudulently conceals information about the harm, the victim can bring suit within five years after learning about the harm (ILL. REV. STAT. ch. 110, § 13-215 (1983)). The second statute, ILL. REV. STAT. ch. 110, § 2-1205 (1983), revised the so-called "collateral source rule," providing that awards shall be reduced by 50% of collateral source benefits for the injury, so long as the reduction does not exceed 50% of the judgment rendered on the

insurance availability problems of the mid-1970s.<sup>15</sup>

As Illinois legislators convened the 1985 regular session, a renewed campaign for medical malpractice reform was well underway. Reports commissioned by state and national medical groups claimed that the increasing costs of medical malpractice insurance had begun to reach unaffordable levels.<sup>16</sup> One American Medical Association report described the situation as follows:

[P]hysicians' costs for professional liability insurance protection have risen to extraordinary levels in many areas, threatening to divert some physicians out of their major specialties and barring young physicians from practicing in places or specialties where premiums are especially high. The effect of today's professional liability climate is to restrict patients' access to quality medical care.<sup>17</sup>

In Illinois, the Governor's Task Force on Medical Malpractice held a series of public hearings in early 1985 and issued a report which concluded that "Illinois is accelerating through the first stages of a crisis in medical malpractice" and suggested a lengthy series of statutory reforms to Illinois medical malpractice law.<sup>18</sup>

Before the end of the legislative session, the General Assembly approved three measures that (1) contained a series of procedural and substantive reforms to medical malpractice claim law;<sup>19</sup> (2) provided civil immunity to hospital personnel for their participation in certain disciplinary proceedings;<sup>20</sup> (3) permitted the Illinois State Medical Disciplinary Board, upon a showing of a possible violation of the Medical Practices Act, to compel a licensee or applicant to submit to physical and psychological examinations;<sup>21</sup> and (4) required professional liability insurers to file annual reports with the Illinois Department of Insurance detailing their insurance experience for the prior year.<sup>22</sup> The principal measure, Public Act 84-7, provided for a mandatory

---

verdict. The third statute, ILL. REV. STAT. ch. 110, § 2-1113 (1983), permitted voluntary agreements in medical services contracts to arbitrate medical malpractice claims.

15. See *Report of the Task Force on Medical Malpractice to Governor James R. Thompson* 9-11 (1985) [hereinafter cited as *Report of Task Force*].

16. See, e.g., *American Medical Association Special Task Force on Professional Liability and Insurance: Report II, Professional Liability in the '80's* 3 (November 1984) (detailing costs of medical malpractice insurance and noting trends).

17. *American Medical Association Special Task Force on Professional Liability and Insurance: Report I, Professional Liability in the '80's* 3 (October 1984).

18. See *Report of Task Force*, *supra* note 15, at 3, 4-13 (1985). The full paragraph stated: The Governor's Task Force on Medical Malpractice finds that Illinois is accelerating through the first stages of a crisis in medical malpractice and today stands on the edge of a medical system that is beginning to deteriorate dramatically. In the absence of immediate action by the legislature, the problems of medical malpractice will permanently change . . . the availability of necessary health care.

*Id.* at 3.

19. P.A. 84-7, 1985 Ill. Legis. Serv. 8 (West).

20. P.A. 84-164, 1985 Ill. Legis. Serv. 128 (West).

21. *Id.*

22. P.A. 84-201, 1985 Ill. Legis. Serv. 163 (West).

medical review panel procedure<sup>23</sup> similar to that held unconstitutional by the Illinois Supreme Court in 1976.<sup>24</sup>

Under the new Illinois act, all medical malpractice cases<sup>25</sup> must proceed before a medical review panel composed of a judge, lawyer and physician<sup>26</sup> as a condition precedent to court trial,<sup>27</sup> unless waived by unanimous agreement of the parties.<sup>28</sup> The parties may at any time unanimously elect to be bound by the panel decision.<sup>29</sup> Panel decisions are not admissible at trial as evidence of liability or damages, but are admissible at hearings examining the propriety of the prosecution or defense.<sup>30</sup> When a party rejects a unanimous panel decision and then loses on the issue of liability at trial, the court upon motion shall assess against the rejecting party those costs and fees incurred by the prevailing party in connection with the panel proceeding and the trial.<sup>31</sup>

In addition, Public Act 84-7 details the procedures to be followed in forming a panel<sup>32</sup> and in conducting a panel hearing.<sup>33</sup> The act provides time limits for panel action<sup>34</sup> and grants absolute civil immunity to panel members for actions in the course of their duties.<sup>35</sup> The act empowers panel members to examine and cross-examine witnesses, and also to issue subpoenas and

---

23. P.A. 84-7, § 2-1010 *et seq.*, 1985 Ill. Legis. Serv. 11 (West).

24. *See supra* notes 12-13 and accompanying text.

25. P.A. 84-7, § 2-1012, 1985 Ill. Legis. Serv. 11 (West).

26. P.A. 84-7, §§ 2-1013, 2-1014, 1985 Ill. Legis. Serv. 11-12 (West). A prospective panel member must disqualify himself if he is "materially" associated with any party, attorney or health care professional involved in the case. P.A. 84-7, § 1015(f), 1985 Ill. Legis. Serv. 14 (West).

27. P.A. 84-7, §§ 2-1012, 2-1018(d), 1985 Ill. Legis. Serv. 11, 16 (West).

28. P.A. 84-7, § 2-1012, 1985 Ill. Legis. Serv. 11 (West).

29. P.A. 84-7, § 2-1018(a), 1985 Ill. Legis. Serv. 16 (West). A party who does not file a written rejection with the circuit court clerk within 28 days of receiving service of the panel determination is deemed to have accepted the decision. P.A. 84-7, § 2-1018(b), 1985 Ill. Legis. Serv. 16 (West).

30. P.A. 84-7, § 2-1018(d), 1985 Ill. Legis. Serv. 16 (West).

31. P.A. 84-7, § 2-1019(c), 1985 Ill. Legis. Serv. 17 (West).

32. P.A. 84-7, §§ 2-1013, 2-1014 and 2-1015, 1985 Ill. Leg. Serv. 11-16 (West), provides for selection of panel members from rotating rosters of judges, lawyers and health professionals. P.A. 84-7, § 2-1015, 1985 Ill. Legis. Serv. 14 (West), prohibits panel participation by persons with a conflict of interest and permits prospective panel members to disqualify themselves without cause.

33. P.A. 84-7, § 2-1016, 1985 Ill. Legis. Serv. (West), states that the Code of Civil Procedure "shall be followed insofar as practicable." The section also permits panel members to examine and cross-examine witnesses and to call their own witnesses.

34. P.A. 84-7, § 2-1013, 1985 Ill. Legis. Serv. 11 (West), provides the following time limits: (a) the court shall order a panel convened no longer than 90 days after the parties are at issue on the pleadings; (b) the panel shall convene within 120 days of such order; (c) the panel shall render its decision within 180 days after convening; and (d) the decision period may, upon the ruling of the judicial member, be extended up to a maximum of 180 days.

35. P.A. 84-7, § 2-1016, 1985 Ill. Legis. Serv. 15 (West).



call their own witnesses.<sup>36</sup> Panels are required to file written decisions, in which the judge states his conclusions of law and the panel its conclusions of fact. Dissents are also permitted.<sup>37</sup> Provision is made for compensating non-judicial members,<sup>38</sup> and the Illinois Supreme Court is expressly granted authority to adopt rules governing panel operation.<sup>39</sup>

Within minutes after Governor Thompson signed Public Act 84-7 into law,<sup>40</sup> a complaint was filed in the Circuit Court of Cook County seeking to have the legislation declared unconstitutional.<sup>41</sup> A seven-day evidentiary hearing was held before Circuit Court Judge Joseph M. Wosik, who declared much of the act unconstitutional.<sup>42</sup> Judge Wosik found the review panel procedure unconstitutional because it (1) vests judicial power in non-judges, (2) provides for review by trials *de novo*, (3) creates fee officers, (4) deprives malpractice litigants due process of law, (5) violates state and federal equal protection guarantees, (6) constitutes special legislation, (7) deprives malpractice litigants of access to the courts, and (8) denies malpractice plaintiffs the right to trial by jury.<sup>43</sup> After oral arguments in March of this year [1986], the decision is now pending in the Illinois Supreme Court.<sup>44</sup>

This article examines the constitutionality of the medical review panel procedure contained in Public Act 84-7. Particularly, the article measures the panel provisions against the requirements of the Judicial Article of the Illinois Constitution,<sup>45</sup> and the protections afforded by the due process<sup>46</sup> and equal protection<sup>47</sup> clauses of the Illinois and United States Constitutions. Additionally, the article examines whether the panel provisions constitute special legislation in contravention of the Illinois Constitution<sup>48</sup> or infringe upon the right to trial by jury guaranteed by the Illinois and United States Constitutions.<sup>49</sup> As political scientist Paul Starr has observed, "A crisis can be a truly marvelous mechanism for the withdrawal or suspension of established rights, and the acquisition and legitimation of new privileges."<sup>50</sup>

---

36. P.A. 84-7, § 2-1016(b), 1985 Ill. Legis. Serv. 15 (West).

37. P.A. 84-7, § 2-1017(a), 1985 Ill. Legis. Serv. 16 (West).

38. P.A. 84-7, § 2-1019, 1985 Ill. Legis. Serv. 17 (West).

39. P.A. 84-7, § 2-1020, 1985 Ill. Legis. Serv. 17 (West).

40. See Chicago Sun Times, June 26, 1985, at 20, col. 1.

41. Complaint, *Bernier v. Burris*, 85 CH 6627 (filed June 25, 1985).

42. Judge Wosik's full decision is reprinted in Chicago Daily Law Bulletin, Dec. 19, 1985, at 2.

43. *Bernier v. Burris*, 85 CH 6625, Trial Court Conclusion A-1 (filed June 25, 1985), reprinted in Chicago Daily Law Bulletin, Dec. 19, 1985, at 2, 11.

44. Docket No. 62876. Oral argument is scheduled for March 27, 1986.

45. See *infra* notes 53-99 and accompanying text.

46. See *infra* notes 100-119 and accompanying text.

47. See *infra* notes 120-204 and accompanying text.

48. See *infra* notes 205-216 and accompanying text.

49. See *infra* notes 217-311 and accompanying text.

50. Quoted in *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 168, 695 P.2d 665, 687, 211 Cal. Rptr. 368, 390 (1985) (Bird, C.J., dissenting) (quoting Jenkins & Schweinfurth, *Cal-*

Throughout this analysis, recognition is given to the existence of something of a crisis in the medical malpractice insurance market,<sup>51</sup> and to the fact that medical malpractice continues to occur.<sup>52</sup> However severe the crisis may be, legislative responses must nevertheless fall within constitutional parameters.

## II. THE JUDICIAL ARTICLE

Article VI of the Illinois Constitution establishes the judicial branch of the state government and contains several prohibitions which, with respect to the medical review panel created by Public Act 84-7, give rise to the following three questions. First, do the panel provisions give judicial power to non-judges in violation of Article VI, section 1?<sup>53</sup> Second, do the panel provisions divest the circuit court of original jurisdiction over medical malpractice cases and thereby provide for review by trials *de novo* in violation of Article VI, section 9?<sup>54</sup> And third, do the panel provisions create fee officers in violation of Article VI, section 14?<sup>55</sup> This section addresses these questions.

### A. *Encroachment on the Judicial Function*

The Illinois Constitution vests judicial power in the courts alone.<sup>56</sup> An issue raised by the review panel provisions of Public Act 84-7 is whether the

---

*ifornia's Medical Injury Compensation Reform Act: An Equal Protection Challenge*, 52 So. CAL. L. REV. 829, 935 (1979)).

51. Apparently rejecting the conclusions of the *Report of Task Force*, *supra* note 15, which was submitted as evidence of the "crisis" by the Attorney General, Judge Wosik determined that "there was no need for the challenged provisions of the legislation. . . [because] there is no empirical data to support the claim that a medical malpractice insurance crisis exists in the State of Illinois." *Bernier v. Burriss*, 85 CH 6625, Trial Court No. A-1 (filed June 23, 1985), *reprinted in* Chicago Daily Law Bulletin, Dec. 19, 1985, at 2.

52. *See, e.g.*, The Washington Post, Feb. 9, 1985, at B1, col. 1; The State Journal Register (Springfield, Ill.), Mar. 23, 1985, at 6; The Washington Post, Mar. 9, 1985, at B1, col. 1; The State Journal Register (Springfield, Ill), Mar. 9, 1985, at 6, col. 1; The New York Times, Mar. 10, 1985, at 22, col. 1; The Chicago Tribune, Mar. 24, 1985, at 1, col. 1; The Chicago Tribune, Mar. 22, 1985, at 10, col. 2; The Miami Herald, Mar. 10, 1985, at 4E, col. 1. *See Statement of the Association of Trial Lawyers of America, Hearings on Medical Malpractice Before the Subcomm. on Health of the House Ways and Means Comm.*, 98th Cong., 2nd Sess. (June 28, 1984) (statement of Thomas Bendorf).

53. ILL. CONST. art. VI, § 1 (1970) provides that "[t]he judicial power is vested in a Supreme Court, an Appellate Court and Circuit Courts."

54. ILL. CONST. art. VI, § 9 (1970) provides:

Circuit Courts shall have original jurisdiction of all justiciable matters except when the Supreme Court has original and exclusive jurisdiction relating to redistricting of the General Assembly and to the ability of the Governor to serve or resume office. Circuit Courts shall have such power to review administrative action as is provided by law.

55. ILL. CONST. art. VI, § 14 (1970) states that "[t]here shall be no fee officers in the judicial system."

56. *See supra* note 53.

utilization of both laypersons and judges in an apparently adjudicative role violates the sphere of authority reserved exclusively for the judiciary. The answer to that query can only be distilled from a careful analysis of the powers exercised by a medical review panel.<sup>57</sup>

Several types of governmental powers are *not* involved in the review panel process. First, as the Massachusetts Supreme Court has stated, medical review panels do not exercise legislative authority.<sup>58</sup> Second, though perhaps less obvious, panels do not exercise the "quasi-judicial" authority of an administrative agency.<sup>59</sup> Administrative adjudicative power is incidental to an executive department's primary duty to administer and enforce a sufficiently detailed statute over which the legislature has given it authority.<sup>60</sup> Medical

57. For a similar analysis, see Comment, *The Constitutional Considerations of Medical Malpractice Screening Panels*, 27 AM. U.L. REV. 161, 173-79 (1977) [hereinafter cited as Comment, *Screening Panels*].

58. In *Paro v. Longwood Hosp.*, 373 Mass. 645, 657, 369 N.E.2d 985, 991-92 (1977), upholding a review panel statute, the Massachusetts Supreme Court wrote:

[T]he tribunal procedure, in its role as a first step in obtaining judicial access, does not function as part of the legislative department, but as part of the judicial department. The role of the tribunal in hearing the plaintiff's offer of proof, receiving evidence, and determining the legal sufficiency of the claim, is a part of the judicial process at the preliminary stages of an action seeking damages for alleged medical malpractice. The tribunal's intimate connection with the judicial proceeding makes it clear that the hearing procedure is itself a part of the judicial process.

59. Administrative agencies frequently exercise what has been described as "quasi-judicial" authority. In *Devine v. Brunswick-Balke-Collender Co.*, 270 Ill. 504, 510, 110 N.E. 780, 782 (1915) (quoting *State v. Illinois Central R.R. Co.*, 246 Ill. 188, 231, 92 N.E. 81, 833 (1910)), the Illinois Supreme Court wrote:

Administrative and executive officers are frequently called upon, in the performance of their duties, to exercise judgment and discretion, and yet it has been held that they do not exercise judicial power, within the meaning of the constitutional provision. . . . The power exercised is ministerial or executive, but as an incident to it the official is called upon to perform acts which are in their nature judicial,—very nearly akin to those exercised by the courts. Such powers, when conferred upon other officials than judges, are often termed *quasi-judicial* or discretionary. They are said to "lie midway between the judicial and ministerial ones. The lines separating them from such as are thus on their two sides are necessarily indistinct, but in general terms, when the law, in words or by implication, commits to any officer the duty of looking into facts and acting upon them, not in a way which it specifically directs but after a discretion in its nature judicial, the function is termed *quasi-judicial*."

(Emphasis in original) (citations omitted).

60. See, e.g., *Gadlin v. Auditor of Public Accounts*, 414 Ill. 89, 97, 110 N.E.2d 234, 238 (1953) ("We have said many times that an administrative officer empowered to issue and revoke licenses to engage in a business or profession necessarily exercises quasi-judicial powers, but such exercise is incidental to the duty of administering the law relating to the regulation of a particular business or calling and does not constitute the exercise of judicial power within the prohibition of the Constitution"). See also *Department of Finance v. Gandolfi*, 375 Ill. 237, 240, 30 N.E.2d 737, 739 (1940) (enabling act of Department); *Grand Trunk Western R.R. Co. v. Industrial Comm'n*, 291 Ill. 167, 176, 125 N.E. 748, 752 (1919) (Workmen's Compensation Act).

review panels, on the other hand, are directly interposed into an established judicial scheme to which litigants have access by constitutional right,<sup>61</sup> and over which the panels have no authority. Additionally, the relationship between a review panel and the courts differs from that between an administrative agency and the courts. Public Act 84-7 permits a party who is dissatisfied with the panel determination to "proceed to trial as in any other civil case."<sup>62</sup> In contrast, judicial review of an administrative proceeding is generally confined to determining whether the legislative delegation of power is valid, whether the administrative body acted within the scope of that power, and whether the decision of the agency is arbitrary or capricious.<sup>63</sup> Furthermore, an administrative body's factual findings are taken as conclusive if reasonably supported by the evidence.<sup>64</sup> The findings of a review panel are not conclusive and binding on the court; medical malpractice litigants under Public Act 84-7 may proceed to a trial that will be based upon a newly-created record.<sup>65</sup>

Because medical review panels are part of neither the executive nor legislative branch, they must be part of the judicial process.<sup>66</sup> The panels do not, however, exercise *full* judicial power. Although authorized to perform many judge-like functions,<sup>67</sup> they are not empowered to render and enforce

---

61. ILL. CONST. art. I, § 13 (1970).

62. P.A. 84-7, § 2-1018(d), 1985 Ill. Legis. Serv. 16 (West).

63. See, e.g., *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944) (Board determination that newsboys are "employees" within delegated powers and warranted by record). See also 5 U.S.C. § 706 (1970) (providing for limited review of administrative agency findings).

64. See, e.g., *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951) (agency determination upheld where supported by substantial evidence).

65. P.A. 84-7, § 2-1018, 1985 Ill. Legis. Serv. 16 (West). Indeed, the review panel determination is not even admissible as evidence of liability or damages in the court trial. P.A. 84-7, § 2-1018(d), 1985 Ill. Legis. Serv. 16 (West). The determination is, however, "admissible as evidence in any hearing or trial where the issues concern the propriety of the prosecution or defense of the claim reviewed by the panel as opposed to the claim itself." *Id.*

66. See *supra* note 58. *Accord* *Carter v. Sparkman*, 335 So. 2d 802, 807-08 (Fla. 1976) (England, J., concurring), *cert. denied*, 429 U.S. 1041 (1977); *Wright v. Central DuPage Hosp. Ass'n*, 63 Ill. 2d 313, 322, 347 N.E.2d 736, 739-40 (1976).

67. "The panel shall . . . proceed as a body to hear evidence and argument on the question of liability and on the question of damages." P.A. 84-7, § 2-1016(a), 1985 Ill. Legis. Serv. 15 (West). "The panel shall have the power of subpoena . . . [and] may call witnesses, examine evidence, call for additional or particular evidence, and may examine or cross examine witnesses." P.A. 84-7, § 2-1016(b), 1985 Ill. Legis. Serv. 15 (West). "The panel shall make its determination . . . on the issue of liability and, if liability is found, on the issue of fair and just compensation for damages . . . in a written opinion." P.A. 84-7, § 2-1017(a), 1985 Ill. Legis. Serv. 16 (West).

Similar authority was given the coroner's jury in a statute upheld as not vesting judicial power in non-judges. *Devine v. Brunswick-Balke-Collender Co.*, 270 Ill. 504, 110 N.E. 780 (1915). In that decision, the Illinois Supreme Court wrote:

While the duties and functions of such jury are of a judicial nature to the extent that they are authorized to inquire into and investigate how, by whom, and in what

a final judgment.<sup>68</sup> Instead, review panels issue "determinations" which courts may convert into judgments only upon the unanimous agreement of the parties.<sup>69</sup> This circumscribed authority granted to review panels falls short of what the Illinois Supreme Court has described as judicial power:

The power involves not only the power to hear and determine a cause, but also the power and jurisdiction to adjudicate and determine the rights of the parties to the controversy and to render a judgment or decree which will be effectual and binding upon them in respect to their personal or property rights in controversy in such proceedings. The power to hear without the power also to adjudicate and determine the rights of the parties to such proceedings cannot be said to be the exercise of judicial power as that term is used in the Constitution of this state.<sup>70</sup>

Nevertheless, in the highly-criticized<sup>71</sup> decision of *Wright v. Central DuPage*

manner the deceased came to his death and of all the facts and circumstances connected with or in any manner related to or connected with such person's death, and may subpoena and examine witnesses under oath for that purpose, they have no power, on such hearing, to adjudicate and determine the rights and liabilities of the parties growing out of the matter under investigation by them, and their finding has none of the attributes of a judgment or decree.

*Id.* at 511, 110 N.E.2d at 785.

68. Such authority has been described as the "essence of judicial power." *DiAntonio v. Northampton-Accomade Memorial*, 628 F.2d 287, 292 (4th Cir. 1980); *Lacy v. Green*, 428 A.2d 1171, 1178 (Del. Super. Ct. 1981) (pre-trial screening panels do not encroach on essential powers of court). *See also Eastin v. Broomfield*, 116 Ariz. 576, 582, 570 P.2d 744, 748 (1977) ("Judicial power is the power of the court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision") (quoting *Stuart v. Norviel*, 26 Ariz. 493, 501, 226 P.2d 908, 910 (1924)); *Attorney General v. Johnson*, 282 Md. 274, 287, 385 A.2d 57, 65 (1978) ("It is elementary that an entity does not exercise the sovereign power of the State constitutionally assigned to the judiciary if its decision is in no sense final, binding or enforceable; no power of any meaningful kind inheres in a decision which, as in the Act before us, need not be accepted and which, if accepted, cannot be enforced by the entity which made it").

69. P.A. 84-7, § 2-1018, 1985 Ill. Legis. Serv. 16 (West). *Cf. Grace v. Howlett*, 51 Ill. 2d 478, 490, 283 N.E.2d 474, 480-81 (1972) (mandatory small claims mediation procedure unconstitutional). The court wrote:

Under the provisions of Section 609 the award of the arbitrator "must be entered by the court in its record of judgments, and has the effect of a judgment upon the parties unless reversed on appeal." Such a procedure cannot be likened to pretrial procedures. By the terms of the statute it is a judgment which is being reviewed.

70. *Devine v. Brunswick-Balkie-Collender Co.*, 270 Ill. 504, 511, 110 N.E. 780, 783 (1915) (coroner and coroner's jury, empowered by statute to determine cause of death, do not exercise judicial powers). *See also People ex rel. Christiansen v. Connell*, 2 Ill. 2d 332, 348, 118 N.E.2d 262, 270 (1954) (judicial participation in pre-trial counseling in divorce actions not the exercise of judicial power).

71. *See, e.g., Redish, supra note 2; Note, Medical Malpractice Mediation Panels: A Constitutional Analysis*, 46 FORDHAM L. REV. 322 (1977); *Note, Wright v. Central DuPage Hospital Association: A Grim Prognosis for Medical Malpractice Review Panels?* 22 S.D.L. REV. 461 (1977); *Comment, Constitutional Challenges to Medical Malpractice Review Boards*, 46 TENN. L. REV. 607 (1979); *Comment, First Checkup, supra note 2.*

*Hospital Association*,<sup>72</sup> the Illinois Supreme Court held that a review panel statute unconstitutionally vested judicial powers in non-judges even though the panel decision had no binding force absent the agreement of the parties.<sup>73</sup> In analyzing the 1975 statute, the court emphasized the ability of lay panel members to determine the applicable law, even over the objections of the judicial panel member. As the court explained:

Section 58.6 also provides that the circuit judge member of the medical review panel "shall preside over all proceedings of the panel and shall determine all procedural issues, including matters of evidence." But as to other issues, both legal and factual, the power and function of the lawyer and physician member of the panel are the same as that of the judge. Furthermore, the powers of the judge concerning the determination of "matters of evidence" are diluted by the provision that "The law of evidence shall be followed, except as the panel in its discretion may determine otherwise . . . ." Section 58.7 provides that "The panel shall make its determination according to the applicable substantive law," and by its terms, the lawyer and physician are vested with authority, equal to that of the judge, to determine and apply the "substantive law" . . . [even] over the dissent of the circuit judge. This, we hold, empowers the nonjudicial members of the medical review panel to exercise a judicial function in violation of . . . the Constitution.<sup>74</sup>

In contrast to the statute involved in *Wright*, lay panel members under Public Act 84-7 have no power to rule on the applicable substantive law.<sup>75</sup> The judge member alone "determine[s] all questions of law, including matters of evidence,"<sup>76</sup> and the panel "make[s] its determination according to the applicable substantive law as determined by the judge on the panel."<sup>77</sup> Thus, the encroachment on the judicial function that was present in *Wright* is absent in Public Act 84-7.

Without the ability to render and enforce final judgments, review panels are not correctly characterized as a "trial substitute."<sup>78</sup> The General Assembly would exceed its constitutional authority if it attempted to create a new "court" of first impression and empower panel members — the judge, physician and attorney — to operate as a court.<sup>79</sup> Rather, the review panel

---

72. 63 Ill. 2d 313, 347 N.E.2d 736 (1976). *Accord* State *ex rel.* Cardinal Glennon Mem. Hosp. v. Gaertner, 583 S.W.2d 107, 115 (Mo. 1979) (Simeone, J., concurring) (review panel statute unconstitutional).

73. P.A. 79-960, § 58.8, 1975 Ill. Laws 2888.

74. *Wright v. Central DuPage Hosp. Ass'n*, 63 Ill. 2d 313, 322, 347 N.E.2d 736, 739-40 (1976).

75. Panel procedure and decision-making authority are governed by P.A. 84-7, §§ 2-1016 - 2-1017, 1985 Ill. Legis. Serv. 15-16 (West).

76. P.A. 84-7, § 2-1016(a), 1985 Ill. Legis. Serv. 15 (West).

77. P.A. 84-7, § 2-1017(a), 1985 Ill. Legis. Serv. 16 (West).

78. See Comment, *Screening Panels*, *supra* note 57, at 176-77.

79. See *Wright v. Central DuPage Hosp. Ass'n*, 63 Ill. 2d 313, 317 N.E.2d 736 (1976); *Grace v. Howlett*, 51 Ill. 2d 478, 283 N.E.2d 474 (1972).

process contained in Public Act 84-7 more closely resembles a mandatory pre-trial settlement conference, an analogy that recognizes the judge's duties as judicial.<sup>80</sup> The focus is therefore on the permissibility of judicial participation in pre-trial settlement conferences and on the availability of a trial following the review panel proceeding as a sufficient guarantee of the litigant's constitutional right of access to court.<sup>81</sup>

This view was articulated in *Carter v. Sparkman*,<sup>82</sup> in which the Florida Supreme Court upheld the constitutionality of Florida's medical review panel statute. The concurring opinion characterized review panels as being distinct from the "judicial forum" of the traditional common law trial, and, finding no constitutional guarantee of immediate access to a formal trial,<sup>83</sup> concluded that "[t]he panel becomes, in essence, akin to a required pre-trial settlement conference, a procedure common in many jurisdictions at the onset of litigation."<sup>84</sup>

Because Illinois review panels cannot enter and enforce final judgments, they should, like their Florida counterparts, be viewed as little more than a required pre-trial settlement conference. Given the limited role played by the lay panel members,<sup>85</sup> it is difficult, if not impossible, to see how the Illinois review panel process could be considered an encroachment on the judicial function in contravention of the Illinois Constitution.

### B. Trial De Novo

In the so-called "Blue Ballot" of 1962, the state electorate amended the Judicial Article of the Illinois Constitution to eliminate the numerous trial courts of limited jurisdiction, replacing them with a single court of original jurisdiction.<sup>86</sup> That concept was retained in Article VI, section 9 of the 1970 Constitution with the following phrase: "Circuit courts shall have original jurisdiction of all justiciable matters . . ."<sup>87</sup> One purpose behind this consolidation of trial courts was the elimination of the trial *de novo*, "the appeal from justice of the peace or police magistrate courts, wherein jury trials were available, to the county or circuit courts, wherein a second jury trial was available in the trial *de novo*."<sup>88</sup> Regarding these justice of the peace and police magistrate courts, Professor Cohn has stated:

---

80. *Carter v. Sparkman*, 335 So. 2d 802, 808 (Fla. 1976) (England, J. concurring).

81. *Id.* at 807.

82. *Id.*

83. *Id.*

84. *Id.*

85. See *supra* notes 75-77 and accompanying text.

86. See Giese, *Why Illinois Proposes to Abolish Justice of the Peace Courts*, 46 ILL. B.J. 754-61 (1958); Cedarquist, *The Proposed Judicial Amendment*, 39 CHI. B. REC. 109-13 (1958).

87. ILL. CONST. art. VI, § 9 (1970). For the full text of that section, see *supra* note 54.

88. *Grace v. Howlett*, 51 Ill. 2d 478, 512, 283 N.E.2d 474, 491-92 (1972) (Underwood, C.J., dissenting).

[T]heir principal deficiency, aside from the generally low level of competence of their judges, most of whom were not lawyers, was the fact that they were not courts of record. Their decisions were re-triable *de novo* either in the county or circuit court at the instance of the losing party who frequently failed, quite deliberately, to defend in the justice or magistrate courts . . . . The system of re-trials *de novo* from judgments of justice and magistrate courts was expensive, frustrating, and wasteful of judicial time and manpower.<sup>89</sup>

Unlike those now-banned trial courts of limited jurisdiction, review panels cannot issue binding and enforceable judgments absent agreement of the parties and action by the courts.<sup>90</sup> This contrasts sharply with the mandatory arbitration statute reviewed in *Grace v. Howlett*,<sup>91</sup> where the Illinois Supreme Court wrote:

Under the provisions of Section 609 the award of the arbitrator "must be entered by the Court in its record of judgments, and has the effect of a judgment upon the parties unless reversed upon appeal." Such a procedure cannot accurately be likened to pretrial procedures. By the terms of the statute it is a judgment which is being reviewed. It is being reviewed by the wasteful process of a trial *de novo*, the process which was intended to be eliminated.<sup>92</sup>

The review panel process, on the other hand, *can* accurately be likened to pretrial procedures.<sup>93</sup> Because the panel procedure is not a trial and results in no judgment, a subsequent proceeding in the circuit court is not a trial *de novo*.

### C. Fee Officers

Article VI, section 14 of the Illinois Constitution decrees that "[t]here shall be no fee officers in the judicial system."<sup>94</sup> The Illinois Supreme Court has defined "fees" as "court charges imposed *on a litigant* . . . [that are] assessed to defray the costs of his litigation."<sup>95</sup> The problem inherent in a

89. G. BRADEN & R. COHN, THE ILLINOIS CONSTITUTION: AN ANNOTATED AND COMPARATIVE ANALYSIS 330-31 (1969). See also ILL. CONST. ANN. art. VI, § 9, Constitutional Commentary (1970 Smith-Hurd) ("Section 9 retains the concept of a single integrated trial court structure in Illinois. A single trial court prevents the conflicts which otherwise arise when there are numerous trial courts of limited jurisdiction").

90. See *supra* notes 67-70 and accompanying text.

91. 51 Ill. 2d 478, 283 N.E.2d 474 (1972).

92. *Id.*, 283 N.E.2d at 480-81.

93. See *supra* notes 78-85 and accompanying text.

94. ILL. CONST. art. VI, § 14 (1970).

95. *Crocker v. Findley*, 99 Ill. 2d 444, 452, 459 N.E.2d 1346, 1349-50 (1984) (emphasis added). See also Giese, *supra* note 86, at 759 (describing fee system as one under which "the justice was compensated by retaining the fees and costs (as distinguished from fines, penalties and forfeitures) assessed by him against those who appear in cases before him . . ."). In *Grace v. Howlett*, 51 Ill. 2d 478, 490, 283 N.E.2d 474, 481 (1972), the Illinois Supreme Court found that a mandatory arbitration statute established fee officers where the statute required "the losing litigant [to] pay the fees of the arbitrator, which fees are treated as costs."



fee system is that it gives the adjudicator a financial interest in the outcome of the dispute.<sup>96</sup> As Professor Sutherland explained:

The inherent evil of the fee system is that since the justice is dependent for his compensation upon the fees and costs which he may collect from litigants, he is interested in getting more business in order to enlarge his income, and, therefore, he is disposed first, to encourage litigation of controversies which otherwise might not get into the courts, and secondly, to favor, sometimes improperly, those who bring him business.<sup>97</sup>

Unlike the old justices of the peace, panel members receive a salary paid not out of funds collected from litigants but out of the funds appropriated to the Administrative Office of the Courts.<sup>98</sup> Such salaried personnel are not prohibited by Article VI, section 14.<sup>99</sup> Hence members of medical review panels are not fee officers.

### III. PROCEDURAL DUE PROCESS

Courts have rarely conducted due process reviews of statutes that regulate a plaintiff's access to court.<sup>100</sup> Rather, courts typically invoke the due process clause to protect criminal defendants, who must appear in court to protect themselves against a finding of guilt.<sup>101</sup> In the civil context, due process guarantees usually are satisfied when persons who are adversely affected by a statute are given notice and an opportunity to be heard in opposition.<sup>102</sup> Thus, under a traditional due process analysis, states may enact statutes that

96. In the criminal context, see *Tumey v. Ohio*, 273 U.S. 510, 531-32 (1927) (conviction by magistrate who had direct financial interest in outcome of trial, because of fee he would receive only in event of conviction, lacked due process).

97. Sutherland, *A Study of the Justice of the Peace and Other Minor Courts*, 21 CONN. B.J. 300, 331-34 (1947), quoted in Giese, *supra* note 86, at 759-60 (1958). See also Luvera, *Justice for a Fee*, 53 A.B.A. J. 242 (1967).

98. P.A. 84-7, § 2-1019(a), (b), 1985 Ill. Legis. Serv. 17 (West).

99. Then Chief Justice Underwood implied as much in his dissent in *Grace v. Howlett*, 51 Ill. 2d 478, 513, 283 N.E.2d 474, 492 (1972), writing: "If it should subsequently develop that sufficient numbers of arbitrators are unwilling to serve without compensation, the General Assembly may well provide some method of payment other than 'fees'." See also ILL. CONST. ANN. art. VI, § 14, Constitutional Commentary at 518 (1970 Smith-Hurd) ("If the State wishes to provide a salaried judicial officer to perform the functions of the old Master in Chancery, on a non-fee basis to litigants, it is permitted to do so").

100. See *Boddie v. Connecticut*, 401 U.S. 371, 375-76 (1971) (recognizing general inapplicability of due process clause to statutes that regulate plaintiff's access to court).

101. *Id.* For criminal defendants, a judicial hearing is a matter of substantive importance. See, e.g., *Douglas v. California*, 372 U.S. 353, 354-358 (1963); *Griffin v. Illinois*, 351 U.S. 12, 16-20 (1956). Additionally, criminal statutes must give notice of the conduct they prohibit. *People v. McPherson*, 65 Ill. App. 3d 772, 382 N.E.2d 858 (1978).

102. See, e.g., *Boddie v. Connecticut*, 401 U.S. 371, 377-79 (1971); *Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 158 (1931); *Gratten v. Ahlberg Bearing Co.*, 373 Ill. 455, 26 N.E.2d 499 (1940); *Estate of Oliver v. Wildermuth*, 50 Ill. App. 3d 1, 365 N.E.2d 281 (1977). Also, due process requires that the hearing not be biased or otherwise unfair. See *infra* notes 115-119 and accompanying text.

require medical malpractice claimants to proceed before a medical review panel prior to gaining access to the state courts.<sup>103</sup>

Indeed, the federal courts have considered access to state courts primarily an issue of state concern and have accorded state legislatures great latitude to establish and alter the governing procedures for access to their courts.<sup>104</sup> Furthermore, a medical malpractice plaintiff has no property interest in pre-existing procedures for enforcing his common law right to a remedy.<sup>105</sup> Hence, no "taking" issue arises under the federal or state due process clause.

An apparent exception to this traditional approach has arisen in cases that involve a fundamental right of an indigent plaintiff for whom even nominal filing costs bar access to the courts and for whom no means of satisfaction as an alternative to the courts is available.<sup>106</sup> In *Boddie v. Connecticut*,<sup>107</sup>

---

103. *Accord* Johnson v. St. Vincent Hosp., 273 Ind. 374, 387, 404 N.E.2d 585, 593 (1980) (Indiana medical malpractice panel procedure does not violate due process).

104. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 551-52 (1949). In upholding a state requirement that a large bond be posted as a condition precedent to bringing a shareholder's derivative suit, the Court stated, "A state may set the terms on which it will permit litigation in its courts." *Id.* See also Lindsey v. Normet, 405 U.S. 56 (1972) (restriction on defenses in actions by landlords against tenants not violative of due process because tenants empowered to bring their own actions); Jones v. Union Guano Co., 264 U.S. 171 (1924) (statute requiring state testing of fertilizer before action could be brought in state court for crop damage from use of fertilizer held not violative of due process); West Penn Power Co. v. Train, 522 F.2d 303, 313 (3d Cir. 1975) ("Nor is a party deprived of due process merely because it must seek administrative resolution of claims before it has access to the courts") (citing Cromwell v. Benson, 285 U.S. 22 (1932); Estep v. United States, 327 U.S. 114 (1946)).

105. The United States Supreme Court has written:

A person has no property, no vested interest, in any rule of common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will or even the whim of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.

*Munn v. Illinois*, 94 U.S. 113, 123 (1877) (quoted in *Hurtado v. State of California*, 110 U.S. 516, 531 (1884)). From that quote, the Indiana Court concluded:

The relationship of health care provider and patient imposes on the health care provider a common law legal duty. The nature and extent of that duty may be modified by legislation. Hence, the Legislature may also validly act to restrict the remedy available for breach of that duty. This challenged provision of the Act may not be regarded as repugnant to due process simply because it alters the standing manner of achieving a remedy in court, or because it restricts a long time remedy.

*Johnson v. St. Vincent Hosp.*, 273 Ind. 374, 387, 404 N.E.2d 585, 593 (1980) (upholding Indiana malpractice panel provision).

106. *Ortwein v. Schwab*, 410 U.S. 656, 658-60 (1973); *United States v. Kras*, 409 U.S. 434, 434-46 (1973); *Boddie v. United States*, 401 U.S. 371 (1971). See also *NAACP v. Patty*, 159 F. Supp. 503 (E.D. Va. 1958), *rev'd on other grounds sub nom.* *Harrison v. NAACP*, 360 U.S. 167 (1959) (statute making it crime to employ attorney for proceedings in which employer-client is not party and has no interest ruled unconstitutional as violation of due process).

107. 401 U.S. 371 (1971).

the United States Supreme Court ruled that requiring fees to be paid before a divorce suit could be filed violated the due process rights of those persons who could not afford to pay the fees. The importance to society of the substantive issue — the dissolution of marriage — and the state's involvement in regulating that fundamental relationship prompted the Court to accord due process protections to the plaintiff.<sup>108</sup> The Court in *Boddie* reasoned that, since a person must go to court to lawfully dissolve a marriage, his situation was analogous to that of a defendant who is required to go to court to defend his rights. Therefore, a plaintiff in a divorce action is entitled to a hearing under the due process clause.<sup>109</sup> Beyond an indigent's right of access to divorce proceedings, *Boddie* specifically refrained from declaring any significant limitations upon a state's ability to regulate access to its courts: "The legitimacy of the State's monopoly over techniques of final dispute settlement, even where some are denied access to its use, stands unimpaired where recognized, effective alternatives for the adjustment of differences remain."<sup>110</sup>

The medical malpractice plaintiff in Illinois is clearly distinguishable from the divorce plaintiff in *Boddie*. Medical review panels do not bar access to a forum for adjudicating the malpractice claim. In fact, the panels are themselves such a forum. Also, the parties to a medical malpractice action may proceed to court if dissatisfied with the panel determination.<sup>111</sup> Finally, a person's right to bring a tort suit has never been held to rise to the level of constitutional significance as does the right to contract or to dissolve a marriage.<sup>112</sup> Thus, no real due process issue arises where such review panels burden,<sup>113</sup> but do not deny, a medical malpractice plaintiff's access to the courts.<sup>114</sup>

Given the ultimate access to the courts afforded a medical malpractice plaintiff, it is perhaps unnecessary to examine whether the presence of a

---

108. *Id.* at 376.

109. *Id.* at 375-76.

110. *Id.* Later cases have limited the application of *Boddie*. See *United States v. Kras*, 409 U.S. 434 (1973) (*Boddie* rationale held inapplicable to filing fee for bankruptcy because bankruptcy does not rise to same level of constitutional importance as does divorce); *Ortwein v. Schwab*, 410 U.S. 656 (1973) (appellate court's filing fee did not deprive indigent of due process when it prevented him from appealing results of an agency hearing on welfare payments because due process clause guarantees only hearing and not appeal therefrom).

111. See *supra* notes 25-31 and accompanying text.

112. See *Ortwein v. Schwab*, 410 U.S. 656 (1973); *United States v. Kras*, 409 U.S. 434 (1973).

113. Medical review panels burden access to the courts by delaying admittance and by imposing additional costs to achieve that admittance. See *supra* note 31.

114. See, e.g., *Lindsey v. Normet*, 405 U.S. 56, 65-66 (1973) (restriction on defenses in suit by landlord against tenant not violative of due process); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 552 (1949) (security bond requirement as prerequisite to suit not violative of due process); *Jones v. Union Guano Co.*, 264 U.S. 171, 181 (1924) (statute requiring state testing of fertilizer prior to any action for crop damage from use of the fertilizer not violative of due process).

physician on the panel renders that forum biased in violation of due process guarantees.<sup>115</sup> Nevertheless, at least five courts have considered and rejected the argument.<sup>116</sup> The cases uniformly conclude that it is totally speculative to assert that all health care providers are incapable of rendering an unbiased opinion in a medical malpractice suit.<sup>117</sup> Furthermore, Public Act 84-7 gives both parties the opportunity to dismiss any prospective panel member who has a conflict of interest in connection with the case.<sup>118</sup> Finally, it may be desirable to have a health care professional on the panel in order to ensure that the panel has the expertise to screen the claims for merit and to make determinations that encourage prompt settlements.<sup>119</sup>

#### IV. EQUAL PROTECTION

##### A. Review Panels Generally

The review panel process established in Public Act 84-7 discriminates against medical malpractice plaintiffs by imposing upon them an additional burden not placed on other personal injury claimants who have direct access to the courts. However, not all forms of discrimination violate the equal protection clause of the fourteenth amendment<sup>120</sup> or of its functionally equivalent<sup>121</sup> counterpart in the Illinois Constitution.<sup>122</sup> Only unreasonable and invidious classification schemes violate these equal protection guaran-

---

115. Due process requires that the hearing not be biased or otherwise unfair. *See* *People v. Scott*, 326 Ill. 327, 157 N.E. 247 (1927); *People v. Ruffalo*, 69 Ill. App. 3d 532, 388 N.E.2d 114 (1979).

116. *Hines v. Elkhart General Hosp.*, 465 F. Supp. 421, 429 (N.D. Ind. 1979); *Johnson v. St. Vincent Hosp.*, 273 Ind. 374, 384-85, 404 N.E.2d 585, 593 (1980); *Linder v. Smith*, 629 P.2d 1187, 1192 (Mont. 1981); *Parker v. Children's Hosp. of Philadelphia*, 483 Pa. 106, 128-29, 394 A.2d 932, 943-44 (1978); *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 515, 261 N.W.2d 434, 446 (1978).

117. *Id.*

118. P.A. 84-7, § 2-1015(b), 1985 Ill. Legis. Serv. 14 (West). Additionally, P.A. 84-7, § 2-1015(f), 1985 Ill. Legis. Serv. 14 (West), provides:

No attorney or health professional may participate as a member of a panel if he is materially associated with any attorney, health professional, or party in the case.

No attorney or health professional may participate as a member of a panel if he has a conflict of interest, as determined by the court on a motion filed by any party or by the attorney, or health professional.

119. *Linder v. Smith*, 629 P.2d 1187, 1192 (Mont. 1982); *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 515, 261 N.W.2d 434, 446 (1978).

120. U.S. CONST. amend. XIV, § 1.

121. In *People v. Kaeding*, 98 Ill. 2d 237, 245, 456 N.E.2d 11, 16 (1983), the Illinois Supreme Court stated, "When examining a legislative scheme which creates classifications by providing for different treatment of groups of persons, this court adheres to the framework of analysis used by the [United States] Supreme Court." *See also Illinois Polygraph Soc'y v. Pellicano*, 82 Ill. 2d 130, 414 N.E.2d 458 (1980); *People ex rel. Tucker v. Kostos*, 68 Ill. 2d 88, 368 N.E.2d 903 (1977).

122. ILL. CONST. art. I, § 2 (1970).

tees.<sup>123</sup> Thus, the relevant inquiry is whether the special legislative treatment accorded to medical malpractice claims under Public Act 84-7 constitutes an unreasonable or invidious classification.

Any equal protection examination must begin with a determination of what standard of review should be used. Under the traditional two-tiered analysis, courts evaluate legislative classifications under the relatively relaxed "rational basis" standard, which Professor Linde contends "is not judicial review but dismissal of a claim of review,"<sup>124</sup> or the more exacting "strict scrutiny" standard, which Professor Gunther asserts "has been 'strict' in theory and fatal in fact."<sup>125</sup> Courts will utilize the strict scrutiny test only when the statute under review contains a "suspect classification" or limits a "fundamental right."<sup>126</sup>

Classifications are considered "suspect" when the "class is . . . saddled with such disabilities or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness, as to command extraordinary protection from the majoritarian political process."<sup>127</sup> To date, the Supreme Court has recognized as suspect only those legislative classifications involving race,<sup>128</sup> national origin<sup>129</sup> and alienage.<sup>130</sup> Surely health care tort victims cannot be considered such a suspect class.

Courts also employ a strict scrutiny analysis when a "fundamental right" is affected, even if the classification is not directed at a downtrodden minority.<sup>131</sup> The Supreme Court has limited this category to only those rights "explicitly or implicitly guaranteed by the Constitution,"<sup>132</sup> thus far recognizing as fundamental only the rights of privacy, marriage, voting, travel and associational freedom.<sup>133</sup> No appellate court has ever found a funda-

123. See, e.g., *McLaughlin v. Florida*, 379 U.S. 184 (1964) ("invidious discrimination"); *McGowan v. Maryland*, 366 U.S. 420 (1961) ("unreasonable classification").

124. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 210 (1976).

125. Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). To survive a strict scrutiny analysis, a statute must be "'tailored narrowly to serve legitimate objectives' . . . in furtherance of compelling governmental interests." *People v. Kaeding*, 98 Ill. 2d 237, 245, 456 N.E.2d 11, 16 (1983).

126. See, e.g., *Graham v. Richardson*, 403 U.S. 365, 372-73 (1971); *People v. Kaeding*, 98 Ill. 2d 237, 245-46, 456 N.E.2d 11, 16-17 (1983).

127. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

128. See, e.g., *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *McLaughlin v. Florida*, 379 U.S. 184 (1964).

129. See, e.g., *Oyama v. California*, 332 U.S. 633 (1948).

130. See, e.g., *Graham v. Richardson*, 403 U.S. 365 (1971) (welfare statute that discriminated against aliens violative of equal protection guarantees).

131. *Zablocki v. Redhail*, 434 U.S. 374 (1978) (marriage); *Roe v. Wade*, 410 U.S. 113 (1973) (privacy); *Bullock v. Carter*, 405 U.S. 134 (1972) (voting); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (travel); *NAACP v. Alabama*, 357 U.S. 449 (1958) (freedom of association).

132. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973).

133. See *supra* note 131.

mental right to exist in collecting damages for personal injuries<sup>134</sup> or in obtaining direct access to the courts for the resolution of claims.<sup>135</sup> In keeping with the strong reluctance of the Illinois and federal courts to recognize additional rights as fundamental,<sup>136</sup> it is highly unlikely that Public Act 84-7 will be found to impinge upon a fundamental right.

Because the review panel statute involves neither a suspect class nor a fundamental right, a traditional equal protection analysis would assess the act under the rational basis test. The Supreme Court described that test in its oft-cited decision *McGowan v. Maryland*:<sup>137</sup>

The constitutional safeguard [of equal protection] is offended only if the classification rests on some ground wholly irrelevant to the achievement of the state's objective. State legislatures are presumed to have acted within their constitutional powers despite the fact that, in practice, their law results in some inequality. A statutory determination will not be set aside if any statement of facts may be reasonably conceived to justify it.<sup>138</sup>

---

134. *Cf. Rohrbaugh v. Wagnorer*, 274 Ind. 661, 664-65, 413 N.E.2d 891, 893 (1980) (medical malpractice claim); *Comisky v. Arlen*, 55 A.D.2d 304, 313, 390 N.Y.S.2d 122, 129 (1976) (medical malpractice claim).

135. *Cf. Carr v. United States*, 422 F.2d 1007, 1011-12 (4th Cir. 1970) (federal employee's common-law right of action against co-worker for injuries sustained in automobile accident not fundamental right). In *Boddie v. Connecticut*, 401 U.S. 371 (1971), the Court found that access to the courts was "the exclusive precondition to the adjustment of a fundamental human relationship [i.e., marriage]," and concluded that a state may not "preempt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so." *Id.* at 383. In contrast, the Court has held that access to the courts for the resolution of claims that involve rights *not* subject to special constitutional protection may be denied if supported by a rational basis; that is, no proof is required of any compelling state interest or that the means chosen was the least restrictive. *See Ortwein v. Schwab*, 410 U.S. 656 (1973) (\$25 filing fee which operated to deprive appellants of opportunity to obtain appellate review of agency determination reducing welfare benefits); *United States v. Kras*, 409 U.S. 434 (1973) (filing fee as precondition to petition court for discharge in bankruptcy). These decisions led a New York court to conclude that "the Supreme Court has made it clear that access to the courts in and of itself is not an independent constitutional right." *Comisky v. Arlen*, 55 A.D.2d 304, 313, 390 N.Y.S.2d 122, 129 (1976). *See also Seoane v. Ortho Pharma., Inc.*, 660 F.2d 146, 150 (5th Cir. 1980) (upholding Louisiana medical malpractice panel statute against equal protection challenge: "[a]s a constitutional matter, when a right is not fundamental, access to the courts may be restricted").

136. *See People v. Kaeding*, 98 Ill. 2d 237, 246, 456 N.E.2d 11, 16-17 (1983), in which the court wrote:

"Fundamental interests generally are those that lie at the heart of the relationship between the individual and a republican form of nationally integrated government" . . . and are rooted in explicit or implicit constitutional guarantees. . . . This court, in keeping with the view of the Supreme Court, has previously recognized a responsibility not to engage in the creation of substantive constitutional rights . . . "in the name of guaranteeing equal protection of the laws."

(Citations omitted.)

137. 366 U.S. 420 (1961).

138. *Id.* at 425-26. *Accord Pazner v. Mauck*, 73 Ill. 2d 250, 255, 383 N.E.2d 203, 205 (1978) ("The court's only inquiry is whether the legislation represents a rational means to accomplish

This standard is appropriate for reviewing legislation in the "area of economics and social welfare" in general,<sup>139</sup> and in the area of medical malpractice in particular.<sup>140</sup>

The classification scheme embodied in the review panel procedure of Public Act 84-7 would be upheld as constitutional under a rational basis test for the following three reasons. First, the act serves the valid<sup>141</sup> legislative goal of encouraging prompt dismissals of frivolous suits and prompt settlements of meritorious claims<sup>142</sup> so as to alleviate any threat to the delivery of health care services caused by the unavailability of reasonably priced medical malpractice insurance.<sup>143</sup> Second, the need for the act is supported by the vast literature describing a crisis in the medical malpractice insurance market,<sup>144</sup> and courts are extremely reluctant to set aside a legislative classification "if any set of facts may be conceived to justify it."<sup>145</sup> Third, as explained below, a showing can be made that a relationship exists between the class of people designated by the review panel statute and the public harm to be remedied thereby.<sup>146</sup> Increasing medical malpractice insurance rates are in part caused

a proper purpose. . . . We will not substitute our judgment for that of the legislature"); *Doolin v. Korshak*, 39 Ill. 2d 521, 527, 236 N.E.2d 897, 901 (1968) ("A statutory discrimination will not be set aside if any set of facts may be conceived to justify it") (quoting *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961)).

139. See *Dandridge v. Williams*, 397 U.S. 471, 485 (1970):

In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality. . . . The problems of government are practical ones and may justify, if they do not require, rough accommodations - illogical, it may be, and unscientific.

Numerous cases reviewing legislation in the area of economics and social welfare have utilized the rational basis standard. See, e.g., *Lindsey v. Normet* 405 U.S. 56, 74 (1972); *Jefferson v. Hackney*, 406 U.S. 535, 546 (1972); *Flemming v. Nestor*, 363 U.S. 603, 611-12 (1960).

140. Numerous courts reviewing similar panel statutes have employed the rational basis standard. See, e.g., *Seoane v. Ortho Pharma., Inc.*, 660 F.2d 146, 150 (5th Cir. 1980); *DiAntonio v. Northampton-Accomack Memorial*, 628 F.2d 287, 291 (4th Cir. 1980); *Woods v. Holy Cross Hosp.*, 591 F.2d 1164, 1172-75 (5th Cir. 1979); *Eastin v. Broomfield*, 116 Ariz. 576, 583, 570 P.2d 744, 750-51 (1977); *Lacy v. Green*, 428 A.2d 1171, 1177 (Del. Super. Ct. 1981); *Paro v. Longwood Hosp.*, 373 Mass. 645, 369 N.E.2d 985 (1977).

141. See *supra* note 45. Cf. *Jones v. State Bd. of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976) (questioning nature and scope of alleged medical malpractice crisis in Idaho) (remanded for additional evidence), *cert. denied*, 431 U.S. 914 (1977).

142. See *supra* note 9.

143. See *supra* notes 3-17 and accompanying text.

144. See *supra* notes 1, 2 & 17. But see *Bernier v. Burreis*, 85 CH 6625, Trial Court Findings A-1 to A-6 (filed June 25, 1985), reprinted in *Chicago Daily Law Bulletin*, Dec. 19, 1985, at 2.

145. *Doolin v. Korshak*, 39 Ill. 2d 521, 528, 236 N.E.2d 897, 901 (1968) (quoting *McGowan v. Maryland*, 366 U.S. 420, 425-46 (1961)).

146. Such a showing is required. See *Tussman & tenBroek, The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 346 (1949).

by the marked increase in malpractice claims and awards,<sup>147</sup> which could be checked if more malpractice suits were settled or disposed of before trial.<sup>148</sup> Because the review panel process arguably facilitates such early disposition of claims,<sup>149</sup> the classification of malpractice actions is sufficiently related to the legislative purpose embodied in Public Act 84-7.<sup>150</sup>

This traditional two-tiered analysis, with its predictable result,<sup>151</sup> has been abandoned in a limited number of recent cases,<sup>152</sup> causing Professor Gunther to discern a movement toward application of what he has labeled a "means-oriented scrutiny test."<sup>153</sup> Under this standard a court does not question the legitimacy of the legislative rationale for the challenged classification.<sup>154</sup> Instead, a court examines whether the classification "rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation."<sup>155</sup> This standard, while providing the legislature with more flexibility than the strict scrutiny test, requires the state to provide a greater justification for its classification than is necessary under the rational basis test. Legislation is held unconstitutional under the rational basis standard only "if the classification rests on grounds *wholly irrelevant*" to the achievement of a conceivably legitimate purpose.<sup>156</sup> Under the means scrutiny test, however, a "substantial *relationship*" must be established between the means and the ends of the challenged legislation.<sup>157</sup>

An examination of the Court's use of the means scrutiny test reveals that it has been limited to "twilight zone" cases<sup>158</sup> — those in which a quasi-fundamental right<sup>159</sup> or an "almost" suspect class is present.<sup>160</sup> While the

---

147. See *supra* notes 1, 2 & 17 and accompanying text.

148. *Id.*

149. See *supra* note 9.

150. See *supra* note 139.

151. See Linde, *supra* note 124, at 202-03:

[T]he famous two-tier model of equal protection analysis . . . deserves a better press than it has had in its later years. . . . The strength of this simple model is not just that its premises are manageable in practice, though that is no small advantage. Its strength is that it calls for judicial scrutiny of a law only by reference to values located somewhere in the Constitution, values external to the complex of ends and means and mere inertia that has resulted in the existing state of the law.

152. See, e.g., *Trimble v. Gordon*, 430 U.S. 762 (1977); *Craig v. Boren*, 429 U.S. 190 (1976); *Reed v. Reed*, 404 U.S. 71 (1971).

153. Gunther, *supra* note 125, at 20-24. The "means scrutiny" analysis was derived in part from Redish, *supra* note 2, at 771-82.

154. Gunther, *supra* note 125, at 21.

155. *Reed v. Reed*, 404 U.S. 71, 76 (1971).

156. *McGowan v. Maryland*, 366 U.S. 420, 425 (1961) (emphasis added).

157. Gunther, *supra* note 125, at 20 (emphasis added).

158. Redish, *Preferential Law School Admissions and the Equal Protection Clause: An Analysis of the Competing Arguments*, 22 UCLA L. REV. 343, 354 n.57 (1974).

159. See, e.g., *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973) (food stamps); *Jackson v. Indiana*, 406 U.S. 715 (1972) (pretrial commitment of incompetent criminal defendants); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (use of contraceptives).

160. See, e.g., *Trimble v. Gordon*, 430 U.S. 762 (1977) (classifications premised on legiti-



review panel statute does not involve an "almost" suspect class, it arguably does involve discrimination affecting the enjoyment of a quasi-fundamental right "since the right of compensation for injury is arguably of great significance."<sup>161</sup> Without articulating the basis for their decision to do so, several courts have analyzed medical malpractice legislation using the means scrutiny standard,<sup>162</sup> as have dissenting opinions in another such case.<sup>163</sup> With one exception,<sup>164</sup> these cases all involved legislative attempts to cap the amount of damages that may be awarded to a medical malpractice plaintiff.<sup>165</sup> The exception involved a panel provision similar to that of Illinois, with the court upholding the statute under the means scrutiny test.<sup>166</sup> As explained

macy); *Craig v. Boren*, 429 U.S. 190 (1976) (gender based classification); *Reed v. Reed*, 404 U.S. 71 (1971) (gender based classification).

161. Redish, *supra* note 2, at 774. In analyzing the Indiana Medical Malpractice Act, one commentator reached a similar conclusion, writing:

The great significance of the right to recover for bodily injury justifies application of the intermediate, "means scrutiny" standard. Full compensation for tort injuries is a state-created right. Since, as a state-created right, the right to collect for bodily injury is not considered a "fundamental" right the "strict scrutiny" standard cannot be applied. However, as a state-created right, the right to collect for bodily injury warrants application of a stricter standard than "rational basis."

Note, *Constitutionality of the Indiana Medical Malpractice Act: Re-Evaluated*, 19 VAL. U.L. REV. 493, 508 (1985) [hereinafter cited as Note, *Constitutionality Re-Evaluated*].

162. *Jones v. State Bd. of Medicine*, 97 Idaho 859, 867, 555 P.2d 399, 407 (1976); *Johnson v. St. Vincent Hosp.*, 273 Ind. 374, 392, 404 N.E.2d 585, 597 (1980); *Atneson v. Olson*, 270 N.W.2d 125, 133 (N.D. 1978); *Carson v. Maurer*, 120 N.H. 925, 932, 424 A.2d 825, 831 (1980); *Graley v. Stayatham*, 74 Ohio Op. 2d 316, 320, 343 N.E.2d 832, 837 (C.C. 1976). The use of the means scrutiny test may have a significant impact on the results of the constitutional review. As one commentator explained:

[T]hose courts striking down medical malpractice legislation on equal protection grounds have all utilized a more exacting standard of review than mere rationality. Although these courts have explicitly concentrated on the factual nexus between purpose and means, an implicit evaluation of conflicting interests also appears to play a prominent role in the judicial decision-making process. The courts have balanced the state goals, assuring adequate health care and lowering malpractice insurance costs, with the interests of the victims of medical malpractice. In each instance, the constitutional balance has favored those victims.

Note, *California's Medical Injury Compensation Reform Act: An Equal Protection Challenge*, 52 S. CAL. L. REV. 829, 880 (1979).

163. *Fein v. Permanente Medical Group*, 338 Cal. 3d 137, 178-79, 695 P.2d 665, 694-95, 211 Cal. Rptr. 368, 397-98 (1985) (Mosk, J., dissenting); *id.* at 172-73, 695 P.2d at 691-92, 211 Cal. Rptr. at 393 (Bird, C.J., dissenting).

164. *Johnson v. St. Vincent Hosp.*, 273 Ind. 374, 404 N.E.2d 585 (1980). The court in *Johnson* did not expressly state that it was utilizing the means scrutiny test in analyzing the Indiana review panel statute. It did, however, adopt the test enunciated in *Reed v. Reed*, 404 U.S. 71 (1971), considered a leading means scrutiny case. *Id.* at 392, 404 N.E.2d at 597.

165. See *supra* notes 162-63.

166. See *supra* note 164.

below, the Illinois Supreme Court should reach the same result in the unlikely event<sup>167</sup> it adopts the means scrutiny standard as the appropriate test for assessing the review panel procedure.

It seems highly unlikely that the Illinois Supreme Court would question the existence of a crisis in the medical malpractice insurance market given the enormous volume of written documentation of the problem.<sup>168</sup> Rather, the court would merely inquire whether the review panels will substantially alleviate that crisis. Should the panel procedure succeed in facilitating the early dismissal or settlement of malpractice claims, they surely will reduce litigation costs and produce greater actuarial certainty in the prediction of future medical malpractice awards.<sup>169</sup> Review panels, unlike traditional pre-trial settlement conferences, should provide an impetus for the early disposal of claims because they make issue determinations that are based on a systematic review of the evidence, including expert testimony, and therefore give the litigants a fair indication of the probable outcome at trial.<sup>170</sup> Thus, the classification scheme contained in Public Act 84-7 "rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation."<sup>171</sup>

The foregoing analysis would be avoided if the Illinois Supreme Court declined to use a means scrutiny test in its equal protection analysis of Public Act 84-7. Such a decision would place Illinois in conformity with the vast majority of states that have considered the question.<sup>172</sup> In fact, there is some doubt as to the continued viability of the means scrutiny standard.<sup>173</sup> For example, during the same term in which it purportedly adopted the means scrutiny standard, the United States Supreme Court used the rational basis test in a case challenging a classification that allegedly infringed on the right of privacy to choose one's lifestyle.<sup>174</sup> Whether an individual's interest in compensation for bodily injury is more fundamental than his privacy interest in choosing a lifestyle is at best debatable.

Perhaps the strongest argument against the use of a means scrutiny test and in favor of the more relaxed rational basis standard is the avoidance of

---

167. See *supra* notes 137-140 and accompanying text.

168. See *supra* notes 1, 2 and 17 and accompanying text.

169. See *supra* note 2.

170. *Accord* Lenore, *Mandatory Medical Malpractice Mediation Panels - A Constitutional Examination*, 44 *INS. COUNS. J.* 416, 425 (1977).

171. *Reed v. Reed*, 404 U.S. 71, 76 (1971).

172. See *supra* note 140. In *Paro v. Longwood Hosp.*, 373 Mass. 645, 649 n.6, 369 N.E.2d 985, 988 n.6 (1977), the Massachusetts Supreme Court adopted the rational basis test without considering the means scrutiny test because the facts did not present a need to consider a test stricter than the rational basis test.

173. See *Redish, supra* note 2, at 773-74.

174. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (upholding ordinance restricting use of land to one-family dwelling while defining "family" to include not more than two unrelated persons).

the dangers inherent in a generally unrepresentative judiciary vetoing complex social policy judgments formulated by the representative units of government.<sup>175</sup> As one commentator wrote:

It is . . . almost impossible to predict whether reform legislation will accomplish its goal. This uncertainty underscores the inadvisability of employing means scrutiny analysis to test medical malpractice legislation. The use of means scrutiny in this situation creates all the obstacles to legislative action that the Supreme Court's rejection of strict scrutiny in all but a handful of cases is designed to avoid: social legislation developed by representative legislative bodies is seriously frustrated by judicial speculation.<sup>176</sup>

### B. *The Cost-Shifting Provision*

Section 2-1019(c), the "cost-shifting" provision of the medical review panel statute, deserves particularly close equal protection analysis. This section states:

Where a party who has rejected a unanimous determination of the review panel does not prevail on the issue of liability on the trial of the case and has not been granted a post trial motion to upset the result of trial, the trial court on the motion of any prevailing party shall summarily tax to the rejecting party the costs, reasonable attorneys' fees and expenses of the prevailing party incurred in connection with the review panel and the trial. Such motion may not be made or granted if both the prevailing party and non-prevailing party have rejected the determination of the medical review panel.<sup>177</sup>

The apparent intent of this provision is to encourage medical malpractice litigants to abide by unanimous review panel determinations. Such an intent is consistent with the goal of the review panel process generally: the encouragement of early settlements for obviously meritorious claims and rapid dismissals for patently non-meritorious ones.<sup>178</sup>

The incentives embodied in Section 2-1019(c) spring from differences in treatment afforded to two groups of medical malpractice litigants: those who reject unanimous panel determination and those who do not. Litigants fall into the latter category either because they accept a unanimous determination or because the determination was not unanimous. Such a classification scheme does not rest on grounds "wholly irrelevant" to the achievement of a conceivably legitimate purpose,<sup>179</sup> and thus passes the rational basis test. This result is made clear by considering all malpractice claims on a spectrum from least to most meritorious. Under the minimal scrutiny of the rational

---

175. Redish, *supra* note 2, at 776.

176. *Id.* at 782.

177. P.A. 84-7, § 2-1019(c), 1985 Ill. Legis. Serv. 17 (West).

178. *See supra* note 9.

179. *McGowan v. Maryland*, 366 U.S. 420, 425 (1961).

basis test, it seems likely that a court would conclude that some relationship might exist between the claims at both extremes of the spectrum, *i.e.*, claims for which the panel process encourages an early disposal, and claims which receive unanimous panel determinations. The correspondence need not be perfect, as the Supreme Court explained in *Dandridge v. Williams*.<sup>180</sup>

In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality . . . ." The problems of government are practical ones and may justify, if they do not require, rough accommodations — illogical; it may be, and unscientific . . . .<sup>181</sup>

A different result would likely follow were a means scrutiny test employed.<sup>182</sup> Making the cost-shifting provision applicable only to those claims that are subject to unanimous panel determinations simply does not bear a "fair and substantial relation to the object of the legislation."<sup>183</sup> This is due to the impossibility of determining where a claim would fall on the frivolous-meritorious spectrum solely by considering the unanimous or non-unanimous character of a panel decision. Additionally, it is difficult to differentiate qualitatively between a unanimous panel determination on damages and a non-unanimous determination where the sole dissenter would award slightly less or slightly more in damages. Yet, the difference between these two determinations is highly significant for the litigant who would opt to proceed to trial.

Two hypothetical examples should illustrate the point. In the first situation, plaintiff "A" obtains a unanimous panel determination in which the defendant is liable in the amount of \$100,000. A is convinced that the panel severely understated his damages. He may proceed to trial only at the risk of being assessed substantial costs and fees.<sup>184</sup> Plaintiff "B," on the other hand, receives a 2-1 determination of no liability, with the dissenting panel member finding only nominal damages. B may proceed to trial with impunity. In the second situation, both malpractice claimants suffer identical injuries at the hands of the same physician. Plaintiff "C" obtains a unanimous determination of liability and damages in the amount of \$250,000. Plaintiff "D" receives a 2-1 determination with the dissenting panel member agreeing as to liability but disagreeing as to damages. Only D may proceed to trial without fear of being assessed costs and fees.

---

180. 397 U.S. 471 (1970).

181. *Id.* at 485 (quoting *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61, 78 (1911) and *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70 (1913)).

182. See *supra* notes 151-57 and accompanying text.

183. *Reed v. Reed*, 404 U.S. 71, 76 (1971).

184. See *infra* notes 278-79 and accompanying text.

A similar analysis resulted in the invalidation of an Illinois statute that required arbitration of small personal injury claims arising out of automobile accidents.<sup>185</sup> The classification was found to be defectively underinclusive because it excluded, without substantial justification, operators of other motor vehicles.<sup>186</sup> Similarly, the California Supreme Court struck down that state's guest statute<sup>187</sup> utilizing the means scrutiny test enunciated in *Reed v. Reed*.<sup>188</sup> The statute was held unconstitutional on three grounds: 1) that it improperly distinguished between automobile guests and other kinds of social invitees who were not barred from suing their hosts, 2) that it irrationally discriminated between paying and nonpaying automobile guests, and 3) that it irrationally distinguished automobile guests from other persons injured in automobile accidents.<sup>189</sup>

If found to be unconstitutional under a means scrutiny test, Section 2-1019(c) might be cured by amendment to allow assessment of fees and costs only on those parties who the trial judge determines acted vexatiously or in bad faith by proceeding to trial. Such discretionary taxing of fees and costs is consistent with a number of statutes.<sup>190</sup> The classifications established by such a provision, *i.e.*, those who have been judicially determined to have proceeded to trial in bad faith and those who have not, would certainly bear a close relationship to the statutory goals of the panel review process.

### C. Diversity Jurisdiction

A final question under equal protection is whether the Illinois review panel process will apply to litigants who bring medical malpractice actions in

---

185. *Grace v. Howlett*, 51 Ill. 2d 478, 283 N.E.2d 474 (1972).

186. *Id.* at 487-77, 283 N.E.2d at 478-79.

187. *Brown v. Merlo*, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

188. 404 U.S. 71, 76 (1971).

189. The court found that the statute was designed to serve two purposes: first, "to promote hospitality by insulating generous drivers from lawsuits instituted by ungrateful guests who have benefited from a free ride"; and second, "to eliminate the possibility of collusive lawsuits." In rejecting these grounds, the court stated: "[Neither of these justifications] provides a reasonable explanation for the tripartite discrimination established by the statute and thus neither provides a rational basis to uphold the section . . ." *Brown v. Merlo*, 8 Cal. 3d 855, 864, 506 P.2d 212, 218, 106 Cal. Rptr. 388, 394 (1973).

190. *See, e.g.*, Government in the Sunshine Act, 5 U.S.C. § 552b(i) (1983) ("costs may be assessed against the plaintiff only where the court finds that the suit was initiated by the plaintiff primarily for frivolous or dilatory purposes"); Jury System Improvements Act of 1978, 28 U.S.C. § 1875(d)(2) (1983) ("[t]he court may award a prevailing employer a reasonable attorneys' fee as part of the costs only if the court finds that the action is frivolous, vexatious, or brought in bad faith"); ILL. REV. STAT. ch. 110, § 2-611 (1983) ("[a]llegations and denials, made without reasonable cause and found to be untrue, shall subject the party pleading them to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleading, together with a reasonable attorney's fee . . ."); ILL. REV. STAT. ch. 110A, § 219(a) (1983) (authorizes assessment of reasonable expenses, including reasonable attorney's fees, for refusal to answer deposition questions if such refusal was "without substantial justification"). Interestingly, the statute struck down in *Wright v. Central DuPage Hosp. Ass'n*, 63 Ill. 2d 313, 320-21, 347 N.E.2d 736, 739-40 (1976), provided for *discretionary* taxation of costs and fees upon the rejecting party.

federal court under diversity jurisdiction. If the Illinois procedure does not apply in federal court, the review panel provisions arguably make an irrational distinction between medical malpractice plaintiffs who are Illinois residents and those who are not.<sup>191</sup>

Several commentators have argued that state statutes requiring submission of malpractice claims to pre-trial screening panels have no place in federal court.<sup>192</sup> In *Wheeler v. Shoemaker*,<sup>193</sup> which involved a Rhode Island statute, a federal district court reached the same conclusion. The statute,<sup>194</sup> like that of Illinois,<sup>195</sup> requires judicial referral of all medical malpractice cases to a pre-trial screening panel immediately after the suit has been filed with the state court. The district court concluded that the Rhode Island screening panel functioned as "adjunct of the superior court" and, as such, would impermissibly deprive the federal court of "the congressional grant of diversity jurisdiction."<sup>196</sup> Accepting this rationale, the Illinois panels are as much or more a part of the state trial courts.<sup>197</sup> However, all the other federal courts that have addressed the issue reject *Wheeler* and require litigants to comply with the applicable screening panel statute before their medical malpractice claims may be heard in federal court.<sup>198</sup>

---

191. The argument may be stated as follows: nonresident plaintiffs may avoid the review panel procedure altogether by opting to bring suit in federal court, while a resident plaintiff, who claims injury at the hands of the same Illinois-based health provider, must undergo the review panel process. Such a distinction between Illinois residents and non-residents is not related to the statutory goal of reducing medical malpractice insurance costs.

192. See Comment, *The Confrontation Between State Compulsory Medical Malpractice Screening Statutes and Federal Diversity Jurisdiction*, 1980 DUKE L.J. 546; Comment, *Mandatory State Malpractice Arbitration Boards and the Erie Problem: Edelson v. Soricelli*, 93 HARV. L. REV. 1562 (1980). See also Turner, *Medical Malpractice Arbitration on the Erie Railroad*, 11 U. TOL. L. REV. 1, 25-26 (1979), in which the author concluded that the relevant case law

do[es] not require or forbid the implementation of state malpractice arbitration procedures in the federal court, but [it does] require that the costs of implementation be considered by the federal courts. If those arbitration costs are found to be excessive, the state's arbitration procedures should be ignored.

193. 78 F.R.D. 218 (D.R.I. 1978). See also *Edelson v. Soricelli*, 610 F.2d 131 (3d Cir. 1979) (Rosen, J., dissenting) (Pennsylvania Health Care Act advances no legitimate state interest and countervails many important federal considerations).

194. R.I. GEN. LAWS § 10-19-1 *et seq.*

195. P.A. 84-7, § 2-1013, 1985 Ill. Legis. Serv. 11 (West).

196. *Wheeler v. Shoemaker*, 78 F.R.D. 218, 221-23 (D.R.I. 1978). See *McClellan v. Carland*, 217 U.S. 268 (1910); *Railway Co. v. Whitton's Adm'r*, 80 U.S. (13 Wall.) 270 (1871); *Floeter v. C.W. Transp., Inc.*, 597 F.2d 1100, 1102 (7th Cir. 1979) (per curiam).

197. The Rhode Island and Illinois statutes share the following features: the presiding judge of the county court appoints the prospective panel members, plaintiffs must file their claims in state court prior to panel review, and the litigants may proceed to trial should either party reject the panel's determination. See R.I. GEN. LAWS § 10-19-1 *et seq.* (1981); P.A. 84-7, § 2-1013 *et seq.*, 1985 Ill. Legis. Serv. 11 (West). The Illinois statute further provides that the judge who is a member of the panel shall make all determinations of law. P.A. 84-7, § 2-1013 *et seq.*, 1985 Ill. Legis. Serv. 15 (West).

198. *Edelson v. Soricelli*, 610 F.2d 131 (3d Cir. 1979); *Woods v. Holy Cross Hosp.*, 591 F.2d

In diversity actions, federal courts must apply those state statutes that create or are bound up with rights and obligations as opposed to those that merely control the form, mode, manner and means of enforcing such rights and obligations.<sup>199</sup> Medical review panels further substantive purposes by discouraging prosecution of baseless claims, encouraging settlements, and seeking generally to stabilize the health care system.<sup>200</sup> *Wheeler* erred in failing to consider these substantive purposes underlying the Rhode Island panel statute.<sup>201</sup>

Mandatory pre-trial screening provisions do not divest a court, state or federal, of jurisdiction.<sup>202</sup> They merely burden the right of access for the purpose of achieving the above-stated substantive goals. To the extent that a federal court is deprived of jurisdiction by reference to a screening panel, the ouster is only temporary. If either party rejects the panel decision, the

---

1164 (5th Cir. 1979); *Hines v. Elkhart Gen. Hosp.*, 603 F.2d 646 (7th Cir. 1979); *Seoane v. Oriho Pharm., Inc.*, 472 F. Supp. 468 (E.D. La. 1979); *Davison v. Sinai Hosp. of Baltimore, Inc.*, 462 F. Supp. 778 (D. Md. 1978); *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).

199. Rules of Decision Act, 28 U.S.C. § 1652 (1983); *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). See *Hanna v. Plumer*, 380 U.S. 460, 475 (1965) (Harlan, J., concurring) (federal court should apply state rule "if the choice of rule would substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation"); *Byrd v. Blue Ridge Elec. Corp.*, 356 U.S. 515, 536 (1958) (federal court must determine whether state requirement is "merely a form and mode of enforcing the immunity [or] a rule intended to be bound up with the definition of the rights and obligations of the parties"). See also, *Szantay v. Beech Aircraft Corp.*, 349 F.2d 60, 63 (4th Cir. 1965) (if state provision is substantive right or obligation at issue, or is procedure intimately bound with state right or obligation, it is controlling); *Conway v. Chemical Leaman Tank Lines, Inc.*, 540 F.2d 837 (5th Cir. 1976) (state evidence rule so bound with state substantive law that federal courts sitting in state should accord it same treatment as state courts).

200. See *Woods v. Holy Cross Hosp.*, 591 F.2d 1164, 1174 (5th Cir. 1979) ("One significant factor causing the rising insurance rates was an increase in malpractice litigation, and one way to reduce such litigation was to screen out non-meritorious claims through the use of liability mediation panels"). By encouraging abandonment of meritless claims and settlement of good claims, pre-trial screening panels may serve the broader purpose of inhibiting medical malpractice litigation, which in turn will help relieve the medical malpractice crisis. See *Redish & Phillips, Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356, 399 n.228, 400 n.231 (1977).

201. Alexander, *State Medical Malpractice Screening Panels in Federal Diversity Actions*, 21 ARIZ. L. REV. 959, 997 (1979).

202. The United States Supreme Court has held applicable in diversity suits various "door closing" state statutes; that is, acts which do not relate to the underlying merits of the plaintiff's claim but merely prevent its enforcement for some extrinsic reason. See *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949) (statutory requirement that foreign corporations doing business in Mississippi file with state name of designated agent upon whom process can be served, with failure to comply resulting in forfeiture of right to bring or maintain action in state court); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) (security bond requirement as precondition to litigation). See also *Vestal & Foster, Implied Limitations on the Diversity Jurisdiction of Federal Courts*, 41 MINN. L. REV. 1, 7-8 (1956).

action will continue in federal court in normal fashion,<sup>203</sup> and thus, diversity jurisdiction remains intact.

In accordance with public policy considerations and the great weight of authority,<sup>204</sup> the Illinois review panel procedure will likely be held applicable in federal diversity actions. Hence, the potential equal protection problems do not arise.

#### V. SPECIAL LEGISLATION

The prohibition against "special legislation" found in the Illinois Constitution<sup>205</sup> is related to the requirements of the federal and state equal protection clauses. Article IV, section 13 states: "The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination."<sup>206</sup> This restriction on local or special laws can be violated in two ways: first, by making a statute apply to a person or entity that is explicitly named in the statute when such specificity is unnecessary; or second, by making a statute apply to a described class of persons or entities in a manner that is illogical and unfair.<sup>207</sup> While the first special legislation test does not apply to Public Act 84-7,<sup>208</sup> the second test has potential relevance.<sup>209</sup>

The extent to which the second special legislation test differs from an equal protection analysis has not always been clear. In *Grace v. Howlett*,<sup>210</sup> the Illinois Supreme Court claimed that while the special legislation and equal protection "provisions of the 1970 Constitution cover much of the same terrain, they are not duplicates."<sup>211</sup> Yet, during that same term the

---

203. P.A. 84-7, § 2-1018, 1985 Ill. Legis. Serv. 16 (West).

204. See *supra* note 198.

205. For a similar special legislation analysis, see Redish, *supra* note 2, at 782-84.

206. ILL. CONST. art. IV, § 13 (1970). Other state constitutions contain similar prohibitions. See generally Cloe & Marcus, *Special and Local Legislation*, 24 KY. L.J. 351 (1936).

207. See generally *Anderson v. Wagner*, 79 Ill. 2d 295, 313-14, 402 N.E.2d 560, 568-69 (1979) (if classification bears reasonable and proper relation to purpose of act and evil it seeks to remedy, it does not violate constitutional proscription of special or local laws); G. BRADEN & R. COHN, *supra* note 89, at 203-26 (1969); Illinois Legislative Council, *1970 Illinois Constitution Annotated* 36 (1983).

208. Public Act 84-7 does not expressly name specific persons or entities to which it applies. This compares with statutes appropriating money for specific places, persons, or businesses. Such statutes are allowed because a general law cannot be made applicable to such specific situations. See *supra* note 207 and accompanying text.

209. Judge Wosik ruled that the panel provisions of Public Act 84-7 violated the special legislation clause of the Illinois constitution. *Bernier v. Burris*, 85 CH 6625, Trial Court Conclusion of Law No. A-2 (a) (filed June 25, 1985), reprinted in *Chicago Daily Law Bulletin*, Dec. 19, 1985, at 2.

210. 51 Ill. 2d 478, 283 N.E.2d 474 (1972).

211. *Id.* at 487, 283 N.E.2d at 479. See *Jones v. State Bd. of Medicine*, 97 Idaho 859, 872, 555 P.2d 399, 417 (1976) (Idaho's special legislation provision and equal protection clause "were adopted to serve distinctly different purposes").



court formulated a special legislation test that sounds strikingly similar to the rational basis standard it uses in equal protection analysis:

If there is a reasonable basis for the classification, and it bears a reasonable and proper relation to the purposes of the act and the evil it seeks to remedy, it does not violate the constitutional proscription of special or local laws. . . . If there is a reasonable basis for differentiating between the class to which the law is applicable and the class to which it is not, the General Assembly may constitutionally classify persons and objects for the purpose of legislative regulation or control, and may pass laws applicable only to such persons or objects. . . . Such classifications will be sustained where founded upon a rational difference of situation or condition existing in the objects upon which it rests, and where there is a reasonable basis for the classification in view of the objects or purposes to be accomplished.<sup>212</sup>

In later decisions, the Illinois Supreme Court has specifically equated the special legislation provision with the equal protection clause.<sup>213</sup> Thus, in accordance with the foregoing equal protection analysis,<sup>214</sup> as well as the traditional deference given to legislative classifications in special legislation analysis,<sup>215</sup> Public Act 84-7 does not appear to be special legislation in violation of the Illinois Constitution.<sup>216</sup>

212. *Bridgewater v. Hotz*, 51 Ill. 2d 103, 111-12, 281 N.E.2d 317, 322 (1972). *Cf.* *Jones v. State Bd. of Medicine*, 97 Idaho 859, 877, 555 P.2d 399, 417 (1976):

If, as asserted by appellants here, the Act in question is found to have been enacted in response to a problem of statewide concern in Idaho and by alleviation of that problem, is found to serve the health and welfare of the people of the state of Idaho, and the means adopted in the Act are reasonably related to the solution of those problems, then the Act will survive the challenge that it is offensive to [the special legislation provision].

213. *People v. Gurell*, 98 Ill. 2d 194, 205-06, 456 N.E.2d 18, 23 (1983) (upholding constitutionality of the Nursing Home Care Reform Act of 1979); *Anderson v. Wagner*, 79 Ill. 2d 295, 313-15, 402 N.E.2d 560, 568-69 (1979) (upholding constitutionality of § 21.1 of Illinois Limitations Act).

214. *See supra* notes 137-50 and accompanying text.

215. *See Anderson v. Wagner*, 79 Ill. 2d 295, 315, 402 N.E.2d 560, 569 (1979). *See also* Turkington, *Equal Protection of the Laws in Illinois*, 25 DE PAUL L. REV. 385, 410-22 (1976); Whalen & Wolf, *Constitutional Law: The Prudence of Judicial Restraint Under the New Illinois Constitution*, 22 DE PAUL L. REV. 63, 77-79 (1972); Comment, *Medical Malpractice Statute of Limitations as Special Legislation*, 55 CHI.-[ ]KENT L. REV. 519 (1979).

216. *Accord DiAntonio v. Northampton-Accomack Memorial*, 628 F.2d 287, 292 (4th Cir. 1980) (panel statute consistent with Virginia special legislation provision). *Cf. Wright v. Central DuPage Hosp. Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976) (attempt to limit recovery in medical malpractice actions to \$500,000 struck down on ground that it violated special legislation provision of Illinois Constitution). The *Wright* court relied on its earlier opinion in *Grace v. Howlett*, 51 Ill. 2d 478, 283 N.E.2d 474 (1972), in which it invalidated a no-fault automobile insurance plan limited to private vehicles. The court saw no basis for distinguishing its holding in *Grace* that "to the extent that recovery is permitted or denied on an arbitrary basis a special privilege is granted in violation of the Illinois Constitution." *Wright v. Central DuPage Hosp. Ass'n*, 63 Ill. 2d 313, 329, 283 N.E.2d 736, 743 (1976).

## VI. TRIAL BY JURY

The fourteenth amendment does not guarantee the right to trial by jury for civil suits tried in state courts.<sup>217</sup> Article I, section 13 of the Illinois Constitution, however, does provide such a guarantee: "The right of trial by jury as heretofore enjoyed shall remain inviolate."<sup>218</sup> This section, like its predecessors in prior Illinois constitutions, preserves the right to a jury trial as it existed at common law when the state's first constitution was enacted.<sup>219</sup> Hence, because they had the right at common law, medical malpractice plaintiffs are entitled to have their claims heard and decided by juries.<sup>220</sup>

As the Illinois Supreme Court has explained, any statute regulating the right of trial by jury "should be liberally construed in favor of the right, and the inclination of the court should be to protect and enforce the right."<sup>221</sup> Yet, despite its recognition of a public policy favoring free access to the courts,<sup>222</sup> the Illinois Supreme Court has written:

---

217. *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1916). See also *Chicago R.I. & Pac. R.R. v. Cole*, 251 U.S. 54 (1919) (states' almost limitless powers to govern use of a jury in state civil suits).

218. ILL. CONST. art. I, § 13 (1970).

219. See *Londrigan, Judge or Jury - Who Weighs the Evidence?* 55 ILL. B.J. 732, 733-36 (1967). In *George v. People*, 167 Ill. 447, 455, 47 N.E. 741, 743 (1897), the Illinois Supreme Court wrote:

We do not think there is any substantial difference between the provisions incorporated in the three constitutions [of Illinois, adopted in 1818, 1848 and 1870]. The right of trial by jury was the same under one constitution as under the other. The right protected by each constitution was the right of trial by jury as it existed at common law.

In 1976, the court wrote:

This section [i.e., Article I, section 13 of the 1970 Constitution] is the same as Article II, section 5 of the 1870 Constitution except that it deletes an out-dated reference to the office of justice of the peace, which has been abolished.

*Wright v. Central DuPage Hosp. Ass'n*, 63 Ill. 2d 313, 324, 347 N.E.2d 736, 740 (1976).

220. See *Ritchev v. West*, 23 Ill. 329 (1860) (Abraham Lincoln appearing as counsel for the defendant physician) (*cited in Wright v. Central DuPage Hosp. Ass'n*, 63 Ill. 2d 313, 327, 347 N.E.2d 736, 742 (1976)), in which court noted that right to recover in jury trial for injuries arising from medical malpractice existed at common law and was not creature of General Assembly.

221. *Hudson v. Leverenz*, 10 Ill. 2d 87, 93, 139 N.E.2d 255, 258 (1956) (quoting *Morrison Hotel & Rest. Co. v. Kirsner*, 245 Ill. 431, 433, 92 N.E. 285, 286 (1910)). See also *Hernandez v. Power Constr. Co.*, 43 Ill. App. 3d 860, 863, 357 N.E.2d 606, 610 (1976), *aff'd*, 73 Ill. 2d 90, 382 N.E.2d 1201 (1978):

The strong policy of this state as expressed in Article I, section 13 of the Illinois Constitution of 1970 is to favor jury trials, and the Illinois Supreme Court has ruled that the power of the legislature to regulate the right of jury trial should be liberally construed in favor of the right to a jury trial.

222. In 1984, the Illinois Appellate Court wrote, "The overriding public policy of Illinois is that potential suitors should have free and unfettered access to the courts." *Hutchinson v. Reaves*, 126 Ill. App. 3d 87, 89, 466 N.E.2d 1259, 1260 (1984). See also *Stephens v. Kasten*, 383 Ill.

The constitutional guarantee of the right to trial by jury is not so inelastic as to render unchangeable every characteristic and specification of the common-law jury system. Flexibility for the adjustment of details remains, as long as the essentials of the system are retained.<sup>223</sup>

Consistent with that view, Illinois courts have upheld statutes and rules which govern the time in which a jury demand may be made<sup>224</sup> and the procedure through which a jury may be selected.<sup>225</sup> The central issue here, then, is whether Public Act 84-7 constitutes a reasonable limitation on the right to trial by jury.

In *Wright v. Central DuPage Hospital Association*,<sup>226</sup> the Illinois Supreme Court found that a 1975 medical review statute<sup>227</sup> violated the constitutional right to trial by jury. Like Public Act 84-7, the 1975 statute required medical malpractice litigants to proceed before a review panel consisting of a judge, a physician and a lawyer as a condition precedent to a jury trial.<sup>228</sup> The 1975 statute also made the panel determination inadmissible at trial<sup>229</sup> as does Public Act 84-7.<sup>230</sup> Unfortunately, the much distinguished<sup>231</sup> and highly criticized<sup>232</sup> *Wright* decision never identified the precise constitutional defi-

127, 135, 48 N.E.2d 508, 512 (1943) (court abused its discretion in denying late jury demand when such demand "did not tend to inconvenience the court or parties litigant or prejudice any rights in any manner whatsoever"). The right to trial by jury is important at the federal level as well. See *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959) (defendant could not be deprived of full jury trial in antitrust controversy); *Jacob v. New York City*, 315 U.S. 752 (1942) (plaintiff entitled to submit to jury issue of whether his injury resulted from employer's negligence).

223. *People v. Lobb*, 17 Ill. 2d 287, 299, 161 N.E.2d 325, 331-32 (1959). See also *Walker v. New Mexico & So. Pac. R.R.*, 165 U.S. 593, 596 (1897) ("[T]he courts may not set aside any legislative provision [dealing with jury trial procedure] . . . because the form of action — the mere manner in which questions are submitted — is different from that which obtained at the common law"). Courts have limited the seventh amendment test in part to permit adoption of modern forms of pleading and practice. *Twining v. New Jersey*, 211 U.S. 78, 101 (1908).

224. *Stephens v. Kasten*, 383 Ill. 127, 133, 48 N.E.2d 508, 511 (1943) (upholding statute requiring party to make affirmative and timely request in order to obtain jury trial and explaining that "of necessity, the need for a systematic order of procedure requires that there be regulation of the time when the right to a jury trial may be requested"). See also *Hudson v. Leverenz*, 10 Ill. 2d 87, 139 N.E.2d 255 (1956) (court did not abuse its discretion when, pursuant to statutory authority, it refused jury demand first made only two weeks prior to trial).

225. *People v. Lobb*, 17 Ill. 2d 287, 297-303, 161 N.E.2d 325, 331-34 (1959) (upholding Supreme Court Rule governing conduct of voir dire examination).

226. 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

227. P.A. 79-960, § 58.8, 1975 Ill. Laws 2888.

228. *Id.*

229. *Id.*

230. P.A. 84-7, § 2-1018(d), 1985 Ill. Legis. Serv. 16 (West).

231. Several courts, in upholding medical review panel statutes, have distinguished *Wright* as resting on purely Illinois state constitutional grounds. See, e.g., *Woods v. Holy Cross Hosp.*, 591 F.2d 1164, 1170 n.11 (5th Cir. 1979); *Seoane v. Ortho Pharm., Inc.*, 472 F. Supp. 468, 471 n.2 (E.D. La. 1979).

232. See *supra* note 71.

ciency of the 1975 statute. Before reaching the jury trial issue, the court already had invalidated the review panel procedure on the ground that it violated constitutional separation-of-powers requirements.<sup>233</sup> The finding that the panel process violated the right to jury trial seemed to flow from the court's earlier conclusion: "Because we have held that these statutes providing for medical review panels are unconstitutional [on separation-of-powers grounds], it follows that the procedure prescribed therein as a prerequisite to jury trial is an impermissible restriction on the right of trial by jury . . . ."<sup>234</sup> This lack of clarity in reasoning prompted one commentator to write:

It is difficult to understand how the jury trial argument contributes anything to the court's earlier conclusion. If, as the court had concluded, the Illinois procedure violated separation-of-powers principles, it was unconstitutional regardless of its effect on the jury trial right. If, on the other hand, the procedure did not violate another constitutional provision, the court failed to articulate any independent basis for finding a violation of the jury trial right. It is unfortunate that the court felt it necessary to reach the jury trial question in a manner that at best causes confusion and at worst stands as a precedent that may be taken beyond its seemingly irrelevant use in *Wright*.<sup>235</sup>

However elusive the reasoning in *Wright* may be, it is clear that the court did not intend a blanket prohibition against all medical review panel statutes. Immediately following its jury trial conclusion, the court wrote: "In so holding, however, we do not imply that a valid pretrial panel procedure cannot be devised."<sup>236</sup> Several years later, the court reiterated the point: "The critics have read *Wright* too broadly. . . . [T]he case did not hold that all statutory provisions creating panels for the review of malpractice claims were unconstitutional."<sup>237</sup>

In order to examine Public Act 84-7, it is necessary to provide a framework for analyzing the constitutional right to trial by jury.<sup>238</sup> Thus, we shall examine how the review panel process affects the two elements of the jury trial right: the right of the parties to present their cases before a jury<sup>239</sup> and the right to have a jury exercise its constitutional power to determine the facts in controversy.<sup>240</sup>

---

233. *Wright v. Central DuPage Hosp. Ass'n*, 63 Ill. 2d 313, 323, 347 N.E.2d 736, 739-40 (1976).

234. *Id.* at 324, 347 N.E.2d at 741.

235. Redish, *supra* note 2, at 794.

236. *See Wright*, 63 Ill. 2d at 324, 347 N.E.2d at 741.

237. *Anderson v. Wagner*, 79 Ill. 2d 295, 304, 402 N.E.2d 560, 564 (1979).

238. For an analysis similar to the one that follows, *see Lenore, supra* note 170, at 420.

239. *See infra* notes 241-97 and accompanying text.

240. *See infra* notes 298-311 and accompanying text.

### A. Access to the Courts

#### 1. Delay and Added Expense

While the review panel procedures do not preclude a jury trial on a medical malpractice claim, they do delay the parties in reaching a jury and increase the cost of those suits that go to trial.<sup>241</sup> Appellate decisions recognize that "reasonable restrictions prescribed by law"<sup>242</sup> may be imposed on the right of access to court so long as they are not so onerous as to make the right "practically unavailable."<sup>243</sup> Although causing some judicial apprehension,<sup>244</sup> the delays and added expenses imposed by medical review panels have generally been found to be not so substantial as to deny access.<sup>245</sup> The Illinois Supreme Court should join the majority of courts that have reviewed similar statutes and find that the review panel procedures contained in Public Act 84-7 do not, because of the pre-trial burdens they impose, deny medical malpractice litigants access to the courts.

The imposition of procedural prerequisites to the exercise of the right to trial by jury is within the state's power to regulate access to its judicial system.<sup>246</sup> Medical review panels resemble mandatory pretrial conferences,<sup>247</sup> which are imposed by statute in almost every state<sup>248</sup> and have been upheld

---

241. Comment, *First Checkup*, *supra* note 2, at 681.

242. *Carter v. Sparkman*, 335 So. 2d 802, 805 (Fla. 1976) (upholding Florida review panel statute).

243. *In re Smith*, 381 Pa. 223, 112 A.2d 625, *appeal dismissed sub nom.* *Smith v. Wissler*, 350 U.S. 858 (1955) (upholding mandatory pre-trial mediation procedure).

244. In upholding the Florida review panel statute, the Florida Supreme Court proclaimed that "the pre-litigation burden cast upon the claimant reaches the outer limits of constitutional tolerance." *Carter v. Sparkman*, 335 So. 2d 802, 806 (Fla. 1976). Justice England, in his concurring opinion, expressed concern "that persons who seek to bring malpractice lawsuits must be put to the expense of two full trials of their claims, assuming the medical defendant chooses to put plaintiff to her proof before the panel." *Id.* at 807. Significantly, because it makes panel conclusions admissible at trial, the Florida panel statute is arguably more burdensome to malpractice claimants than is the panel procedure contained in Public Act 84-7. *See infra* notes 256-74 and accompanying text.

245. *See, e.g.*, *Woods v. Holy Cross Hosp.*, 591 F.2d 1164, 1173 n.16 (5th Cir. 1979); *Carter v. Sparkman*, 335 So. 2d 802, 805-06 (Fla. 1976); *Johnson v. St. Vincent Hosp.*, 273 Ind. 374, 382-91, 404 N.E.2d 585, 592-96 (1980); *Paro v. Longwood Hosp.*, 373 Mass. 645, 651-54, 369 N.E.2d 985, 989-90 (1977); *Prendergast v. Nelson*, 199 Neb. 97, 103-06, 256 N.W.2d 657, 663-64 (1977); *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 512-13, 261 N.W.2d 434, 444 (1978). *But see infra* notes 266-274 and accompanying text.

246. For example, courts have upheld statutes requiring an affirmative and timely request for a jury, as opposed to a bench, trial. *See, e.g.*, *Odom v. Odom*, 133 Ill. App. 2d 869, 272 N.E.2d 272 (5th Dist. 1971); *Hayworth v. Bromwell*, 239 Ind. 430, 158 N.E.2d 285 (1959).

247. *See supra* notes 79-81 and accompanying text.

248. *See, e.g.*, FLA. R. CIV. PRO. 1.200 (1985); ILL. REV. STAT. ch. 110A, § 218 (1983); IND. TR. PRO. R. 16 (1985); MASS. R. CIV. PRO. 16 (1978); NEB. R. CIV. PRO. 16 (1985).

as non-violative of the right to trial by jury.<sup>249</sup> Significantly, the review panel statute does not delay the filing of a suit, as did a divorce statute that was held unconstitutional by the Illinois Supreme Court in *People ex rel. Christiansen v. Connell*.<sup>250</sup> Rather, the review panel provisions are analogous to “[divorce] statutes which require a lapse of a given period of time after the filing of suit . . . before a final decree for divorce may be entered,”<sup>251</sup> which have been upheld.<sup>252</sup> In a prophetic discussion regarding the constitutional bounds of the state’s ability to limit the right of access, the court in *Christiansen* wrote:

There are many areas of conflict and of litigation in which the participation of a judge or mediator or counselor might be desirable. The volume of personal injury litigation might be reduced, for example, or labor disputes averted, by preliminary mediation before a judge.<sup>253</sup>

Medical review panels are the sort of reasonable limitation on the right of access envisioned in *Christiansen*. In fact, the pre-trial burdens imposed by the review panel process are accompanied by benefits to the litigants which partially mitigate the negative impact of the procedure. As the Indiana Supreme Court explained:

The participation by the parties in the panel process will satisfy to a great extent their preparation needs. Such satisfaction will tend to reduce total aggregate time for trial preparation. Thus, the delay complained of will be offset to an appreciable extent. The cost to the party in whose favor the opinion is rendered would be in the range that such party would expect to pay to develop such evidence individually. And the cost to the party against whom the opinion is rendered has been subjected to a cost by the process which would be much the same as he expects to pay to discover his opponent’s evidence.<sup>254</sup>

Also, the delay occasioned by review panels will be relatively short because the statute requires the panel procedure to be completed within 570 days, or

---

249. See, e.g., *State ex rel. Kennedy v. District Court of the Fifth Jud. Dist.*, 121 Mont. 320, 326-28, 194 P.2d 256, 260 (1948) (upholding statute prohibiting civil case from being set for trial before pre-trial conference is held). See also *Fidelity & Deposit Co. v. United States*, 187 U.S. 315 (1902) (requirement of preliminary hearing does not impermissibly infringe on seventh amendment right to trial by jury).

250. 2 Ill. 2d 332, 118 N.E.2d 262 (1954).

251. *Id.* at 345, 118 N.E.2d at 268.

252. *Id.*

253. *Id.* at 348, 118 N.E.2d at 269. Immediately following this passage, the court wrote, “It is arguable that the State should be able to make full use of its judiciary, wherever their services might be valuable. But that result cannot be reached unless our constitutional doctrine of separation of powers is first altered.” *Id.* For a discussion of the separation of powers issue, see *supra* notes 56-85.

254. *Johnson v. St. Vincent Hosp.*, 273 Ind. 374, 384, 404 N.E.2d 585, 592 (1980). *Accord Lacy v. Green*, 428 A.2d 1171, 1179 (Del. Super. Ct. 1981). In fact, it may be a constitutional requirement that statements made during a panel proceeding be admissible at trial for impeachment purposes. See *Linder v. Smith*, 629 P.2d 1187 (Mont. 1981) (based on due process grounds).

a little more than a year and a half.<sup>255</sup> Given the typical backlog characteristic of Illinois courts, the panel procedure should be completed during the time in which the parties would normally be waiting for the case to be heard.

Although a statute may be constitutional in theory, it may prove to be unconstitutional as applied.<sup>256</sup> Should the Illinois Supreme Court decide that the nineteen-month statutory period for panel action<sup>257</sup> does not deny a medical malpractice plaintiff access to court, the court could later reverse itself if, *in practice*, panel action consumes a longer period of time so as to effectively deny access to the courts.<sup>258</sup> To date, two state supreme courts have reviewed statistical analyses of the operation of review panel statutes and have found them to be unconstitutional.<sup>259</sup> Additionally, at least one commentator has urged that a third review panel statute be invalidated on this ground.<sup>260</sup>

Under the Florida Medical Mediation Act, the panel was required to hold a final hearing within ten months from the date the claim was filed.<sup>261</sup> Failure to meet this ten-month limitation resulted in the panel losing jurisdiction over the case,<sup>262</sup> with the parties, through no fault of their own, being forced into court.<sup>263</sup> Such loss of jurisdiction fell most heavily on the defendant, who lost the benefits of the panel mediation process. Consequently, the Florida Supreme Court held that application of this strict ten-month limitation period was "arbitrary and capricious" and a violation of the defend-

---

255. See *supra* note 34.

256. See *Aldana v. Holub*, 381 So. 2d 231 (Fla. 1980) (review panel statute unconstitutional as applied); *Mattos v. Thompson*, 491 Pa. 385, 421 A.2d 190 (1980) (review panel statute unconstitutional as applied); Note, *Constitutionality Re-Evaluated*, *supra* note 161 (review panel statute should be found unconstitutional as applied). *Contra* *Johnson v. St. Vincent Hosp.*, 273 Ind. 374, 404 N.E.2d 585 (1980) (review panel statute constitutional as written); *Parker v. Children's Hosp. of Phil.*, 483 Pa. 106, 394 A.2d 932 (1978) (review panel statute constitutional as written). One decision that upheld the constitutionality of a review panel act suggested that such an act may be unconstitutional as applied. See *Seoane v. Ortho Pharm., Inc.*, 660 F.2d 146, 151 (5th Cir. 1981) ("The legislation we review has not been shown to be unreasonable, either on its face or *as applied*") (emphasis added).

257. A panel must render its decision no later than 570 days, or 19 months, after the parties are at issue on the pleadings. P.A 84-7, § 2-1013, 1985 Ill. Legis. Serv. 3, at 11 (West), provides the following time limits: (1) the court shall order a panel convened no longer than 90 days after the parties are at issue on the pleadings; (2) the panel shall convene within 120 days of such order; (3) the panel shall render its decision within 180 days after convening; and (4) the decision period may, upon the ruling of the judicial member, be extended up to a maximum of 180 days.

258. See *supra* note 43.

259. *Aldana v. Holub*, 381 So. 2d 231 (Fla. 1980); *Mattos v. Thompson*, 491 Pa. 385, 421 A.2d 190 (1980).

260. See Note, *Constitutionality Re-Evaluated*, *supra* note 161.

261. FLA. STAT. ANN. § 786.44(3) (West Supp. 1983).

262. "If no hearing on the merits is held within 10 months of the date the claim is filed, the jurisdiction of the mediation panel on the subject matter shall terminate, and the parties may proceed in accordance with the law." *Id.*

263. *Aldana v. Holub*, 381 So. 2d 231, 236 (Fla. 1980).

ant's due process rights.<sup>264</sup> Further, the court claimed that any extension of the statutory time limitation would be an "effective denial of one's access to the courts."<sup>265</sup> As a result of its inability to operate as legislatively designed, the Florida act was held unconstitutional.

Two years after having declared the Pennsylvania Health Care Service Malpractice Act constitutional,<sup>266</sup> the Pennsylvania Supreme Court reviewed five years of statistical data concerning panel operations.<sup>267</sup> The court stated that the excessive delays<sup>268</sup> occasioned by the review process "are unconscionable and irreparably rip the fabric of public confidence in the efficiency and effectiveness of our judicial system."<sup>269</sup> The court concluded that "the delays involved in processing . . . claims under the . . . Act result in an oppressive delay and impermissibly infringe upon the constitutional right to a jury."<sup>270</sup>

While holding the act unconstitutional, the Pennsylvania Supreme Court reaffirmed its faith in arbitration as "a viable, expeditious, alternative method of dispute resolution."<sup>271</sup> The court claimed that its "conclusion merely indicat[ed] the inability of *this* statutory scheme to provide an effective alternative dispute resolution forum in the area of medical malpractice."<sup>272</sup> Perhaps multi-member review panels are inherently incapable of encouraging prompt resolution of medical malpractice claims. As one commentator observed:

There are several reasons for these delays. One of the major causes is the panel member selection process. The system has failed to attract enough willing panelists due to inadequate compensation. In addition, some non-populous states have difficulty finding specialists in the field of health care practicing within the state. There are concomitant problems of professional bias and friendship, failure of attorneys to complete discovery procedures promptly and scheduling problems when all panelists are practicing professionals.<sup>273</sup>

Only experience with Public Act 84-7 will provide the answer to whether such delays can be avoided.<sup>274</sup>

---

264. *Id.* at 238.

265. *Id.*

266. *Parker v. Children's Hosp. of Phil.*, 483 Pa. 106, 394 A.2d 932 (1978).

267. *Mattos v. Thompson*, 491 Pa. 385, 421 A.2d 190 (1980).

268. *Id.* at 393-96, 421 A.2d at 194-95.

269. *Id.* at 396, 421 A.2d at 195.

270. *Id.* at 396, 421 A.2d at 196.

271. *Id.* (quoting *Parker v. Children's Hosp. of Phil.*, 483 Pa. 106, 120, 394 A.2d 932, 939-40).

272. *Id.* at 397, 421 A.2d at 196 (emphasis added).

273. Sakayan, *Arbitration and Screening Panels: Recent Experience and Trends*, 17 F. 682, 688 (1982).

274. "[I]t is an accepted principle of constitutional law that deference to a coequal branch of government requires that [courts] accord a reasonable period of . . . time to test the effectiveness of legislation." *Mattos v. Thompson*, 491 Pa. 385, 387, 421 A.2d 190, 191 (1980) (quoting *Parker v. Children's Hosp. of Phil.*, 483 Pa. 106, 121, 394 A.2d 932, 940 (1978)).



## 2. Cost-Shifting Provision

In contrast with the delays and added expenses associated with the review panel procedure, the cost-shifting provision contained in Section 2-1019(c) tends to, in the words of *In re Smith*,<sup>275</sup> make access to the courts "practically unavailable."<sup>276</sup> Section 2-1019(c) provides that, when a party loses on the issue of liability at trial after rejecting a unanimous panel determination, "the trial court on motion of any prevailing party *shall summarily tax* to the rejecting party the costs, reasonable attorneys' fees and expenses of the prevailing party incurred in connection with the review panel and the trial."<sup>277</sup> The judge has no discretion in the assessment of these fees and costs. For medical malpractice litigants who are subject to unanimous panel determinations, the possibility of being taxed such fees and costs represents a disincentive to proceed with a jury trial that is so substantial that it makes the right of access practically unavailable.

These fees and costs are likely to average over \$50,000 a case,<sup>278</sup> and could be as high as \$500,000.<sup>279</sup> Such an assessment potentially confronts each malpractice plaintiff who is subject to a unanimous panel determination, regardless of the merit of his claim.<sup>280</sup> For example, a plaintiff who receives a unanimous finding of liability may be dissatisfied with the damage assessment. Because nobody can be certain of a trial's outcome the plaintiff proceeds to court at substantial risk. The plight of a malpractice defendant can be more serious. For example, a defendant may believe that a unanimous panel overstated plaintiff's damages. To demand a jury trial will almost inevitably cost this defendant plaintiff's fees and costs, since there is no quarrel with the finding of liability. The review panel statute contains no provision that allows a defendant, free of the cost-shifting section, to concede liability and merely have a jury determine only the amount of damages.

As the Illinois Supreme Court has stated, "[t]he constitution does not guarantee to the citizen the right to litigate without expense, but simply protects him from the imposition of such terms as unreasonably and injuriously interfere with his right to a remedy in the law. . . ." <sup>281</sup> Financial burdens on the right to trial by jury, then, are constitutionally acceptable so long as the financial imposition is reasonable. For example, Illinois courts

---

275. 381 Pa. 223, 122 A.2d 625, *appeal dismissed sub nom.* *Smith v. Wissler*, 350 U.S. 858 (1955).

276. *Id.* at 231, 112 A.2d at 629.

277. P.A. 84-7, § 2-1019(c), 1985 Ill. Legis. Serv. 17 (West) (emphasis added).

278. *Bernier v. Burris*, 85 CH 6625, Trial Court Finding No. B-3 (filed June 25, 1985), *reprinted in* Chicago Daily Law Bulletin, Dec. 19, 1985, at 2.

279. *Bernier v. Burris*, 85 CH 6625, Trial Court Finding No. B-1 (filed June 25, 1985), *reprinted in* Chicago Daily Law Bulletin, Dec. 19, 1985, at 2.

280. Other cost-imposing statutes, by contrast, are effectuated only upon a finding that the party's claim was without merit or that the challenged action was undertaken in bad faith. *See supra* note 190.

281. *Williams v. Gottschalk*, 231 Ill. 175, 179, 83 N.E. 141, 142 (1907).

have upheld a \$10 fee for the filing of tax objections,<sup>282</sup> a \$50 fee for the empanelling of a six-person jury,<sup>283</sup> and a \$100 fee for the empanelling of a twelve-person jury.<sup>284</sup> The Illinois Supreme Court has implied, however, that jury demand fees so high "as to price a trial by jury out of the market" unconstitutionally deny access to the courts.<sup>285</sup> In 1954 the court wrote: "Thus, for example, were the legislature to pass a law conditioning the right to petition for divorce upon the payment of a fee of \$1,000, such a law would, we believe, clearly . . . [violate] our constitution . . . ."<sup>286</sup>

In *In re Smith*, the court used its "practical unavailability" test to uphold the constitutionality of a mandatory pre-trial arbitration statute that required a losing party to pay the costs of the arbitration proceeding before being able to appeal to a trial *de novo*.<sup>287</sup> However, the court invalidated certain fees that were so high as to preclude appeal.<sup>288</sup> Significantly, the statute in *Smith* involved only small claims. Review panels consider claims that are much more expensive to litigate. Thus, the cost-shifting provision in Public Act 84-7 constitutes a far weightier barrier to trial.

One potentially acceptable means of encouraging compliance with a review panel determination is the bond requirement found in other medical review panel statutes. However, such bond requirements have encountered diametrical results when subjected to state constitutional review. A Massachusetts law provides a judge with the discretion to impose, as a precondition to trial, a bond of \$2,000 or higher for those cases the medical review panel finds have no merit.<sup>289</sup> While he may fix a lower amount if the plaintiff is indigent, he may not eliminate the bond requirement.<sup>290</sup> Significantly, the Massachusetts Supreme Court did not find the bond requirement to constitute an unconstitutional denial of access for the indigent because of the wide discretion granted to the judge.<sup>291</sup> As originally enacted, Arizona's review

---

282. *Sanko v. Carlson*, 69 Ill. 2d 246, 249-50, 371 N.E.2d 246, 248 (1977). *Cf.* *United States v. Kras*, 409 U.S. 434 (1973) (statutory requirement of payment of filing fees as condition precedent to obtaining discharge in bankruptcy has rational basis and does not deny indigents equal protection of law).

283. *People ex rel. Flanagan v. McDonough*, 24 Ill. 2d 178, 180 N.E.2d 486 (1962) (\$50 fee for six-person jury and \$100 fee for twelve-person jury upheld as reasonable). *See also* *Fried v. Danahey*, 46 Ill. 2d 475, 479, 263 N.E.2d 820, 822 (1970) (\$50 jury demand fee upheld as reasonable and not arbitrary).

284. *People ex rel. Flanagan v. McDonough*, 24 Ill. 2d 178, 180 N.E.2d 486 (1962).

285. *Id.* at 181, 180 N.E.2d at 487.

286. *People ex rel. Christiansen v. Connell*, 2 Ill. 2d 332, 342, 118 N.E.2d 262, 267 (1954) (struck down mandatory waiting period before filing of complaint seeking annulment).

287. *In re Smith*, 381 Pa. 223, 112 A.2d 625, *appeal dismissed sub nom. Smith v. Wissler*, 350 U.S. 858 (1955).

288. *Id.* at 232-33, 112 A.2d at 630. Here the court found unconstitutional the requirement that a losing party pay the fees of the arbitrators where the fees totaled \$225 in a case involving less than \$500.

289. MASS. GEN. LAWS ANN. ch. 231, § 60B (West 1980).

290. *Id.*

291. *Paro v. Longwood Hosp.*, 373 Mass. 645, 651-54, 369 N.E.2d 985, 990 (1977).

panel statute similarly required a plaintiff wishing to proceed to court after an adverse panel decision to post a \$2,000 bond payable to the defendant for his costs and fees should the plaintiff not prevail at trial.<sup>292</sup> The same bond applied to a defendant proceeding to trial following a panel determination favoring the plaintiff.<sup>293</sup> Upon motion, an Arizona judge could reduce the bond amount if the party required to post the bond was found to be indigent, "or upon other just cause," but he could not eliminate the bond requirement.<sup>294</sup> Unlike its Massachusetts counterpart, the Arizona Supreme Court found this last requirement to be a denial of the indigent's constitutional right of access to the court.<sup>295</sup> Subsequently, the Arizona legislature amended its medical review panel statute to eliminate the bond requirement.<sup>296</sup> A similar bond requirement in Illinois, waivable entirely for the indigent, would certainly constitute a far smaller burden on the right to access than does the cost-shifting provision contained in Section 2-1019(c) and could potentially be found constitutional.

### B. *Factual Determination by a Jury*

As one reviewing court succinctly stated, "[t]he gravamen of the right to jury trial is that a party asserting a claim is entitled to have a jury be the final arbiter of the facts in dispute."<sup>297</sup> In determining whether statutes affecting the operation of jury trials abridge the right of trial by jury, courts have formulated a test which differentiates between the form and the substance of the right.<sup>298</sup> As Justice Brandeis explained in an opinion approving

292. ARIZ. REV. STAT. ANN. § 12-567 (I) (1982).

293. *Id.* § 12-567 (J) (1982).

294. *Id.* § 12-567 (K) (1982).

295. *Eastin v. Broomfield*, 116 Ariz. 576, 586, 570 P.2d 744, 753 (1977).

296. ARIZ. REV. STAT. ANN. § 12-567 *et seq.* (1985 Cum. Supp.).

297. *Lacy v. Green*, 428 A.2d 1171, 1175 (Del. Super. Ct. 1981). In *People v. Lobb*, 17 Ill. 2d 287, 298, 161 N.E.2d 325, 331 (1959), the Illinois Supreme Court echoed this sentiment:

The right of trial by jury as it existed at common law is the right to have the facts in controversy determined, under the direction and superintendence of a judge, by the unanimous verdict of twelve impartial jurors who possess the qualifications and are selected in the manner prescribed by law.

298. The Illinois Supreme Court has written:

The constitutional guarantee of the right of trial by jury is not so inelastic as to render unchangeable every characteristic and specification of the common-law jury system. Flexibility for the adjustment of detail remains, as long as the essentials of the system are retained.

*People v. Lobb*, 17 Ill. 2d 287, 299, 161 N.E.2d 325, 332 (1959). In *People v. Schoos*, 399 Ill. 527, 536, 78 N.E.2d 245, 249-50 (1948), the court elaborated:

The essential requirements of a trial by jury at common law and preserved by the constitution are that there must be twelve impartial and qualified jurors, selected in the manner required by law, who shall unanimously decide the facts in controversy under the direction and superintendence of a judge. . . . The constitutional provision is not so inelastic, on the other hand, as to render unchangeable every characteristic

the use of auditors in complex cases to narrow the issues of fact for a jury and to express opinions on those facts:

The command of the Seventh Amendment that "the right of trial by jury shall be preserved" does not require that old forms of practice and procedure be retained. It does not prohibit the introduction of new methods for determining what facts are actually in issue, nor does it prohibit the introduction of new rules of evidence. Changes in these may be made. New devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right. The limitation imposed by the amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with.<sup>299</sup>

Thus, if the review panels do not interfere with the jury's ability to resolve all issues of fact in medical malpractice trials, this second element of the jury trial right is not infringed.

The review panel process contained in Public Act 84-7 in no way interferes with this important jury function because the panel reports are inadmissible at trial.<sup>300</sup> However, if the cost-shifting section is ruled unconstitutional,<sup>301</sup> the General Assembly might consider making panel reports admissible. This would provide a substitute incentive for litigants to comply with panel determinations and thereby help to effectuate the statutory goal of encouraging early settlements and dismissals of medical malpractice claims.<sup>302</sup> Additionally, the admissibility of panel determinations "will add more credibility to the review process, thereby causing the litigants to take the process more seriously and come to the panel better prepared."<sup>303</sup>

Such an admissibility rule, however, arguably infringes upon the power of a jury to determine the facts. Parties against whom panel determinations are rendered might claim that introduction of the panel findings is so prejudicial as to preclude a jury from making an independent assessment of the medical malpractice claim, even though the panel report is to be given

---

and detail of the common-law system.

Using this framework, the Illinois courts have upheld numerous statutes affecting the trial of a suit by jury. *See, e.g.,* *People v. Lobb*, 17 Ill. 2d 287, 161 N.E.2d 325 (1959) (upholding Supreme Court rule governing conduct of *voir dire* examination); *People ex rel. Denny v. Traeger*, 372 Ill. 11, 22 N.E.2d 679 (1939) (upholding statute directing county jury commissioners to include women on jury rolls); *People v. Kelly*, 347 Ill. 221, 179 N.E. 898 (1931) (upholding statute prohibiting trial judge from expressing opinions on facts to jury).

299. *In re Peterson*, 253 U.S. 300, 309-310 (1920). *Accord* *Walker v. New Mexico & S. Pac. R.R. Co.*, 165 U.S. 593 (1897) (*quoted with approval in* *People v. Kelly*, 347 Ill. 221, 225, 179 N.E. 898, 900 (1932)).

300. *See supra* note 30.

301. *See supra* notes 177-190, 275-295 and accompanying text.

302. *See supra* note 9.

303. *See Note, Constitutionality Re-Evaluated, supra* note 161, at 514. *See also* Alexander, *State Medical Malpractice Screening Panels in Federal Diversity Action*, 21 ARIZ. L. REV. 959, 971 (1979).

only "such weight as the jury . . . chooses to ascribe it."<sup>304</sup> As a New York trial court, in holding that state's review panel statute unconstitutional, reasoned:

Determinations of physician negligence virtually always involve the resolution of technical and complex factual issues. Couched in medical terminology and buttressed on either side by expert evidence, the burden on the petit juror to decipher and absorb such information is substantial. Enter now a recommendation with respect to liability of a panel composed of the most highly respected members of the community which has pre-digested the complexities and technicalities of the case. While not wishing to impute to the petit jury an active abdication of its prerogatives, one is inexorably led to the conclusion that the jurors will be passively drawn to adopt this prize panel's recommendation.<sup>305</sup>

The New York Appellate Court disagreed, rejecting the "assumption that no jury could evaluate a medical malpractice panel's recommendation with objectivity, or follow a trial court's instruction regarding the weight to be given it."<sup>306</sup> Rather, the court found that the "[n]et effect of the statute . . . has been to furnish the jury in a medical malpractice action with the opinion of an expert panel."<sup>307</sup> Reviewing courts in several states have opined that, with proper instructions by the court as to the weight to be given a panel finding, the determination becomes no more than an item of evidence to be considered by the jury.<sup>308</sup> The New York Court of Appeals recently wrote:

304. N.Y. JUD. LAW § 148-a (8) (McKinney 1984). See also OHIO REV. CODE ANN. § 2711.21 (c) (Page 1984); VA. CODE § 8.01-581.8 (1985 Cum. Supp.).

305. *Comiskey v. Arlen* (N.Y. Sup. Ct. 1976) (holding New York review panel statute unconstitutional), *rev'd*, 55 A.D.2d 304, 390 N.Y.S.2d 122 (2d Dept. 1976). See also *Beatty v. Akron City Hosp.*, 67 Ohio St. 2d 483, 498, 424 N.E.2d 586, 595 (1981) (Brown, J., dissenting) ("Clearly, the arbitration panel was designed as a check on the jury . . . As such, it suggests a lack of faith in the fairness of jury verdicts . . . [and therefore] is prohibited by our state constitution").

306. *Comiskey v. Arlen*, 55 A.D.2d 304, 307, 390 N.Y.S.2d 122, 125 (1976).

307. *Id.* at 315, 390 N.Y.S.2d at 130. *Accord Eastin v. Broomfield*, 116 Ariz. 576, 581, 570 P.2d 744, 749 (1977) ("In essence, the panel's finding constitutes an expert opinion which the jury may hear, evaluate, accept or reject just as it would any other expert opinion").

308. *Beatty v. Akron City Hosp.*, 67 Ohio St. 2d 483, 488, 424 N.E.2d 586, 590 (1981) ("For if the trial court instructs the jury with clarity and simplicity, their true roles as the exclusive finders of fact will prevail. . . . With the proper instructions by the court, there could be no constitutional infirmity to contaminate the purity of the jurors' prerogatives"). *Accord Seoane v. Ortho Pharm., Inc.*, 660 F.2d 146 (5th Cir. 1981) (Louisiana statute). Regarding the possible defendant bias of review panel determinations, one court wrote, "[I]f there is a risk that a panel opinion will favor a health care provider . . . simply by reason of the makeup of the panel, the jury can be made aware of it through articulate and imaginative advocacy." *Johnson v. St. Vincent Hosp.*, 273 Ind. 374, 385, 404 N.E.2d 585, 593 (1980). See also *Meeker & Co. v. Lehigh Valley R.R. Co.*, 236 U.S. 412 (1915) (provisions of Interstate Commerce Act, which make findings contained in Commission orders prima facie evidence of facts therein stated in suits to enforce reparations awards, does not infringe right of trial by jury); *Ex parte Peterson*, 253 U.S. 300 (1920) (court-imposed requirement of preliminary examination by auditor in complex accounting cases, with auditor's findings admissible, not violative of seventh amendment).

“The role of the medical malpractice mediation panel is to assist — not supplant — the trier of fact in reaching a verdict.”<sup>309</sup> One cannot presume that jurors will abdicate their role as triers of fact because, as the Ohio Supreme Court has noted:

Historically, jurors for the most part have proven their independence. They guard their roles with a unique jealousy. They accept with obvious pride the admonitions of the trial court that they are “sole judges of the facts.”<sup>310</sup>

#### CONCLUSION

Public Act 84-7 was enacted in response to the purported crisis in the medical malpractice insurance market. The Act establishes a review panel procedure designed to encourage prompt disposal of medical malpractice suits and thereby reduce the cost and consumption of time associated with the litigation of such claims in court. Declared unconstitutional by a state trial judge, the panel procedure is now before the Illinois Supreme Court for constitutional review.

Medical review panels do not violate the Judicial Article of the Illinois Constitution. Because panel members are compensated out of funds which are appropriated by the legislature and not collected from the litigants as fees, they are not fee officers. Also, because review panels are not empowered to issue and enforce final judgments, the panel process does not vest judicial power in non-judges, and subsequent court proceedings do not constitute trials *de novo*. In short, the panel process is not a “trial substitute”; it is mandatory pretrial procedure that is closely akin to the familiar settlement conference.

Review panels do not deprive litigants of their due process rights because (1) states are accorded great latitude to establish and alter procedures which govern access to their courts for the resolution of civil claims, and (2) a medical malpractice claimant has no property interest in preexisting procedures for enforcing his common-law right to a remedy. The contention that panels will be biased due to the presence of the physician member must be rejected as speculative.

The panel process should be found to comport with equal protection guarantees if the Illinois Supreme Court employs the rational basis standard; however, if a means-scrutiny test is used, the cost-shifting section will likely fail. That particular provision is not “wholly irrelevant” to the achievement of the purposes underlying Public Act 84-7, but it is not “substantially related” to those legislative goals because not all portions of the review panel provisions constitute special legislation under the Illinois Constitution.

---

309. *Treyball v. Clark*, No. 516 slip. op. (N.Y. Ct. App., Sept. 12, 1985).

310. *Beatty v. Akron City Hosp.*, 67 Ohio St. 2d 483, 488, 424 N.E.2d 586, 590 (1981).

In general, the panel process does not violate the right to trial by jury because it is a reasonable limitation on that right. Panel-imposed delays and expenses are relatively modest, and litigants retain the right to have a jury as the final arbiter of fact. The cost-shifting provision, however, does violate the jury trial right because, due to the size of the fees and costs that may be assessed, it makes the right practically unavailable for litigants who are subject to unanimous panel determinations.

Thus, with the exception of the cost-shifting section, the review panel procedure contained in Public Act 84-7 should be upheld as constitutional. It is noteworthy that Illinois courts have become increasingly receptive to non-court alternatives to dispute resolution.<sup>311</sup> In fact, the Illinois Judicial Conference this year successfully sought passage of a measure to allow the Illinois Supreme Court to establish a program of mandatory arbitration for cases in which the disputed amount does not exceed \$15,000.<sup>312</sup> Regardless of such public policy considerations, the issue before the Illinois Supreme Court is the constitutionality, not the social wisdom, of Public Act 84-7.<sup>313</sup>

---

311. Burleigh, *Justice by Arbitration in Illinois*, ILL. ISSUES 16 (Nov. 1985).

312. P.A. 84-844, 1985 Ill. Legis. Serv. 12, at 338 (West).

313. See *Treyball v. Clark*, No. 516 (N.Y. Ct. App. Sept. 12, 1985) (upholding medical malpractice statute) ("For the correction of alleged deficiencies in the statutory scheme, plaintiff's 'appeal lies to the ballot and to the legislative processes of government, not to the courts'"); *Grand Trunk Western R.R. Co. v. Industrial Comm'n*, 291 Ill. 167, 172, 125 N.E. 748, 750 (1919) (upholding statute) (in reviewing constitutionality of act, "neither the motive nor the wisdom of the General Assembly is ever questioned"). See also Redish, *supra* note 2, at 763; Comment, *Medical Malpractice Arbitration: A Comparative Analysis*, 62 VA. L. REV. 1285, 1286 (1976).

The Illinois Supreme Court ruled on the constitutionality of several provisions of the Medical Malpractice Reform Act in *Bernier v. Burris*, No. 62876 (March 1986). The court used the rational basis test to determine if the challenged provisions violated the equal protection or due process guarantees of the United States and Illinois constitutions and if some of the provisions constituted special legislation in violation of the Illinois Constitution. The court struck down only the provisions setting out the procedures for review panels, ILL. REV. STAT. 1985, ch. 110, §§ 2-1012 - 2-1020, as vesting judicial authority in the non-judicial members of the panel. *Id.* at 7. Justice Ryan, in a separate opinion, disagreed, arguing that the jury trial has traditionally vested the fact-finding process in non-judicial personnel. *Id.* at 22-23 (Ryan, J., concurring in part and dissenting in part). The court upheld the constitutionality of the provisions for periodic payment of damages, §§ 2-1701 - 2-1719; the modification of the collateral source rule, § 2-1205; the prohibition of punitive damages, § 2-1115; and the sliding scale for contingent fees that an attorney may charge for representing a plaintiff in a malpractice suit. *Id.* at 10-21.