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COMMENTS

THE MEDICAL MALPRACTICE REFORM ACT OF 1985: LEGISLATIVE SURGERY PRESCRIBED TO SAVE ILLINOIS REVIEW PANELS* **

Extreme law is often extreme injustice.

LATIN LEGAL MAXIM

I. INTRODUCTION

In the 1970's this country¹ first identified the symptoms of what experts soon labeled "the medical malpractice insurance crisis."²

* This article was voted as "Comment of the Year" by the 1985-1986 editorial board of The John Marshall Law Review.

** Immediately prior to publication, the Illinois Supreme Court in *Bernier v. Burris*, held that the state's 1985 Review Panels were unconstitutional. *Bernier v. Burris*, No. 62876, slip op. (Ill. Sup. Ct. June 20, 1986). To that extent the material in this comment has been superseded.

1. Countries other than the United States have also felt the impact of a medical malpractice crisis. In Great Britain for instance, medical malpractice problems have also arisen. U.S. CONGRESS HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 94th CONG. 1st SESS., AN OVERVIEW OF MEDICAL MALPRACTICE 259 (Comm. Print No. 4 1975). The 1970's problem in Great Britain manifested itself in a twofold increase in the percentage of malpractice claims between 1947 and 1971. *Id.* Conversely, Canadian experts note a lower level of medical malpractice activity as compared to either the United States or Great Britain. *Id.* at 254. Canadian experts cite a number of reasons justifying its lower level of malpractice activity. *Id.* Some of the following factors have been enumerated: 1) Canadian health care costs are born by a government compensation system; 2) Canadian physicians are less likely to give expert testimony against a fellow member of their medical society; 3) malpractice plaintiffs in Canada are unlikely to receive the benefit of the *res ipsa loquitur* doctrine; 4) Canadian statutes of limitations are very short and commence from the date treatment of the condition in question ends; 5) Canadian plaintiffs must pay their lawyer win or lose; they do not benefit from a contingency fee system; 6) plaintiffs who lose often must pay a portion of their opponent's defense costs; 7) the climate in Canada, both in the legal community and among the general public, is more sympathetic toward the physician than in the United States. *Id.*

2. A significant amount of controversy exists as to whether an actual "crisis" existed during the 1970's in the medical malpractice insurance field. Several commentators have claimed that the crisis was a physician-created figment of the media's imagination. See, e.g., Bell, *Legislative Intrusions into the Common Law of Medical Malpractice: Thoughts About the Deterrent Effect of Tort Liability*, 35 SYRACUSE L. REV. 939, 943 (1984) (refers to the malpractice problem as the "so-called crisis"); Gesler, *Medical Malpractice: Eliminating the Myths*, 68 MARQ. L. REV. 260, 262-70 (1985) (contends that the medical society and the insurance industry contrived the

Characteristics of the crisis included a dramatic growth in the num-

entire crisis and that, in fact, the two parties react to the concept of medical malpractice with a kind of unhealthy paranoia); 2 AMERICAN BAR ASSOCIATION SECTION OF LITIGATION, *THE CRISIS IN MEDICAL PROFESSIONAL NEGLIGENCE: FACT OR FANCY?* 16 (1977) (concedes a crisis in New York and California but contends no crisis exists in the rest of the country). See also Brief of Plaintiff-Appellee, Jean Mary Wright at 25-37, *Wright v. Central Du Page Hosp.*, 63 Ill.2d 313, 347 N.E.2d 736 (1976) (alleging that the problem is vastly overstated).

However, such skeptical articles are in the vast minority. In 1969, Senator Abraham Ribicoff, Chairman of the Subcommittee on Executive Reorganization of the Senate Subcommittee on Government Operations, conducted the first nationwide examination of the medical malpractice crisis in this country. Comment, *The Constitutional Consideration of Medical Malpractice Screening Panels*, 27 AM. U.L. REV. 161, 162 (1977) (citing *Senate Subcommittee on Executive Reorganization*, 91st CONG., 1st Sess., *A Study on Medical Malpractice: The Patient Versus the Physician* 1-6 (1969)). The Ribicoff subcommittee established that a crisis did in fact exist and documented some of the causes of the crisis. *Id.* For enumeration of some of the causes of the crisis, see *infra* this note.

The Ribicoff subcommittee's conclusions prompted President Richard M. Nixon to direct the Department of Health, Education and Welfare to establish a commission on medical malpractice to study the problem in greater depth. Comment, *The Constitutional Considerations of Medical Malpractice Screening Panels* 27 AM. U.L. REV. 161, 162 (1972) (citing DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE 5-10 (1973)). The resulting report statistically supported the existence of a medical malpractice insurance crisis. *Id.*

In 1975, Senator James F. Hastings orchestrated a third examination of the medical malpractice insurance crisis. HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 94th CONG., 1st Sess., AN OVERVIEW ON MEDICAL MALPRACTICE 3 (Comm. Print 1976). Senator Hastings' committee established that the malpractice insurance problem had been escalating to crisis proportions since the 1960's, *Id.* For example, the Hastings' committee found that between 1960 and 1970 the cost of professional liability insurance for physicians rose 540.8 percent and for surgeons it rose 949.2 percent. *Id.* at 4. The Hastings' report concluded that, among other things, physicians would be unable to obtain malpractice insurance if prices continued to increase. *Id.*

In 1975, the House of Representatives conducted a hearing to examine the impact that runaway malpractice premiums would have on the delivery of health care. *Medical Malpractice Insurance and its Effect on the Delivery of Health Care Services*, 1975: *Hearings Before the Subcomm. on Health and the Environment of the Committee on Interstate and Foreign Commerce*, 94th Cong., 1st Sess. 1 (1975). Among other things, the committee determined that, while the crisis was in fact characterized by rapidly increasing costs of medical malpractice insurance, the impact of the crisis was not limited to this factor. *Id.* at 1. Other attributes of the crisis included: increased costs to patients of defensive medicine, increased burdens on an already overtaxed judicial system, and an increasingly complicated burden in administering involved health care facilities. *Id.*

Numerous other literature abounds with discussions of the existence and the ramifications of the malpractice insurance crisis. See, e.g., CENTER FOR HEALTH POLICY RESEARCH OF THE AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, *THE MEDICAL MALPRACTICE DILEMMA* 2 (1977) (cites increased insurance premium cost to physicians and fact that insurance companies may stop providing coverage as two main factors in the crisis); P. DANZON, *THE FREQUENCY AND SEVERITY OF MEDICAL MALPRACTICE CLAIMS* V (1982) (cites fact that frequency and severity of malpractice claims outpaced inflation as contributing factors in the crisis) [hereinafter cited as *Severity of Malpractice*]; M. REDISH, *LEGISLATIVE RESPONSES TO THE MEDICAL MALPRACTICE CRISIS: CONSTITUTIONAL IMPLICATIONS* 1 (1977) (describes the cost of medical malpractice insurance as a horror story that shocks the senses) [hereinafter cited as *LEGISLATIVE RESPONSE*]; M. TODD, *THE AVAILABILITY AND COST OF MALPRACTICE INSURANCE* 2 (1975) (states physicians will have to suspend practice due to their inability to

ber of lawsuits against health care workers³ and a skyrocketing increase in the size of jury awards.⁴ As a result, the number and size of

financially afford malpractice premiums).

3. A growth in the number of lawsuits against health care workers is, of course, one of the key factors in the malpractice insurance crisis. This element is often referred to as the frequency of claims factor. This historical development of the increase in liability suits had an insidious onset. It was not until 1930 that liability suits against physicians began to materialize in any significant number. AMER. MED. A. SPECIAL TASK FORCE ON PROFESSIONAL LIABILITY AND INSURANCE, PROFESSIONAL LIABILITY IN THE '80s REPORT 1 at 3 (1984) [hereinafter cited as AMA REPORT 1]; see also Flemma, *Medical Malpractice: A Dilemma in the Search for Justice*, 68 MARQ. L. REV. 237 (1985) (includes lengthy history of medical malpractice suits from 400 A.D. to 1985). Since 1930 there has been a steady increase in the frequency of claims, an increase which eventually reached a plateau during World War II. AMA REPORT 1, at 3. After World War II, professional liability suits against physicians surfaced again with their frequency slowly rising until the 1960's. *Id.* at 4. Concurrent with the rise of medical malpractice lawsuits was an increased complexity in the technology used in medical care delivery. *Id.* Although no one questions the marvels of these new diagnostic and therapeutic techniques in modern medicine, these new advances brought with them potential hazards that were unknown historically. *Id.* Thus, the steady escalation in the frequency of medical malpractice lawsuits became even more rapid as technology developed. *Id.* For example, between 1935 and 1975 eighty percent of all medical malpractice lawsuits were filed in the final five years of that forty year period. *Id.* This is remarkable because the final five years were also the most medically sophisticated years of that period. *Id.*

Between 1976 and 1978 the frequency of claims against physician insurers plateaued temporarily. *Id.* at 6. In 1979, however, claims once again began to rise. *Id.* at 13. The number of claims against physician-owned insurance companies between 1979 and 1983 were as follows: 1979 saw 9,915 claims, in 1980 12,797 claims were filed, in 1981 15,450 claims, in 1982 17,895 claims, and in 1983 there were 21,104 claims filed against the physician-owned insurance company. *Id.* In other words there was a 53 percent increase from 1979 to 1983. In sum, the Special Task Force Report clearly indicated rapid increases in lawsuits against health care workers. *Id.*

4. Another contributing factor to the medical malpractice insurance crisis was a growth in the dollar value awarded by juries. This factor is sometimes referred to as the severity of claims element of the medical malpractice crisis. The severity of claims factor is perceived to be more significant than the increase in frequency of claims. AMA REPORT 1, *supra* note 3, at 11. It is more significant than the frequency of claims factor in its effect upon the cost of the liability insurance for the physician. *Id.*

One manifestation of the increase in severity of claims has been the sudden rise in the number of jury awards exceeding one million dollars. Richard, *Malpractice Losses are Building—Again*, 58 HOSPITALS 108 (1984). The historical rise in claims in the early 1970's caused many insurance carriers to abandon the medical malpractice insurance market. *Id.* During the early 1970's, however, there were only about 3 to 5 verdicts in excess of one million dollars handed down per year. *Id.* By the late 1970's the number of million dollar verdicts per year had climbed to the teens. *Id.* In 1980 the number of million dollar verdicts skyrocketed to fifty. *Id.* In 1981 there were forty-five of these million dollar verdicts. *Id.* In 1984, 5 of the 10 largest jury verdicts rendered in Cook County, Illinois resulted from malpractice claims. *Malpractice Cases had Largest Awards in Illinois County*, AMER. MED. NEWS 30 (Feb. 22, 1985). All five awards ranged in the millions of dollars. *Id.* The largest verdict went to a plaintiff who was granted 21.2 million dollars in damages. *Id.*

Traditionally, the largest verdicts have always gone to birth-injured infants. *Id.* at 19. By 1984 the jury awards for fetal injuries averaged at \$1,452,211. *Id.* at 19. This mammoth payout to birth-injured infants further evidences the trend toward an increased frequency of awards in excess of one million dollars. *Id.* at 12. A recent malpractice case in Illinois resulted in a structured settlement which may eventually pro-

insurance claims rose precipitously, and the cost of professional medical liability insurance augmented sharply.⁵ Some physicians summarily passed on the cost of increased premiums to their patients.⁶ Physicians who chose not to pass on the entire burden either

vide seventy-five million dollars to be paid over the life of the victim (an infant), if the child lives to maturity. *Id.*

These gigantic awards are crippling the malpractice insurance market. The experts perceive the 1984—1985 crisis to be more severe than the crisis in the 1970s. *Id.* at 14. Funds may not be available to pay patient awards. *Id.* Insurance companies are operating at a loss. *Id.* Furthermore, because of the increase in awards, the cost of liability insurance continues to rise. For a discussion of the increased cost of liability insurance see *infra* note 5. This continues the seemingly endless cycle of the malpractice insurance crisis.

5. One of the biggest problems underlying the malpractice crisis is the astounding increase in the cost of medical professional liability insurance for physicians. For instance, between 1975 and 1983, the cost of liability premiums rose by more than 80 percent for all practitioners. AMA REPORT 1, *supra* note 3, at 8. Furthermore, in more litigious parts of the country, certain physician specialists paid premiums as high as \$70,000 per year. *Id.* In 1983 Illinois physicians' insurance premiums amounted to as high as \$42,700 annually. AM. MED. A. SPECIAL TASK FORCE ON PROF. LIABILITY AND INSURANCE, PROFESSIONAL LIABILITY IN THE '80'S REPORT 2 II (1984) [hereinafter cited as AMA REPORT 2].

In 1983, physician malpractice premiums in other parts of the country were similarly high. *Id.* New York physicians paid an average of \$12,400 per year. *Id.* This was the highest average premium paid annually by physicians in any state. *Id.* Indiana physicians paid an average of \$1,200 per year which was the lowest average premium paid anywhere in the country. *Id.* Indiana's lower average rate may be partially attributable to the comprehensive package of tort reform measures that have been enacted and held constitutional by the Indiana Supreme Court. See generally Johnson v. St. Vincent Hosp., 273 Ind. 374, 404 N.E.2d 585 (1980).

6. One of the major concerns surrounding any medical malpractice reform act is the inevitable limitations that such legislation imposes upon the rights of the victims of medical negligence. However, one of the major focuses of the Illinois State Medical Society's campaign against the malpractice crisis is to prove to the public that everyone is an inevitable victim of the crisis. ILLINOIS STATE MED. SOC'Y, MALPRACTICE: NOBODY WINS . . . EVERYBODY PAYS 5 (no date provided, but contains materials up to 1985, available at Illinois State Medical Inter-Insurance Exchange, 20 N. Michigan Ave., Chicago, Illinois, 60602). Clearly, no business can silently absorb the astounding cost of medical professional liability insurance. *Id.* Undoubtedly, physicians pass on the costs of their malpractice premiums to their patients. *Id.* An American College of Obstetrics and Gynecology (ACOG) study showed that 50 percent of all obstetricians and gynecologists increased their fees two or more times in the last two years. *Id.* The physicians studied by ACOG cited malpractice insurance as the major factor causing the increase in their rates. *Id.* Therefore, every patient who has to pay more for the cost of their health care, becomes at least the financial victim of the malpractice crisis.

Not only does every person have to pay more for their health care, but other more insidious results of the malpractice crisis have increased the cost of health care to the patient. One major factor which has caused an increase in the cost of health care is the cost of what has been labeled "defensive medicine." AMA REPORT 1, *supra* note 3, at 16. Basically what has occurred is that physicians, sensitive to malpractice litigation, have changed their methods of practice in order to minimize lawsuits. ILLINOIS STATE MED. SOC'Y MALPRACTICE: NOBODY WINS . . . EVERYBODY PAYS, 5 (no date provided, but contains material up to 1985). Doctors' treatment modes now include defensive tactics meant to decrease their potential vulnerability to malpractice. *Id.* These defensive tactics include: additional tests, longer stays in the hospital for observation, and consultation with specialists to confirm diagnosis and treatment. *Id.* One study conducted by the American Medical Association estimates that 30 to 40

quit their practice⁷ or limited it to the care of a lower medical risk patient population less likely to be litigiously active against physicians.⁸ Both solutions possibly shielded physicians from some lawsuits, but neither solution ultimately remedied the medical malpractice crisis.⁹

State legislatures, sensitive to the crisis, have enacted a myriad of tort reform measures¹⁰ designed to remedy the situation. One of

percent of all physician-ordered tests are defensive. *Id.* at 6. It is estimated that in 1982 the cost of defensive medicine in Illinois amounted to an astounding \$725 million. *Id.*; see also Kotulak, *Useless Care Pads Bills*, *AMA Journal Says*, Chicago Tribune, September 6, 1985, at 1, Col. 2.

Another hidden cost of the malpractice crisis lies in the fact that physicians have found it necessary to eliminate certain high-risk procedures from their portfolio of treatment options. *Id.*; see also *The Hidden Cost of Health Care: Malpractice*, 167 ILL. MED. J. 302 (1985). In fact, many physicians have limited the types of patients that they will treat. *Id.* Patients who fall into undesirable "high risk" categories are summarily refused treatment. *Id.* Patients that are refused necessary treatment are perhaps the most severely affected victims of the malpractice crisis.

Another hidden cost of the malpractice crisis is the emotional stress inflicted upon the medical community by the increased incidence of litigation. One researcher has found that doctors involved in malpractice litigation have exhibited the following psychological as well as physical symptoms: 1) headaches; 2) gastro-intestinal disorders; 3) coronary occlusions; and 4) symptoms associated with major depressive disorders such as anger, rage and loss of sleep. *The Cost of Doing Business*, 167 ILL. MED. J. 383 (1985). Unlike other professions, physicians are expected to be able to respond immediately in life and death situations. Physicians crippled by the emotional trauma associated with lawsuits cannot possibly be expected to provide the same quality of treatment as those unencumbered by such emotional distress.

7. Some physicians have actually quit practicing medicine because of growing pressures associated with the explosion in the medical malpractice market. Reprint of speech given by Malcolm C. Todd, M.D., president of the American Medical Association, *The Availability and Cost of Malpractice Insurance*, National Conference of State Legislatures (May 8, 1975). The real tragedy, according to Dr. Todd, is that the physicians that are precisely the most capable practitioners are the ones that have felt the greatest impact of the malpractice insurance crisis. *Id.* Dr. Todd cites, as an example of one of the casualties of the medical malpractice crisis, an orthopedic surgeon from Madison, Wisconsin who quit his practice because of his inability to obtain liability insurance coverage. *Id.* See also *With a Certain Degree of Sadness*, 167 ILL. MED. J. 378 (1985) (describes one Illinois physician's choice to abandon her practice rather than increase her fees). Dr. Todd pleaded with the National Conference of State Legislatures to find a solution before "the crisis" becomes a tragedy. Reprint of speech given by Malcolm C. Todd, M.D., president of the American Medical Association, *The Availability and Cost of Malpractice Insurance*, National Conference of State Legislatures (May 8, 1975).

8. For a discussion of how physicians have limited their practice, see *supra* note 6.

9. For a discussion of the growth in lawsuits, see *supra* note 3.

10. Every state except West Virginia has enacted some tort reform measure aimed at curing each state's respective malpractice crisis. *AMA REPORT 2, supra* note 5, at 20-21 (includes comprehensive chart delineating tort reform measures enacted in all 49 states). The Virgin Islands has, in fact, enacted certain malpractice reform measures, including a medical malpractice review panel. *Quionnes v. Charles Harwood Mem. Hosp.*, 573 F. Supp. 1101 (D. V.I. 1983) (medical malpractice review panel of the Virgin Islands held constitutional). Medical malpractice tort reform measures enacted around the country include *inter alia*: 1) elimination of *ad damnum* clauses (*ad damnum* clauses are the part of the plaintiff's initial pleading which

the most controversial portions of these remedial legislative enactments is the establishment of medical malpractice review panels.¹¹ This pre-trial device requires the plaintiff in a medical malpractice action to submit his or her claim to a review panel before commencing legal proceedings in an appropriate court of law.¹² Although state-by-state variations cause the panels to assume chameleonic forms,¹³ all of the review panels enacted into law share similar underlying purposes. All of the review panels share the dual goals of encouraging the expeditious settlement of meritorious claims while facilitating withdrawal of claims that, in the opinion of the panel,

states the amount of monetary damages and other relief requested); 2) provisions for binding arbitration of medical claims (either voluntary or involuntary); 3) statutorily imposed attorney fee regulation (usually provides caps on an attorney's contingent fees); 4) provisions for awards of costs, expenses and fees (usually provide that where one party to a lawsuit loses at trial, he will be taxed the reasonable costs, expenses and fees of his opponent); 5) provisions for collateral source deductions in medical malpractice cases; 6) provisions regulating the qualifications and use of expert witnesses; 7) provisions for liability caps (limits the liability of defendants in medical malpractice lawsuits); 8) provisions for patient compensation funds (state government-operated mechanism established to pay any judgment portion in excess of statutorily defined amount); 9) provisions for structured payments of malpractice verdicts (periodic rather than lump sum payment of verdict amount); 10) provisions for pre-trial screening panels; 11) enactments defining the standard of care to which the health care worker is to be held; and 12) alterations in the statute of limitations for medical malpractice lawsuits (usually alters the tolling period for minors and eliminates the "long tail" on liability created by the date-of-discovery rule). AMA REPORT 2, *supra* note 5, at 22-23. For a discussion of the "long tail" of liability created by the date-of-discovery rule, see *infra* notes 81-86 and accompanying text. See also NATIONAL CONFERENCE OF STATE LEGISLATURES, A LEGISLATOR'S GUIDE TO THE MEDICAL MALPRACTICE ISSUE (1976) (includes state-by-state summary of national legislative activities on medical malpractice).

11. Various forms of medical malpractice review panels have been enacted in at least thirty states. AMA REPORT 2, *supra* note 5, at 20-21 (includes chart of all states which have enacted review panels); see, e.g., ARIZ. REV. STAT. ANN. § 12-567 (Supp. 1982-83); ARK. STAT. ANN. §§ 72-626-627 (1979); DEL. CODE ANN. tit. 18, §§ 6803-6814 (Supp. 1982); FLA. STAT. ANN. §§ 768-44, -47 (West Supp. 1983); HAWAII REV. STAT. §§ 671.11, 13 (Supp. 1982); IND. CODE ANN. §§ 16-95-9 to -9 (Burns 1983); KAN. STAT. ANN. §§ 65-4901 to -4909 (1980); LA. REV. STAT. ANN. § 40:1299.47 (West Supp. 1983); MASS. GEN. LAWS ANN. ch. 231, § 60B (West Supp. 1983); MO. REV. STAT. §§ 538.010-.055 (Supp. 1983); NEB. REV. STAT. §§ 44-2840-2847 (1978); N.H. REV. STAT. ANN. §§ 519-A:1 to :10 (1974); N.M. STAT. ANN. §§ 41-5-14 to -24, -28 (1982); N.Y. JUD. LAW § 148-a (McKinney 1983); OHIO REV. CODE ANN. §§ 2711.21-.24 (Page 1981); PA. STAT. ANN. tit. 40, §§ 1301.301-606 (Purdon Supp. 1983-84); TENN. CODE ANN. §§ 29-26-101 to -121 (1980); VA. CODE §§ 8.01-581.2 to .9 (Supp. 1983); see also THE INSTITUTE OF JUDICIAL ADMINISTRATION, MEDICAL MALPRACTICE PANELS IN FOUR STATES (1977) (in-depth analysis of panels in New York, New Mexico, New Jersey and Pennsylvania).

The operation of review panels trigger numerous constitutional and practical problems and are thus extremely controversial. For a discussion of the constitutional attacks against panel procedure in twenty states, see *infra* note 72 and accompanying text.

12. Comment, *Constitutional Challenges to Medical Malpractice Review Boards*, 46 TENN. L. REV. 607, 612 (1979).

13. For a discussion of variations in panel proceedings, see *infra* notes 47-51 and accompanying text.

are founded on insufficient evidence of professional negligence.¹⁴ Despite these admirable goals the establishment of review panels has been met with a plethora of state and federal constitutional challenges. The highest courts of several states, in fact, have held their respective panels unconstitutional.¹⁵

In 1985 the Illinois General Assembly determined that the exacerbation of the medical malpractice crisis in Illinois warranted legislative action.¹⁶ In response, the legislature enacted a comprehensive package of legislation intended to quell the escalating crisis.¹⁷ Included in this package was Illinois' version of the medical malprac-

14. LEGISLATIVE RESPONSE, *supra* note 2, at 13; see also Abraham, *Medical Malpractice Reform: A Preliminary Analysis*, 36 MD. L. REV. 489, 514 (1977) (review panels are intended to promote early settlement of meritorious claims and voluntary dismissal of nonmeritorious claims); Comment, *Arizona's Medical Malpractice Act Is Not Unconstitutional*, 9 TEX. TECH. L. REV. 489 (1977) (panels are intended to encourage settlements, voluntary dismissals, and decrease the number of large judgments); Comment, *Louisiana Medical Malpractice Review Panel Upheld Under Equal Protection Scrutiny*, 53 TUL. L. REV. 640, 643 (1979) (panels are designed to encourage settlement of meritorious claims and to expedite abandonment of questionable claims); Comment, *The Massachusetts Medical Malpractice Statute: A Constitutional Perspective*, XI SUFFOLK U.L. REV. 1289, 1299 (1977) (panels are intended to reduce the number of meritless malpractice suits) [hereinafter cited as *Massachusetts Statute*]; Comment, *Medical Malpractice Legislation: The Kansas Response to the Medical Malpractice Crisis*, 23 WASHBURN L.J. 566, 585 (1984) (screening panels are intended to eliminate frivolous suits and encourage early settlement of valid claims); Comment, *Medical Malpractice Mediation Panels: A Constitutional Analysis*, 46 FORDHAM L. REV. 322, 323 (1977) (purpose of panel is quick disposition of all medical malpractice claims); Note, *Medical Malpractice Screening Panels: A Judicial Evaluation of Their Practical Effect*, 42 U. PITT. L. REV. 939 (1981) (panels are a pretrial device designed to weed out frivolous medical malpractice claims and to encourage settlement of nonfrivolous ones); Note, *Pre-Trial Screening of Medical Malpractice Claims Versus the Illinois Constitution*, 10 J. MAR. J. PRAC. & PROC. 133, 134 (1976) (panels are intended to reduce the amount of malpractice litigation); Note, *The Constitutional Considerations of Medical Malpractice Screening Panels*, 27 AM. U.L. REV. 161, 163 (1977) (panels are designed to relieve the burden on the tort system by weeding out unjustified nuisance suits and expediting settlement of meritorious claims).

Other commentators have articulated a greater number of goals that, in their view, panel proceedings were meant to achieve. The following goals have been enumerated: 1) increased delivery of health care; 2) reduced expense of health care; 3) decreased volume of nonmeritorious cases; 4) reduced backlog of malpractice cases which commonly proceed to trial; 5) increased timely dispositions of meritorious claims prior to trial. M. McCafferty & S. Meyer, *MEDICAL MALPRACTICE BASES OF LIABILITY* 172 (1985) [hereinafter cited as *BASES OF LIABILITY*]; see also Sakayan, *Arbitration and Screening Panels: Recent Experience and Trends*, 17 FORUM 682 (1982).

While the panel concepts are intended to encourage the expeditious settlement of meritorious claims, panels often fail to achieve this purpose. For a discussion of the delay problems associated with panel proceedings see *infra* notes 105-130 and accompanying text.

15. For a discussion of state and federal constitutional challenges to panel procedures see *infra* notes 64-179 and accompanying text.

16. For a discussion of the historical development of the Medical Malpractice Reform Act of 1985, see *infra* note 40.

17. ILL. REV. STAT. Ch. 110, §§ 2-114, 2-611.1, 2-622, and 2-1010 to 2-1020 (1985).

tice review panel.¹⁸ On December 19, 1985, Judge Joseph Wosik of the Circuit Court of Cook County held the review panel unconstitutional.¹⁹ The Illinois Supreme Court is presently considering the constitutionality of the legislature's 1985 panel enactment.²⁰

This comment briefly examines the history of the medical malpractice dilemma in Illinois. Included is a discussion of the Illinois legislature's response to that dilemma. This comment then compares review panel procedures in Illinois to those established in other states, and it identifies constitutional questions triggered by the Illinois panel procedure. Practical problems engendered by panel proceedings in other states will also be treated. Finally, in the conclusion, this comment recommends that the Illinois Supreme Court hold the panels unconstitutional. In the alternative, if the court does uphold the panel procedure as constitutional, it is recommended that the Illinois legislature simplify the procedure in order to increase the panel's efficiency and potential for success.

II. THE MEDICAL MALPRACTICE DILEMMA IN ILLINOIS

The Illinois legislature first began to identify the symptoms of a medical malpractice crisis in 1975.²¹ Illinois' symptoms were the

18. ILL. REV. STAT. ch. 110, §§ 2-1012 to 2-1019 (1985).

19. *Bernier v. Burris*, No. 85 CH 6627, slip op. at 2 (Cir. Ct. Cook County Dec. 19, 1985).

20. Notice of Direct Appeal to the Illinois Supreme Court, *Bernier v. Burris*, No. 85 CH 6627 (Cir. Ct. Cook County Dec. 19, 1985) (notice filed December 24, 1985).

21. During the 1974 through 1975 malpractice insurance crisis, 77 of the 90 hospitals in Cook County, Illinois were involved in suits for malpractice. Brief for Amicus Curiae Illinois State Medical Society and Jerry M. Ingalls, M.D. at 3, *Wright v. Central Du Page Hosp.*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976). Furthermore, twenty per cent of Cook County's physicians were sued for malpractice. *Id.* This was a mammoth increase in comparison to 1969 when the ratio of malpractice claims to physicians was only 1 to 23. *Id.*

The increase in lawsuits caused a concomitant rise in the price of malpractice insurance for physicians and hospitals alike. Specific examples include the fact that Michael Reese Hospital in Chicago confronted an insurance premium rate increase from \$500,000 per year to \$3,000,000 per year in 1975. *Id.* at 4. Similarly, Illinois Masonic Medical Center in Chicago saw a rate escalation from \$250,000 per year to \$2.6 million in one year. *Id.* Rural hospitals in Illinois were similarly affected. *Id.* In general, Hartford Casualty Insurance Company, the largest medical malpractice carrier in Illinois, reported that between 1969 and 1974 there had been a 301 percent increase in the total amount of claims settlements. Note, *Medical Malpractice Statute Unconstitutional—In Wright v. Central Du Page Hospital Association*, 1977 U. ILL. L.F. 298 [hereinafter cited as *Malpractice Statute Unconstitutional*]; see also Brief for Plaintiff-Appellee Hartford Casualty Company at 14, *Wright v. Central Du Page Hosp.*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

Unfortunately, the elements of the crisis were not limited to an increased incidence of lawsuits with a correlative rise in insurance premiums. *Id.* Physicians and hospitals alike faced the risk that malpractice insurance would be unobtainable at any cost. *Id.* In fact, the Medical Protective Company of Fort Wayne, a major provider of malpractice insurance in Illinois, refused to write new policies or renew cov-

same as those manifested elsewhere in the country: increasing medical malpractice lawsuits, escalating malpractice insurance premiums, and a resulting rise in health care costs.²² In response to this perceived crisis, the Illinois General Assembly on September 12, 1975, passed "An Act to revise the law in relation to Medical Malpractice."²³ One of the Act's major provisions created pretrial medical review panels whose purpose was to determine both liability and damages in medical malpractice cases as a prerequisite to trial.²⁴

Immediately²⁵ after the 1975 Act became effective, it was challenged in the landmark Illinois Supreme Court case of *Wright v. Central DuPage Hospital*.²⁶ In addition to a prayer for relief in negligence, the plaintiff sought a declaratory judgment holding the

erage for many physicians; high risk specialists such as obstetricians-gynecologists, orthopedic surgeons, neurosurgeons, plastic surgeons, and anesthesiologists, were most often refused liability coverage. Brief for Amicus Curiae Illinois State Medical Society and Jerry M. Ingalls, M.D. at 5, *Wright v. Central Du Page Hosp.*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

In 1975, the legislature responded to the crisis when it enacted Public Act 79-962. MEDICAL MALPRACTICE TASK FORCE OF ILLINOIS, REPORT OF THE TASK FORCE ON MEDICAL MALPRACTICE TO GOVERNOR JAMES R. THOMPSON, at 1 (1985) [hereinafter cited as MEDICAL MALPRACTICE REPORT]. Public Act 79-962 made allowance for the formulation of a 20-member commission created to study the medical malpractice problem. *Id.* The commission was to develop an inclusive plan for a medical reparation system. *Id.* The reparation system was supposed to provide prompt and fair compensation to the victims of medical negligence while maintaining insurance at a reasonable cost. *Id.* On June 2, 1976, the commission issued its report and recommendations for reform. *Id.* Many of the commission's recommendations became law. *Id.* However, some of these laws were ultimately declared unconstitutional in *Wright v. Central Du Page Hospital*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976), and many of the remaining recommendations were temporarily defeated in the legislature.

22. For a discussion of the rise in lawsuits and malpractice premiums, see *supra* notes 3 and 5.

23. ILL. REV. STAT. ch. 70, § 2.1; ch. 110, §§ 58.2-58.10 (1975) (held unconstitutional in *Wright v. Central Du Page Hosp.*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976)).

The Illinois Hospital Association had authored the bill, but the Illinois Legislature amended it. MALPRACTICE STATUTE UNCONSTITUTIONAL, *supra* note 16, at 300. As enacted, the bill included the following five major portions which: 1) created medical review panels to delineate both liability and damages in every malpractice lawsuit as a condition precedent to trial; 2) declared that any contract that was signed as a condition to obtaining medical treatment, or that excused any health care practitioner from liability for negligence, was void and against public policy; 3) placed a two year statute of limitation on medical malpractice suits (measured from the time the plaintiff discovered or should have discovered the negligence); 4) compelled malpractice insurance companies to renew policies that were in effect on June 10, 1975, at the rate charged (rate freeze) on that date, unless the company could defend the increase to the Director of Insurance; and 5) placed a \$500,000 cap on the amount a plaintiff could recover in a medical malpractice suit. *Id.*

24. ILL. REV. STAT. ch. 110, §§ 58.2-58.10 (1975) (held unconstitutional in *Wright v. Central Du Page Hosp.*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976)).

25. The Act was passed in its entirety on September 12, 1975 and became effective on November 11, 1975. MALPRACTICE STATUTE UNCONSTITUTIONAL, *supra* note 21, at 200 n.18. The review panel, liability cap, and rate freeze provisions of the Act were challenged the day following the effective date of the Act, on November 12, 1975. *Id.*

26. 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

medical review panels unconstitutional.²⁷ Only eight months after the Act's effective date, the *Wright* court found that the panels violated the plaintiff's constitutional rights under two provisions of the Illinois Constitution,²⁸ namely the judicial article and the jury trial provision. The *Wright* court held that the review panel provision of the 1975 Act contravened the judicial article²⁹ of the Illinois Constitution in that it authorized lay members of the panel to perform judicial functions.³⁰ Similarly, the court found that making medical malpractice litigants pass through the panel before trial unconstitutionally impinged upon the litigants' right to trial by jury.³¹ The *Wright* court, however, expressly limited its holding to the type of review panel then under consideration,³² thereby leaving open a judicial window for future legislative attempts to create constitutionally intact review panels. Indeed, it adumbrated the possibility of judicial support for modified versions of the review panel when it stated that it did not mean to "imply that a valid pretrial panel procedure [could not] be devised."³³

27. The *Wright* case was a consolidation of two declaratory judgment suits and a malpractice suit. In the malpractice suit, Mary Jean Wright prayed for damages amounting to \$750,000 as reparation for injuries putatively caused by the negligence of one Dr. Heitzler and Central Du Page Hospital. *Id.* at 313, 347 N.E.2d at 736. Ms. Wright had further sought a declaratory judgment which prayed for the court to hold unconstitutional the liability caps as well as the medical review panels. *Id.*

28. *Wright* held that the review panel portion of the Act violated sections one and nine of the judicial article of the Illinois Constitution. *Id.* at 322, 347 N.E.2d at 740.

29. Section one of the judicial article provides: "the judicial power is vested in a Supreme Court, an Appellate Court and Circuit Court." ILL. CONST. Art. 6, § 1. Section nine provides, in pertinent part, that the "Circuit Courts shall have original jurisdiction of all justiciable matters [and] such power to review administrative action as provided by law." *Id.*

30. 63 Ill. 2d at 313, 347 N.E.2d at 736. For a discussion of the 1975 Act's specific unconstitutional authorizations of judicial functions to lay panelists, see *infra* note 133 and accompanying text.

31. The *Wright* court did not make it clear just how the panel system violated the jury trial provision of the Illinois Constitution. It appeared that the *Wright* jury trial reasoning was a necessary corollary to its judicial article reasoning. For a discussion of the jury trial violations found in *Wright*, see *infra* notes 151 to 165 and accompanying text.

32. The *Wright* court stated: "In so holding [the panel procedure unconstitutional], however, we do not imply that a valid pretrial panel procedure cannot be devised." 63 Ill. 2d at 313, 347 N.E.2d at 741. In so stating, *Wright* limited its holding to the panels in question.

33. *Id.* Specific judicial support for malpractice crisis cures were present in the *Wright* opinion. In fact, in *Wright*, Justice Underwood concurred in part, but dissented from the majority's holding that the \$500,000 liability cap was unconstitutional. *Id.* at 313, 347 N.E.2d at 746 (Underwood, J., concurring in part and dissenting in part). In the dissenting portion of his opinion, Justice Underwood took notice of the serious problems that existed in the medical malpractice arena. *Id.* In fact, Justice Underwood opined that the seriousness of the medical malpractice situation rendered the liability caps constitutional as a valid exercise of legislative discretion. *Id.*

One year later, Justice Underwood agreed with Justice Ryan's dissent in another

In 1979, the Illinois Supreme Court bolstered its stance that it was possible to devise a valid pretrial panel system. In *Anderson v. Wagner*,³⁴ the court scolded "the critics" for giving an overbroad interpretation to *Wright*,³⁵ and it reaffirmed the *Wright*³⁶ position that it was possible to formulate a constitutional panel system.³⁷

medical malpractice action. See *Renslow v. Mennonite Hosp.*, 67 Ill. 2d 348, 367 N.E.2d 1250 (1977) (Ryan, J., dissenting). In *Renslow*, the plaintiff had received Rh incompatible blood while a teenager. *Renslow*, 67 Ill. 2d at 348, 367 N.E.2d at 1250. Several years later, the plaintiff delivered an infant whose birth injuries stemmed from the blood transfusion. *Id.* In *Renslow*, the court held that the infant could maintain an action against the hospital and physician for the injury sustained as the result of the negligent transfusion, even though the transfusion had occurred several years prior to the infant's conception. *Id.*

Justice Ryan's concern with the majority opinion in *Renslow* stemmed from the fact that, in his opinion, it was just one more example of how courts were impermissibly expanding the traditional limits of tort liability. *Id.* at 1265, 367 N.E.2d at 1250 (Ryan, J., dissenting). Justice Ryan cited an everbroadening concept of duty, along with a then recent trend toward jury sympathy for plaintiffs' injuries, as two major factors that contributed to the inflated size of jury verdicts in tort cases. *Id.* Justice Ryan forcefully argued that because of these factors society had reached the point where it could no longer bear the economic burden of our then present system of tort law. *Id.* Justice Ryan, then resurrected the court's ongoing discussion on the seriousness of the medical malpractice crisis. *Id.* Justice Ryan invited the legislature to remedy the situation by either limiting tort liability (liability caps) or by adopting a method of no-fault insurance. *Id.* Justice Ryan concluded that a person who received negligently inflicted injuries should "recover adequate, not exorbitant, damages." *Id.* Overall, Justice Ryan's opinion reflects the Illinois Supreme Court's ongoing discussion regarding the necessity of a cure for the medical malpractice insurance crisis.

34. 79 Ill. 2d 295, 405 N.E.2d 560.

35. 63 Ill. 2d 292, 347 N.E.2d 736.

36. *Id.*

37. *Anderson*, 79 Ill. 2d 295, 402 N.E.2d 560 (1980). *Anderson* contained a lengthy discussion of the fact that the *Wright* court was one of this country's first state supreme courts to constitutionally review its state's panel procedure. *Id.* at 563. The *Anderson* opinion took particular note of the fact that, since *Wright*, the majority of state supreme courts had initially found their respective panel procedure constitutional. *Id.* at 563-64. After noting this trend *Anderson* stated that: "The critics have read *Wright* too broadly [*Wright*] did not hold that all statutory provisions creating panels for the review of malpractice actions were unconstitutional." *Id.* at 564. Thus, the Illinois Supreme Court appeared to reverse its view of the constitutionality of its state's review panels. The foreign state supreme courts' holdings that their respective panels were constitutional appeared to influence the Illinois Supreme Court's view about the constitutionality of its panel proceeding.

This represents a common trend among the state courts. State court often reason by analogy. A home court will look to a foreign jurisdiction's constitutional evaluation of the foreign jurisdiction's panel proceedings in order to determine whether the home state's panel is constitutional. Unfortunately one weakness in this reasoning is the fact that in *Anderson*, the Illinois Supreme Court cited Pennsylvania and Florida panels as support for the constitutionality of panel proceedings. However, the Florida and Pennsylvania Supreme Courts have subsequent to *Anderson* held their respective panels unconstitutional. *Carter v. Sparkman*, 355 So. 2d 802 (Fla. 1976), *rev'd sub. nom.* *Aldana v. Holub*, 381 So. 2d 231 (Fla. 1980) (practical operation and effect of the panel rendered it unconstitutional); *Parker v. Children's Hosp. of Philadelphia*, 483 Pa. 106, 394 A.2d 932 (1978), *rev'd sub. nom.* *Mattos v. Thompson*, 491 Pa. 385, 421 A.2d 190 (1980) (delays apparent on second review rendered panel proceeding unconstitutional). Perhaps state supreme courts would, therefore, be better advised to look more carefully at their own respective panels, in light of their own state

The *Anderson* court's strong restatement of its support for the panel concept left no doubt that it was inviting the legislature to re-enact a modified version of the review panel.³⁸

Subsequent to *Wright*³⁹ and its progeny, the Illinois State Medical Society lobbied for eleven consecutive years to limit escalating physician malpractice liability.⁴⁰ On November 1, 1984, Governor

constitutions.

38. In *Anderson*, Justices Ryan and Underwood saw for the first time some of the relief from the malpractice crisis that they had advocated in *Wright*, 79 Ill. 2d at 295, 402 N.E.2d at 560 (Ryan, J., dissenting).

39. 63 Ill. 2d 292, 347 N.E.2d 736.

40. *Society Lobbies to Limit M.D. Malpractice Liability*, AM. MED. NEWS, April 26, 1985, at 22.

In 1985, medical malpractice reform legislation became a nationwide drive. Medical Malpractice Reform Act Seminar, Illinois Trial Lawyers Association (August 10, 1985) (discussing legislative history of the Medical Malpractice Reform Act). Malpractice legislation has been introduced in approximately 32 states. *Id.* The 1985 Illinois medical malpractice legislation was first introduced as a package of emergency legislation in the spring of 1984. *Id.* The legislation was tabled in 1984 and was reintroduced in the 1985 legislative year. *Id.*

In November of 1984, the Illinois Trial Lawyers Association, the Chicago Bar Association, and the Illinois State Bar Association began negotiating to determine exactly what type of medical malpractice legislation should be enacted in Illinois. *Id.* One specific concern in these negotiating sessions was to determine what legislation was necessary to quell the malpractice crisis. *Id.* The paramount goal among the negotiators was to design some sort of legislation which would put an end to the "frivolous lawsuit." *Id.* Illinois lawyers participating in these negotiations conceded that there was a problem with attorneys filing nonmeritorious lawsuits. *Id.* In response to the conceded problem with nonmeritorious lawsuits, the Illinois lawyers through Senator Rock in the Illinois Senate and through Representative Cullerton in the Illinois House of Representatives, introduced a bill to the General Assembly entitled the "Lawyers Bill." *Id.* The "Lawyers Bill," however, was exclusively aimed at diminishing the problem with nonmeritorious suits. *Id.*

In contrast to the "Lawyers Bill," the Illinois physicians' lobbyists sought to enact legislation of a much more comprehensive scope than the legislation proposed by the lawyers' lobbyists. *Id.* The physicians' legislative package sought: 1) to place some limitations on the filing of medical malpractice lawsuits; 2) to make it more difficult to find an expert; 3) to make it more extensive and time consuming to try a medical malpractice case; 4) to control attorneys' fees; 5) to place limitation on jury awards; 6) to provide absolute caps on noneconomic damages (pain and suffering); 7) to structure verdicts in excess of \$50,000; and 8) to provide a \$25,000 limit on recovery for wrongful death. *Id.* See also H.B. 1600-1609, 84th General Assembly, 1985 Ill.; S.B. 0960-0968, 84th General Assembly, 1985 Ill.

On May 22, 1985, approximately 4,000 Illinois physicians converged on the state capital of Springfield in order to rally for the successful passage of the Illinois State Medical Society Malpractice Bill. *Society Lobbies to Limit M.D. Malpractice Liability*, AM. MED. NEWS, April 26, 1985, at 22. See also *Physicians Storm Capital Demanding Malpractice Reform*, 167 ILL. MED. J. 431 (1985). At this particular rally, Governor James R. Thompson announced to the Illinois physicians that "he had their bill." Medical Malpractice Reform Act Seminar, Illinois Trial Lawyers Association (August 10, 1985) (discussing legislative history of 1985 Medical Malpractice Reform Act). Later, the physicians' bill was amended and was finally passed so as to include the following thirteen major provisions. *Id.* First, for a discussion of the provisions concerning the panel procedures of the Medical Malpractice Reform Act see *Infra* notes 60 through 75 and accompanying text. Second, one section of the Act provides that where physicians sue attorneys for malicious prosecution, physicians no longer have to prove an element of special damages. ILL. REV. STAT. ch. 110, § 2-114 (1985).

James R. Thompson responded to this lobbying effort when he appointed a Medical Malpractice Task Force to examine the escalating crisis and to submit recommendations to the Illinois General Assembly for counteracting the dilemma.⁴¹ After establishing that the medical malpractice problem was in fact a palpable crisis in Illinois,

That section also provides that punitive damages are not available in such malicious prosecution actions. *Id.* A third provision provides that where either opponent makes allegations and denials without reasonable cause, and these statements are found to be untrue, the attorney and party making such allegations will be liable for their opponent's reasonable attorney's fees. ILL. REV. STAT. ch. 110, § 2-611.1. (1985). A fourth provision requires the plaintiff's attorney to provide a certificate from a physician certifying that, in the physician's opinion, the case is meritorious. ILL. REV. STAT. ch. 110, § 2-622 (1985). A fifth provision requires itemized verdicts in medical malpractice lawsuits. ILL. REV. STAT. ch. 110, § 2-1109 (1985). A sixth provision establishes a sliding scale for any attorney's contingent fees in medical malpractice actions. ILL. REV. STAT. ch. 110, § 2-1114 (1985). A seventh provision abolishes punitive damages in medical malpractice actions. ILL. REV. STAT. ch. 110, § 2-1115 (1985). An eighth provision requires certain collateral source reductions from medical malpractice judgments. ILL. REV. STAT. ch. 110, § 2-1205 (1985). The ninth provision defines economic and non-economic losses. ILL. REV. STAT. ch. 110, § 2-1702 (1985). The tenth provision defines past and future damages. ILL. REV. STAT. ch. 110, § 2-1703 (1985). The eleventh major provision of the Act describes all the aspects of the new periodic payment requirements for medical malpractice verdicts. ILL. REV. STAT. ch. 110, §§ 2-1705 to 2-1714 (1985). The twelfth provision requires hospitals to produce records within 60 days from the date of the request for such documents. ILL. REV. STAT. ch. 110, § 8-2001 (1985). Finally, the thirteenth provision establishes standards for expert witnesses. ILL. REV. STAT. ch. 110, § 8-2001 (1985).

41. On November 1, 1984, Governor James R. Thompson appointed a staff of eighteen individuals to investigate the medical malpractice problem in Illinois and to propose possible legislative remedies. MEDICAL MALPRACTICE REPORT, *supra* note 21, at i. This task force was charged with the responsibility of examining the Illinois malpractice crisis in depth. *Id.* Throughout the task force's examination it found the following recurrent themes:

- 1) there is, in fact, malpractice occurring among physicians;
- 2) there are, in fact, too many non-meritorious (or "frivolous") lawsuits being filed;
- 3) the current system of compensating victims of medical malpractice in Illinois is inefficient, expensive and slow; and
- 4) the current environment is not conducive to readily available, affordably priced insurance.

Id. The task force then considered these problems and finally made eight recommendations for reform. *Id.* Most importantly, the task force first recommended that the legislature enact "some type of review mechanism" for medical malpractice cases. *Id.* The task force recommended that the review mechanism should accomplish the following purposes:

- 1) to alleviate frivolous malpractice lawsuits;
- 2) to expedite the settlement of meritorious malpractice lawsuits; and
- 3) to preserve the judicial system for those cases that truly belong in the courts.

Id. The task force summarized the purposes of this review mechanism when it stated:

A successful review mechanism would provide for the cooperative participation of the medical, legal and judicial elements of the medical malpractice system and encourage the dismissal of meritless suits and settlement of well founded action, *while not impairing the constitutional right to trial or the judiciary's constitutionally established authority.*

Id. (emphasis added).

the task force made numerous recommendations for reform.⁴² One of its major recommendations was the establishment of "some type of review mechanism."⁴³ The task force concluded that a review panel was necessary to reduce frivolous malpractice lawsuits, accelerate the settlement of creditable malpractice lawsuits, and preserve the judicial system for truly meritorious claims.⁴⁴

On April 11, 1985, the Illinois State Medical Society announced that its legislative allies had introduced a package of ten bills designed to curb the malpractice crisis.⁴⁵ After several amendments, Governor Thompson approved the bills, and they went into effect on August 15, 1985.⁴⁶ One of the most controversial portions of the legislature's response to the crisis was the provision establishing review panels. Complex review panels are controversial partially because their creation, composition, and function have triggered numerous constitutional questions.⁴⁷ In fact, the constitutional challenge to the new Illinois legislation, *Bernier v. Burris*, was filed only twenty minutes after the Governor signed the bill.⁴⁸

42. For the task force's recommendation for reform, see *supra* note 41. The task force also made seven other recommendations for medical malpractice litigation reform. Almost all of these recommendations were implemented in the 1985 Malpractice Reform Act. For a list of the legislation that was enacted in Illinois in 1985, see *supra* note 40.

It is interesting to note that on December 19, 1985, in *Bernier v. Burris*, Judge Joseph Woskik of the Cook County Circuit Court of Illinois held the review panels unconstitutional. *Bernier v. Burris*, No. 85 CH 6627, slip op. at 2 (Cir. Ct. Cook County Dec. 19, 1985). Among other findings of fact in *Bernier*, the court found that there was no actual data to support the existence of a malpractice crisis in Illinois. *Id.*

43. MEDICAL MALPRACTICE REPORT, *supra*, note 21, at i.

44. *Id.*

45. *ISMS Malpractice Bills Introduced, XII ON THE LEGIS. SCENE: ILL. ST. MED. SOC'Y 1* (1985).

46. For a list of the bills originally proposed by the Illinois State Medical Society compared to the list of the bills finally enacted, see *supra* note 40.

47. For a discussion of the constitutional questions invoked by review panels, see *infra* notes 77-165 and accompanying text.

48. Complaint to Enjoin Disbursement of Public Funds at 1, *Bernier v. Burris*, No. 85 CH-6627 (Cir. Ct. Cook County, decided Dec. 19, 1985) (filed June 25, 1985) comprised the constitutional challenge to the Illinois Medical Malpractice Reform Act of 1985. The Illinois General Assembly passed the Medical Malpractice Reform Act on June 20, 1985, and the Governor of Illinois approved the Act on June 25, 1985. ILL. REV. STAT. ch. 110, §§ 2-114 through 2.611.1, 2.622, 2-1010, 2-1012 through 2-1020, 2-1109, 2-1114, 2-1115, 2-1205, 2-1701 through 2-1719, 8-2001, 8-2003, 8-2501 (1985); see also Complaint to Enjoin Disbursement of Public Funds at 2, *Bernier v. Burris*, No. 85 CH-6627 (Cir. Ct. Cook County, decided Dec. 19, 1985) (filed on June 25, 1985). On June 25, 1985, only 20 minutes after the Governor signed the bill, the constitutional challenge was filed. Address by Mr. Leonard M. Ring on the Constitutional Challenge to the Medical Malpractice Reform Act, Medical Malpractice Reform Act Seminar, Illinois Trial Lawyers Association (Aug. 10, 1985).

In *Bernier*, the plaintiff contended that the panel provision of the 1985 Act violated her constitutional rights under the following provisions of the United States and Illinois Constitution: 1) right of trial by jury, U.S. CONST. amend. VII; ILL. CONST. art. I, § 13; 2) right to due process and equal protection of the law, U.S. CONST. amend. XIV § 1; ILL. CONST. art. 1, § 2; ILL. CONST. art IV, § 13; 3) right of access to

In *Bernier v. Burris*, Judge Joseph M. Wosik of the Circuit Court of Cook County considered the constitutionality of the 1985 Medical Malpractice Reform Act.⁴⁹ Judge Wosik held the review panels unconstitutional.⁵⁰ The *Bernier* court summarily stated that, among other things, the review panel enactment was so complex and difficult to employ that it could be held unconstitutional for that reason alone.⁵¹

Other states have also addressed the problem of the complexity of their respective review panels.⁵² In some states the initial review panel enactment was found to be too complex, and these states recognized the need to streamline their procedure.⁵³ The experience of other states with review panels illuminates both the legal and practical problem associated with the Illinois panel procedure.⁵⁴

III. PANEL PROCEEDINGS: SIMPLE V. COMPLEX

Legislatures in at least thirty states⁵⁵ have enacted sundry forms of the medical malpractice review panel. The Illinois panels, like those established in most states, are a pre-trial screening device which operates as a condition precedent to trial.⁵⁶ Some state panel proceedings are fairly simple. For instance Rhode Island, after finding its three-member panel too burdensome, reenacted a panel system consisting of a superior court judge who was required to hold a preliminary hearing in all medical malpractice cases.⁵⁷ A second ex-

courts. ILL. CONST. art. 1, § 2; ILL. CONST. art. IV, § 13. Complaint to Enjoin Disbursement of Public Funds at 10-14, *Bernier v. Burris*, No. 85 CH-6627 (Cir. Ct. Cook County, decided Dec. 19, 1985) (filed June 25, 1985). The plaintiff also contended that the review panel enactment contravened the judicial article of the Illinois Constitution (ILL. CONST. art. VI, §§ 1, 9, and 14). Complaint to Enjoin Disbursement of Public Funds at 10-14, *Bernier v. Burris*, No. 85 CH-6627 (Cir. Ct. Cook County, decided Dec. 19, 1985) (filed June 25, 1985).

49. *Bernier v. Burris*, No. 85 CH-6627, slip op. at 1 (Cir. Ct. Cook County Dec. 19, 1985).

50. *Id.*

51. *Id.* at 2.

52. For a discussion of various complex review panels, see notes 53 through 73 and accompanying text.

53. *Id.*

54. *Id.*

55. The following states have enacted medical malpractice review panels: Alaska, Arizona, Arkansas, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, Tennessee, Virginia, and Wisconsin. AMA REPORT 2, *supra* note 5, at 20-21.

56. ILL. REV. STAT. ch. 110 § 2-1012 (1985). This section provides that the review panel provisions of the Act apply exclusively to all "healing art malpractice cases." *Id.* Panel proceedings can be avoided only through the unanimous agreement of all parties. *Id.*

57. *Boucher v. Sayeed*, — R.I. —, 459 A.2d 87 (1983). In 1976, the Rhode Island Legislature amended its three-member panel statute and established a substantially

ample of a fairly simple proceeding can be found in Louisiana, where the panel considers only written evidence presented to or subpoenaed by it.⁵⁸ In this way, the Louisiana procedure dispenses with the necessity of calling or cross-examining witnesses. In fact, the sole duty of the Louisiana panel is to express an expert opinion.⁵⁹

In contrast to the straight-forward procedures employed in Rhode Island and Louisiana, complexity infects every portion of the Illinois panel procedure. To begin with, a claimant must comply with numerous deadlines in order to institute Illinois panel proceedings.⁶⁰ Thereafter, panel proceedings are initiated with a complex

different system for the processing of medical malpractice complaints. *Id.* at 89. Under the amended enactment, a superior court justice was to hold a preliminary hearing within ninety days of the filing of the defendant's answer. *Id.* The justice was given the power to examine records, to appoint medical experts to physically examine the plaintiffs, or appoint medical experts to review other relevant evidence. *Id.* at 90. The justice was also empowered to *sua sponte* subpoena records or individuals to supplement the evidence that the parties presented. *Id.* At the completion of the hearing, the justice was to make a determination as to whether the proffered evidence, if properly substantial and considered in the light most favorable to the plaintiff, was "sufficient to raise a legitimate question of liability appropriate for judicial inquiry" or whether the plaintiff's case was merely an "unfortunate medical result." *Id.* The case was to be dismissed with prejudice where the finding was one of "unfortunate medical result." *Id.* Conversely, the controversy would proceed to a *de novo* hearing where the plaintiff had carried his or her burden of proving that the evidence was "sufficient to raise a legitimate question of liability appropriate for judicial inquiry." *Id.* In 1983, however, the *Boucher* court held the preliminary hearing procedure unconstitutional without commenting on the preliminary hearing's success or failure. *Id.* at 93. The preliminary hearing was unconstitutional, according to the *Boucher* court, because there was no medical malpractice crisis in Rhode Island and therefore no reasonable basis for such an enactment. *Id.*

58. *Everett v. Goldman*, 359 So.2d 1256 (La. 1978). The Louisiana panel consists of three physicians and one nonvoting attorney-chairman. *Id.* at 1263. The panel examines only written evidence such as medical charts, laboratory tests, and depositions. *Id.* The panel is entitled to consult with medical authorities as necessary. *Id.* The Louisiana panel's sole duty is to express an expert opinion. *Id.* The panel is to express its opinion within thirty days of the selection of the last panelist. *Id.* The panel has a maximum of 180 days within which to render its opinion if it is unable to do so within thirty days. *Id.* The panel does not make any finding as to damages. *Id.*

59. *Id.* According to one author, screening panels are generally informally conducted. *BASES OF LIABILITY*, *supra* note 14, at 175. This author contrasts the usual case of the informal proceeding against the more complex panels in which "proceedings in several states range from adversarial 'trials' with opening and closing statements, live testimony under oath, and cross examination of witnesses, to submissions in writing in which the parties explain their position and provide evidentiary exhibits such as x-rays, hospital reports, and deposition transcripts." *Id.* The Illinois panel is analogous to the complex proceeding described above. The Illinois panel is indeed an "adversarial trial," requiring live witnesses, evidentiary exhibits and all other procedures generally followed at trial.

60. Address by Mr. Robert Clifford on the Makeup and Selection of Panel, Medical Malpractice Reform Act Seminar, Illinois Trial Lawyers Association Seminar (August 10, 1985). Some of the time frames that must be complied with in order to institute Illinois proceeding include: (1) an order to convene the panel must be issued no later than 90 days after the parties are "at issue" on the pleadings; (2) absent "good cause" for delay, the panel is to convene within 120 days after the order; (3) within 14 days of the order which convenes the panel, the parties can unanimously

procedure in which panel members consisting of one judge, one physician, and one lawyer are chosen.⁶¹ After selection, the Illinois panel is required to convene its hearing within 120 days.⁶² Proceedings before the Illinois panel have all of the features of a full-blown trial; each party may call and cross examine witnesses and may present evidence "as at trial in the circuit court."⁶³ In fact, Illinois panel procedures are more complex than those at trial because the law vests the panelists with the authority to examine evidence beyond what the opponents present. The panel, for example, has subpoena power and may call for any additional witnesses and evidence it deems necessary.⁶⁴ The panel is required to follow the Code of Civil Procedure whenever feasible,⁶⁵ and the judge is required to delineate rules of evidence.⁶⁶ While the panelists are to decide questions of fact, the judge is to determine all questions of law.⁶⁷ In all, Illinois proceedings have the potential for dilating a purported shortcut to an eighteen month commitment.⁶⁸

After the hearing is concluded, panelists are required to produce a written opinion determining liability and damages.⁶⁹ When parties to the lawsuit agree to accept the panel's decision as binding, judgment will be entered thereon.⁷⁰ Nevertheless, even when the panel reaches a unanimous decision, the parties may decline to accept its decision as binding.⁷¹ An unanimous panel opinion is given some statutory teeth, however, because rejection of an unanimous panel decision results in serious consequences for a party who does not prevail on the issue of liability at trial. That party, by motion of his opponent, may be assessed the reasonable costs, attorneys' fees, and expenses of the prevailing party.⁷²

The complexity of the Illinois review panel burdens the prelitigation stages of medical malpractice cases with delays nonexistent in generic tort cases. Medical malpractice cases are already very arduous, costly, and complex to try. The imposition of further complica-

agree on a health care worker to serve on the panel. ILL. REV. STAT. ch. 110, §§ 2-103 to 2-1015. This is just a sampling of the many time frames mandated by the 1985 panel enactment.

61. ILL. REV. STAT. ch. 110, § 2-1015 (1985); see also Clifford, *Malpractice Review Panel Examined*, Chi. Daily L. Bull., Aug. 13, 1985, at 1, cols. 2-6, and at 14, cols. 1-3 (complete description of review panel procedure).

62. ILL. REV. STAT. ch. 110, § 2-1013 (1985).

63. ILL. REV. STAT. ch. 110, § 2-1016 (1985).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. ILL. REV. STAT. ch. 110, § 2-1013 (1985).

69. ILL. REV. STAT. ch. 110, § 2-1017 (1985).

70. ILL. REV. STAT. ch. 110, § 2-1018 (1985).

71. *Id.*

72. ILL. REV. STAT. ch. 110, § 2-1019 (1985).

tions upon an already complicated procedure invariably triggers numerous constitutional questions.⁷³ In fact, to date, appellate courts in at least twenty states have reviewed their mandatory screening panels.⁷⁴ While the majority of states have, at least initially, upheld

73. For a discussion of the constitutional questions triggered by the Illinois Medical Malpractice Reform Act of 1985 see *infra* notes 77-165 and accompanying text.

74. State courts reviewing the constitutionality of their respective panel proceedings have reached different conclusion. At least four state supreme courts have held their panel proceedings unconstitutional on first review. *Wright v. Central Du Page Hosp.*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976) (1975 review panels violated the judicial article and trial by jury provision of the Illinois Constitution); *State ex rel. Cardinal Glennon Mem. Hosp. for Children v. Gaetner*, 583 S.W.2d 107 (Mo. 1979) (review panels violated the constitutional right of access to courts guaranteed under the Missouri Constitution); *Simon v. St. Elizabeth Med. Center*, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (1976) (compulsory nonbinding arbitration provision of Ohio Malpractice Act violated plaintiff's due process, equal protection, and jury trial rights); *Boucher v. Sayeed*, — R.I. —, 459 A.2d 87 (1983) (preliminary hearing device in medical malpractice cases violated plaintiff's federal constitutional right to equal protection of laws).

In addition, the Florida and Pennsylvania Supreme Courts first upheld their malpractice acts as constitutional, but these courts later found that the practical operation of their respective panels violated the plaintiffs' constitutional rights. *Carter v. Sparkman*, 335 So. 2d 802 (Fla. 1976), *cert. denied*, 429 U.S. 1041 (1977), *rev'd sub. nom.* *Aldana v. Holub*, 381 So. 2d 231 (Fla. 1980) (practical operation and effect of the panel rendered it unconstitutional in its entirety as a violation of the United States and Florida Constitutions); *Parker v. Children's Hosp. of Philadelphia*, 483 Pa. 106, 394 A.2d 932 (1978), *rev'd sub. nom.* *Mattos v. Thompson*, 491 Pa. 385, 421 A.2d 190 (1980) (delays involved in processing claims under prescribed panel procedure resulted in oppressive delay and impermissibly infringed upon right to jury trial).

The Montana Supreme Court found its panel unconstitutional in part. *Linder v. Smith*, — Mont. —, 629 P.2d 1187 (1981).

In contrast, eight state supreme courts have upheld their panels as constitutional. *Eastin v. Broomfield*, 116 Ariz. 576, 570 P.2d 744 (1977) (panels did not violate equal protection, trial by jury or judicial power provision); *Johnson v. St. Vincent Hosp.*, 273 Ind. 374, 404 N.E.2d 585 (1980) (panel did not violate due process, equal protection, special law, jury trial, privileges and immunities, or separation of powers provisions); *Everett v. Goldman*, 359 So. 2d 802 (La. 1978) (panel statute was not in violation of due process, equal protection, access to courts, or special law provision); *Attorney General v. Johnson*, 282 Md. 168, 385 A.2d 57 (1978) (panel did not violate access to courts, due process, jury trial, separation of powers, or judicial power provision); *Paro v. Longwood Hosp.*, 373 Mass. 645, 369 N.E.2d 985 (1977) (panel did not violate due process, equal protection, jury trial, separation of powers, access to courts, or judicial power); *Perna v. Pirozzi*, 92 N.J. 446, 457 A.2d 431 (1983) (panels did not violate equal protection mandates); *Strykowski v. Wilkie*, 81 Wis. 2d 491, 261 N.W.2d 434 (1978) (panel did not violate equal protection, procedural due process, substantive due process, jury trial, or separation of powers).

Four state appellate courts have also upheld review panels as constitutional. *Lacy v. Green*, 428 A.2d 1171 (Del. Super. Ct. 1980) (panel did not violate due process, equal protection, access to court, jury trial, or privileges and immunities); *Suchit v. Baxt*, 176 N.J. Super. 407, 423 A.2d 670 (1980) (panel did not violate due process, jury trial, equal protection, or separation of powers); *Comiskey v. Arlen*, 55 A.2d 304, 390 N.Y.S.2d 122 (1976) (panel did not violate jury trial, due process, or equal protection rights); *Halpern v. Cozan*, 85 Misc. 2d 753, 381 N.Y.S.2d 744 (1976) (panel did not violate jury trial right).

In addition, numerous federal courts sitting in diversity jurisdiction cases have upheld review panels as constitutional. See, e.g., *DiAntonio v. Northampton-Accomack Mem. Hosp.*, 628 F.2d 287 (4th Cir. 1980) (Virginia panels did not contravene

their panels as valid, several state review panel procedures have failed to survive constitutional inquiry.⁷⁵

IV. CONSTITUTIONAL AND COMPARATIVE ANALYSIS

A. *Equal Protection and Special Legislation: Unequal Treatment for the Malpractice Victim?*

To date, at least eleven state appellate courts have heard arguments that review panels violate the Equal Protection Clause of the United States Constitution and the parallel provisions of their respective state constitutions.⁷⁶ Both the federal and the Illinois State Constitutions require equal protection of the laws.⁷⁷ In addition, the Illinois Constitution contains a provision prohibiting special legislation.⁷⁸ This provision is a constitutional sibling to the equal protection clause.⁷⁹ Both the special legislation provision and the equal

equal protection or judicial power mandates); *Woods v. Holy Cross Hosp.*, 591 F.2d 1164 (5th Cir. 1979) (Florida panels did not violate equal protection, due process, or jury trial); *Quionnes v. Charles Harwood Mem. Hosp.*, 573 F. Supp. 1101 (D. V.I. 1983) (Virgin Island's review panel held constitutional); *DiFillippo v. Beck*, 520 F. Supp. 1009 (D. Del. 1981) (Delaware panels held constitutional as against delegation of legislative power, equal protection, due process, and jury trial challenges); *Hines v. Elkhart Gen. Hosp.*, 465 F. Supp. 421 (N.D. Ind. 1979) (Indiana panels held constitutional against equal protection, access to courts, and due process challenges).

75. For a comparison of state courts who either upheld or declared unconstitutional their respective panel proceedings, see *supra* note 74.

76. For a list of equal protection challenges to panel enactments, see *supra* note 74.

77. The fourteenth amendment of the United States Constitution provides in part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Article four, section thirteen of the Illinois Constitution provides: No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws. ILL. CONST. art. IV, § 13 (1970).

78. Article four, section thirteen of the Illinois Constitution provides: "The General Assembly shall pass no special or local law when a general law is or can be made applicable." ILL. CONST. art. IV, § 13 (1970). Whether a general law is or can be made applicable shall be a matter of judicial determination. *Id.*

79. A constitutional provision which is a sibling to the equal protection guarantee is a provision in the Illinois Constitution prohibiting special legislation. This provision of the Illinois Constitution prohibits the enactment of a special law in many instances, and in particular precludes such a special law where a general law can be made applicable. *Anderson*, 79 Ill. 2d at 313, 402 N.E.2d at 569; *Grace v. Howlett*, 51 Ill. 2d 478, 486, 283 N.E.2d 474, 489 (1972). Prior to the adoption of the 1970 Illinois Constitution, the special legislation provision of the prior Illinois Constitution stood alone as the only provision in the Illinois Constitution which prohibited arbitrary classifications of Illinois' citizens. *Anderson*, 79 Ill. 2d at 313, 402 N.E.2d at 568. The 1970 Illinois Constitution, in fact, included for the first time an equal protection clause. *Grace*, 51 Ill. 2d at 486, 283 N.E.2d at 479. Both the equal protection clause and the special legislation provision of the Illinois Constitution prohibit arbitrary classifications of Illinois' citizens. However, while the equal protection clause and the special legislation provision both provide many of the same safeguards, they are not entirely identical. *Id.* The special legislation guarantee has been interpreted to in-

protection clause of the Illinois Constitution prohibit the legislature from isolating a class of persons without significant policy reasons for singling out that class for special treatment.⁸⁰

crease judicial responsibility for determining when a general law rather than a special law, can be made applicable. *Id.* In other words, Illinois' judges have a greater responsibility for closely scrutinizing legislation which creates arbitrary classifications of Illinois citizens. This judicial responsibility was specifically interpreted by the Illinois Supreme Court to mean that the available latitude for legislative experimentation is circumscribed. *Id.*

Current interpretations of the special legislation provision explains that while the scope of judicial review is enlarged under special legislation review, the legislature may constitutionally classify persons and objects provided there is a reasonable basis for isolating any legislative class. *Anderson*, 79 Ill. 2d at 317, 402 N.E.2d at 569. In fact, the Illinois Supreme Court has applied its special legislation tests interchangeably with its equal protection tests. *Id.* Thus, though the special legislation provision requires the Illinois' courts to conduct enlarged judicial review, traditional deference is given to the legislative class in special legislation as well as equal protection analysis. *Id.*

80. It is a fundamental axiom of constitutional law that not every classification scheme created by legislative enactment is unconstitutional. *Hines v. Elkart Gen. Hosp.*, 465 F. Supp. 421, 430 (1979). In fact, every law promulgated by the legislature creates a classification which ultimately discriminates in some manner. *Id.* Only unreasonable or invidious classifications are ultimately held unconstitutional. LEGISLATIVE RESPONSE, *supra* note 2, at 17. The relevant inquiry then is not whether there is a classification, but whether the classification is unreasonable or invidious. *Id.* One standard for deciding whether statutory classifications deny equal protection is to ascertain whether the classification bears a rational relationship to a legitimate legislative purpose. *Boucher v. Sayeed*, — R.I. —, 459 A.2d 87, 91 (1983). This standard requires a two-step analysis, examining both the nature of the classification and the goals it seeks to achieve. *Id.* If the nature of the classification is such that it infringes upon a fundamental right or is based upon a suspect class, the classification will fail constitutional scrutiny unless there is a compelling state purpose for the enactment. LEGISLATIVE RESPONSE, *supra* note 2, at 18. On the other hand, if the nature of the classification is not objectionable, the legislation will be upheld as long as there is a rational relationship between the means selected by the legislature and a legitimate legislative objective. *Id.* Extreme respect is afforded the legislature in defining a legitimate objective. *Id.* Therefore, statutes examined under this rational relationship test are almost inevitably upheld. *Id.*

The Supreme Court of Louisiana's analysis in *Everett v. Goldman*, is a classic example of the use of the rational basis test in scrutinizing a review panel procedure. 359 So. 2d 1256 (1978). In *Everett*, the court conceded that the review panel statute created a separate classification of malpractice tort claimants who were required to submit to panel proceedings. *Id.* at 1266. The court then stated that neither a fundamental right nor a suspect classification was involved. *Id.* Rights such as free speech and freedom to travel were fundamental rights and the absence of a panel determination prior to commencement of a lawsuit was not included therein. *Id.* Furthermore, suspect classes included race, alienage and religion; malpractice litigants did not comprise such a suspect classification. *Id.* *Everett* therefore properly concluded that its review panel procedure should be upheld as constitutional provided there was a rational relationship between the creation of the panel and a legitimate legislative objective. *Id.*

Under this rational relation test, as applied in *Everett*, the review panels were easily upheld. *Id.* at 1268. The court articulated the legitimate legislative objectives behind the panels to be the lowering of the general cost of health care and the facilitation of the availability of health care for state citizens. *Id.* The *Everett* court found that the state's review panels were a reasonable response to the health care crisis. *Id.* at 1209. The panels were upheld in *Everett* as part of a constitutional package supported by a valid state purpose. *Id.*

Equal protection and special legislation challenges to review panels rest on the premise that unequal treatment occurs when the law requires medical malpractice tort claimants to undergo review panel proceedings before going to trial on their claims without imposing a similar pretrial burden on ordinary tort claimants.⁸¹ Liti-gants claim that this inequality of treatment is unjustified because there is no real difference between medical malpractice cases and other tort cases.⁸² Automobile accident victims, for example, are not required to submit their claims initially to a review panel before proceeding to their constitutionally protected right to a jury trial.⁸³ Furthermore, these same automobile accident claimants do not have to bear the disquietude borne by the malpractice claimant who faces severe penalties if he refuses to accept an adverse unanimous panel decision.⁸⁴ In other words, automobile accident victims have not been classified or singled out for treatment different from other tort claimants.

In contrast, medical malpractice claimants must comply with the review panel requirement. The classification of medical malprac-tice plaintiffs is based upon their identity as patients who have under-gone an injury as the result of a health care worker's negligence.⁸⁵ The classification of medical malpractice defendants is based upon their identity as workers who provide health care services to others.⁸⁶ Of the two foregoing classifications, neither involves a sus-pect class such as race, alienage, or illegitimacy.⁸⁷ Furthermore, the requirement that a malpractice claimant undergo a pretrial proce-dure aimed at weeding out nonmeritorious cases does not circum-scribe a fundamental right such as voting, procreation, or interstate

In 1983, however, the Rhode Island Supreme Court reached an opposite result from *Everett* on the equal protection issue. *Boucher v. Sayeed*, — R.I. —, 459 A.2d 87 (1983). The Rhode Island Supreme Court in *Boucher v. Sayeed* held its review proce-dure an unconstitutional encumbrance on the malpractice plaintiff's right to equal protection of the laws. *Id.* The *Boucher* court, in applying the proper minimal scru-tiny test, struck down its review procedure because it was unable to find a legitimate legislative objective. *Id.* at 93. The *Boucher* court noted that statutes intended to remedy a crisis normally contain a statement of findings of fact indicating how the statute is to assist public health, safety, or morals. *Id.* Since no statement was forth-coming and, in the court's opinion, no obvious malpractice insurance crisis existed, the court found the statute did not promote a legitimate legislative purpose. *Id.* Therefore, the Rhode Island Supreme Court struck down its review panel procedure as in contravention of the parties' right to equal protection of the laws. *Id.* at 94.

81. *Everett v. Goldman*, 359 So. 2d 1256, 1265 (La. 1978).

82. *Id.*

83. Brief for Plaintiff-Appellee at 54, *Wright v. Central Du Page Hosp.*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

84. *Id.*

85. *Johnson v. St. Vincent Hosp.*, 273 Ind. 374, 404 N.E.2d 585 (1980).

86. *Id.*

87. *Id.*

travel.⁸⁸ Therefore, although the review panel procedure does inflict unequal treatment upon affected parties, the Illinois review panel procedure should be upheld as long as there is a rational relationship between the creation of the panel and a legitimate legislative objective.⁸⁹

88. *Id.*

89. At least one state supreme court has applied scrutiny stricter than the rational basis test to its medical malpractice legislation. See *Jones v. State Board of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976). In *Jones*, the Idaho Supreme Court noted that the United States Supreme Court traditionally follows a two-tiered standard of review in its equal protection analysis. *Id.* at 866, 555 P.2d at 406. Where a class is suspect or where the government action seriously burdens a fundamental right, however, the United States Supreme Court applies a strict scrutiny standard. *Id.* Where there is neither a suspect class nor a fundamental right, the United States Supreme Court follows a restrained standard, the rational basis standard. *Id.* After identifying these two standards, the Idaho Supreme Court examined the then recent United States Supreme Court opinion of *Reed v. Reed*, 404 U.S. 71 (1971) which had applied a newer intermediate standard of scrutiny. *Jones*, 97 Idaho at 867, 555 P.2d at 407. The intermediate standard of scrutiny used in *Reed* was called the "means-focus" standard. *Reed*, 404 U.S. at 71. Under this standard the Court was to test whether the legislative means substantially furthered some specifically identifiable legislative end. *Id.*; see also Gunther, *The Supreme Court, 1971 Term—Forward: In Search of an Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). This standard required the legislature to demonstrate some legitimate connection between the legislation and accomplishment of the goal of reducing malpractice. LEGISLATIVE RESPONSE, *supra* note 2 at 30. In *Jones* the court decided the "means-focus" was the appropriate standard to apply, and it remanded the case to the trial court to apply this standard. 97 Idaho at 867, 555 P.2d at 407.

At least one commentator has advocated that courts should use this intermediate scrutiny or "means-focus" test in examining panel procedures for equal protection validity. *Massachusetts Statute*, *supra* note 14, at 1301. It has been suggested that if equal protection guarantees are to have any meaning with respect to legislation enacted purportedly for the public welfare, the courts should carefully scrutinize the relationship between the legislative goals and the legislative means used to achieve these goals. *Id.* at 1301-02. This type of scrutiny would better serve public welfare by encouraging state lawmakers both to consider the effectiveness of its classification and to consider less restrictive alternatives in reaching its legislative goals. *Id.* at 302. Particularly where special interest groups exert considerable pressure on the legislature, it was recommended that the courts should not mechanically render a presumption that the legislature was acting in the best interests of the public. *Id.*

This reasoning is particularly well-suited to an analysis of the Illinois Medical Malpractice Reform Act of 1985. It is clear that Illinois physicians were well-organized in their lobbying efforts. In fact, on May 22, 1985, over 4,000 doctors converged in Springfield, Illinois in a massive lobbying effort intended to pressure state legislators to support the doctors' bills. *Physicians Storm Capital Demanding Reform*, 167 ILL. MED. J. 430 (1985). Furthermore, articles appeared in medical journals encouraging physicians to "communicate" with their local legislators on a "regular basis" in order to gain greater support for the malpractice legislation. See, e.g., *Legislators are People Too*, 167 ILL. MED. J. 171 (1985); see also *Talk to Those Who Can Help Make A Difference*, 167 ILL. MED. J. 212 (1985). These same articles called for "Action Teams" who were to be responsible for generating publicity in support of the physicians' causes. *Legislators are People Too*, 167 ILL. MED. J. 171, 172 (1985). In addition, the Illinois State Medical Society's (ISMS) president conducted a "President's Tour" of Illinois in order to generate additional press coverage of his efforts to support the new malpractice enactment. *Id.*

Perhaps under this significant pressure generated by physicians' groups, legisla-

In applying the rational relation test, courts traditionally afford the legislature great deference in defining a legitimate legislative objective.⁹⁰ Recently, in *Anderson v. Wagner*, the Illinois Supreme Court evidenced this deference to the General Assembly's perception of a malpractice crisis when the court upheld under constitutional attack a special statute of limitations for malpractice actions.⁹¹ In *Anderson*, the plaintiff had argued that a special statute of limitations applicable only to medical malpractice actions against physicians and hospitals, when contrasted with the date-of-discovery rule governing the time limit for bringing medical malpractice actions against all health care professionals, conferred a particular advantage upon physicians and hospitals while denying that same benefit to other health care professionals.⁹² This special statute of limitations limited the bringing of any medical malpractice action against physicians and hospitals to within four years from the date of the alleged negligence.⁹³ The purpose of this reduction in the exposure period that physicians or hospitals faced was to remedy the difficulty caused by the "long tail" of liability brought about through the frequent use and liberal application of the date-of-discovery rule in medical malpractice cases.⁹⁴ The *Anderson* opinion included a lengthy examination of the continuing medical malpractice crisis in Illinois.⁹⁵ The court implicated the date-of-discovery rule⁹⁶ as one of the contributing factors to the malpractice crisis.⁹⁷

tors were improperly influenced to vote on the medical malpractice legislation. For this reason it would be sound reasoning for the court to require the legislature to substantiate its purpose for such a legislative enactment. It would also be sound reasoning to require the legislature to show how such legislation would actually cure the malpractice crisis. In sum, in light of extreme pressure exerted by the medical society, as a special interest group, the Illinois Supreme Court would be well advised to adopt the "mean-focus" test advocated in *Jones*.

90. In Illinois, parties who attack the validity of a classification have the burden of showing that the classification is unreasonable or arbitrary. *People v. Palkes*, 52 Ill. 2d 472, 288 N.E.2d 469 (1972).

91. *Anderson v. Wagner*, 79 Ill. 2d 295, 402 N.E.2d 560 (1980).

92. *Id.* at 321, 402 N.E.2d at 570.

93. *Id.* at 308, 402 N.E.2d at 561.

94. *Id.*

95. *Id.*

96. *Id.* at 322, 402 N.E.2d at 570; see also Fegan, *The Medical Malpractice Statute of Limitations: The Severance of the Long Tail of Liability*, 70 ILL. B. J. 114 (October 1981). The application of the date-of-discovery rule to medical malpractice actions has caused significant problems for health care workers and their insurers. Fegan, *The Medical Malpractice Statute of Limitations: The Severance of the Long Tail of Liability*, 70 ILL. B. J. 114 (Oct. 1981). The date-of-discovery rule potentially indefinitely prolonged the period during which a plaintiff could bring his action against a health care worker because the statute of limitations did not run until the plaintiff knew or should have known about the defendant's negligence. *Id.* at 115. Therefore, the statute of limitations under the date-of-discovery rule was not a statute of repose for the defendant. *Id.* at 114. For this reason the legislature enacted new legislation which set a four year maximum time period in which an action could be brought. *Id.* In 1980, in *Anderson v. Wagner*, the Illinois Supreme Court upheld the

The *Anderson* court concluded that the classifications created by the legislature, in enacting the maximum four year statute, were reasonably related to the legislative purpose of curing the malpractice crisis.⁹⁸ Therefore, the court held, there was a sound basis for regarding the class of malpractice litigants as distinct for purposes of the legislation.⁹⁹

The 1985 Illinois review panel procedure is a remedy to the malpractice crisis analogous to the outer limit on liability discussed in *Anderson*.¹⁰⁰ In its discussion in *Anderson*, the Illinois Supreme Court articulated the view that a constitutional review panel could be devised for Illinois.¹⁰¹ The *Anderson* court thus revealed its readiness to uphold a new legislative cure for the malpractice crisis.¹⁰² Review panels, like the statute of limitations contested in *Anderson*, do create a special classification of malpractice litigants. Properly fashioned review panels have the potential of weeding out frivolous claims, expediting settlement of minor claims, and easing the congestion on court dockets. Like the special statute of limitations examined in *Anderson*, the review panels help to eradicate the malpractice crisis. Both, therefore, are rationally related to a legitimate legislative objective. In light of the medical malpractice insurance problem, there is a sound basis for regarding the class of malpractice litigants as distinct from the class of generic tort litigants for purposes of the legislation. In sum, the review panel, although it is a special law, does not violate either the special legislation provision or the equal protection clause of the Illinois Constitution.

However, constitutional scrutiny of the Illinois review panel procedure cannot end here. While it is permissible for the legislature to classify malpractice litigants for the purposes of malpractice legislation, it is not permissible for the legislature to encumber other constitutional guarantees in the process. In particular, because of the expense and delays inherent in the Illinois panel, the procedures set forth in the new law come dangerously close to overburdening the medical malpractice plaintiffs' due process rights.

new legislation as constitutional. 79 Ill. 2d 295, 402 N.E.2d 560 (1980).

97. 79 Ill. 2d at 295, 402 N.E.2d at 570.

98. *Id.*

99. *Id.*

100. *Id.*

101. In its diversion to the history of the medical malpractice problem in Illinois, the *Anderson* court resurrected its discussion of the 1975 medical malpractice review panels which it had previously held unconstitutional. *Id.* at 564. *Anderson* chided that the critics of the court had read the *Wright* opinion too broadly. *Id.* The *Anderson* court then entertained the notion that a constitutional panel procedure could be devised. *Id.* However, neither the *Anderson* Court nor the *Wright* Court articulated any guidelines for their respective views of a constitutional panel procedure.

102. *Id.*

B. Due Process: Justice Delayed is Justice Denied

In addition to equal protection and special legislation challenges, the review panel procedure implicates the medical malpractice plaintiffs' constitutional right to due process of law.¹⁰³ Plaintiffs challenging their respective panel procedures on due process grounds usually rely on the double-barreled argument that first, the additional costs,¹⁰⁴ and second, the unavoidable delays¹⁰⁵ inflicted by the panel procedure, deny them their right of free access to

103. The fourteenth amendment of the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

The fifth amendment to the United States Constitution provides: "No person shall . . . be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The fifth amendment of the Constitution of the United States has been made applicable to the several states, and to proceedings in the courts of several states, by Section 1 of Amendment XIV to the Constitution of the United States.

Additionally article one, section two of the Illinois Constitution provides: "No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws." ILL. CONST. art. 1, § 2 (1970).

For a list of state courts that have entertained due process challenges to their respective panel enactments see *supra* note 74.

104. While cost and delay arguments against panel procedures usually arise in a due process context, these arguments against panel procedures have arisen in other contexts as well. For instance in *Wheeler v. Shoemaker*, the United States District Court for the District of Rhode Island sitting in diversity prohibited reference of the plaintiff's medical malpractice action to the state malpractice commission and refused to set up a duplicate panel in the federal court. 78 F.2d 218 (D. R.I. 1978). One factor in the *Wheeler* court's decision to prohibit the establishment of a federal panel was the additional costs which the panel would superimpose over an already costly trial process. The *Wheeler* court stated:

The cost to the judicial system and to the litigants cannot be minimized. . . . Rather than judicial economy, in fact, three tribunals—the panel, the reviewing trial judge, and the jury—will often pass on liability. The federal judiciary has a substantial interest in avoiding the multiplicity of *already staggering delay and cost* to the litigants and to the administration of the federal courts.

Id. at 229 (emphasis added). The court conceded that it chose to honor the federal interests in exercising control over the quality and cost of the adjudicatory process in federal court. *Id.*

105. In 1983, the New Jersey Supreme Court in *Perna v. Pirozzi* considered the delays inherent in its court-adopted panel system. — N.J. —, 457 A.2d 431 (1983). The *Perna* court stated that since its adoption the panel system had generated significant controversy. *Id.* at 437. The controversy centered around the fairness and effectiveness of the panel. *Id.* In 1982, Chief Justice Wilentz of the New Jersey Supreme Court appointed a committee to examine the effectiveness of the state's panel procedure. *Id.* In its 1983 report, the appointed committee concluded that the panel was entirely ineffective and should not be retained in its present form. *Id.* The committee found, in particular, that it was questionable whether the panel hearing encouraged the efficient disposition of medical malpractice claims. *Id.* The committee concluded that cases were efficiently adjudicated not because of the panel procedure, but instead because of early preparation. *Id.* While the *Perna* court did not hold its panel unconstitutional, it decided that after some further consideration it would either completely discard its panel procedure, or it would entirely revise the ineffective system. *Id.*

courts.¹⁰⁶ Almost unanimously, state courts dispose of procedural due process contentions by noting that due process is a flexible concept and that procedural protections need only be tailored to the particular situation at hand.¹⁰⁷ Where fundamental rights are infringed, due process is satisfied when statutory procedures provide

106. For example, in 1983, the New Mexico Supreme Court in *Jiron v. Mahlab* examined whether application of its panel system as applied to the plaintiff, Mrs. Jiron, deprived the plaintiff of free access to courts. 99 N.M. 426, 659 P.2d 311, 312 (1983). The New Mexico panel statute prohibited the filing of a case against a health care worker before the review panels decision was rendered. *Id.* Mrs. Jiron filed her suit prior to seeking a panel determination because the defendant, Dr. Mahlab, was leaving the country and Mrs. Jiron would be unable to obtain service of process over him in a foreign country. *Id.* In *Jiron*, the New Mexico Supreme Court outlined the tests that should be applied in order to determine whether a party is in danger of deprivation of his or her constitutional right to free access to courts. *Id.* To begin with, the court noted that the right of the people to petition the court for redress of grievances is a first amendment right. *Id.* Both the United States and the New Mexico Constitution prohibited the deprivation of a party's life, liberty, or property without due process of law. *Id.* The right to access is one of the elements of this right to petition. *Id.* Therefore, a person is deprived of due process when they are deprived of free access. *Id.* (citing *Boddie v. Connecticut*, 401 U.S. 371 (1971)).

In the case at bar, the New Mexico Supreme Court held that, while the panel statute was not unconstitutional in its entirety, it was unconstitutional as applied to this plaintiff. *Jiron*, 99 N.M. at 425, 659 P.2d at 313-14. Specifically, the court stated that where the requirement of first going before the review panel caused undue delay such that a plaintiff was in jeopardy of losing witnesses or parties, the plaintiff was unconstitutionally deprived of free access. *Id.* at 413. In this case, Mrs. Jiron was in jeopardy of losing personal jurisdiction over the defendant because of the inordinate delay. *Id.* For this reason, the panel statute effectively denied her of free access, and it was therefore unconstitutional as applied to her. *Id.* at 413-14.

The same problems do not exist with regard to the Illinois panels because the court obtains jurisdiction over the case prior to commencement of the panel proceeding. ILL. REV. STAT. ch. 110, § 2-1013 (1985). However, undue delay is a constant topic surrounding these state panel proceedings. In *Jiron*, the plaintiff was in jeopardy of losing personal jurisdiction over the defendant. Similarly, Illinois plaintiffs would certainly be placed in jeopardy of losing some key witnesses because of the delays caused by the panel. For instance, expert witnesses faced with a trial before the panel, and before the trial court as well, may decline to testify for the parties. Therefore, the Illinois panel proceeding certainly places the plaintiff in jeopardy of losing valuable witnesses. In this way the panel proceeding undermines the plaintiff's rights of truly free access to the court system.

For another case discussing how the requirement of proceeding before a review panel prior to the time trial court obtains jurisdiction violates the plaintiffs' free access rights, see *Cardinal Glennon Mem. Hosp. v. Gaetner*, 583 S.W.2d 107 (Mo. 1979). See also *Redish, Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759, 795-96 (1977) (requiring plaintiff to proceed through an expensive and lengthy review process as a condition precedent to an actual judicial hearing effectively denies the plaintiff of free access); but see *Johnson v. St. Vincent Hosp.* 273 Ind. 374, 383-84, 404 N.E.2d 585, 591-92 (1980) (requirement of panel determination prior to filing suit in court did not result in impermissible delay and expense); *Everett v. Goldman*, 359 So. 2d 1259, 1267-69 (La. 1978) (requirement that plaintiff first submit to a review panel did not violate guarantees to free access or due process); *Paro v. Longwood Hosp.*, 373 Mass. 645, 654-55, 369 N.E.2d 985, 989-91 (1977) (statute requiring screening of all medical malpractice actions did not deny plaintiff's right to free access).

107. *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 493, 261 N.W.2d 424, 444 (1978).

an opportunity to be heard in a reasonable time and in a reasonable manner.¹⁰⁸

In *Strykowski v. Wilkie*, the Wisconsin Supreme Court considered the constitutionality of its panel procedure under a combined due process and access to court attack.¹⁰⁹ Wisconsin's complex panel procedure required litigants to submit to a proceeding which amounted to a full-blown trial.¹¹⁰ This process proved to be very expensive for the adversaries.¹¹¹ In refuting the argument that the panel procedure imposed an undue economic burden on the parties, the *Strykowski* court remarked that the state had no constitutional responsibility to diffuse the economic disparities which inevitably make resort to courts more difficult for some parties than others.¹¹²

The Illinois review panel procedure, like the Wisconsin procedure, contains many of the attributes and resulting liabilities of a full-blown trial, including all of the expenses and delays incident to trial. For many plaintiffs this additional financial burden will preclude the possibility of ever proceeding to trial. In addition, parties who reject unanimous panel determinations in Illinois face the onerous possibility of being taxed their opponents' costs if they fail to prevail at trial. The potential liability for an opponents' costs will inevitably have a chilling effect upon parties unable to shoulder this additional expense. Nevertheless, the *Strykowski* holding teaches the lesson that economic disparities are part of the system and that the legislature is under no obligation to diffuse them.¹¹³ Arguments against delay are as easily disposed of by noting that while parties may not have the financial ability to proceed to trial, they still possess the right to do so.¹¹⁴ Neither potential expense nor delay poses a concept which is, in the first instance, offensive to traditional due process notions. Nevertheless, these expense and delay problems have not always been met with court approval.

The Florida Supreme Court, in *Aldana v. Holub*, took a more serious view toward the claimant's contention that the expense and delay inherent in Florida's review panel violated a party's federal due process rights.¹¹⁵ The narrow issue presented in *Aldana* was

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. For a discussion of the right to trial by jury see *infra* notes 151 through 165 and accompanying text.

115. *Aldana v. Holub*, 381 So. 2d 231 (Fla. 1980). *Aldana* was, in fact, the second time the Florida Supreme Court had examined the constitutional due process inquiry involving its panel procedure. *Id.* In 1976, the Florida Supreme Court in *Carter v. Sparkman* had upheld under due process fire its panel procedure. 335 So. 2d 802 (Fla. 1976). The *Carter* court exercised deference to the legislature's determi-

whether the State Medical Mediation Act, which included an absolute nonextendable ten-month jurisdictional period, violated the due process clauses of the state and federal constitutions.¹¹⁶ The inherent inflexibility of the absolute jurisdictional period led the *Aldana* court to conclude that the statute deprived the parties of due process.¹¹⁷ The *Aldana* court further held that the jurisdictional periods were arbitrary and capricious in their operation and, therefore, rendered the statute intractably and incurably defective.¹¹⁸ The court asseverated that it insults due process to sanction a law which bestows a precious legal right, but then allows that right to be whimsically swept away "on the wings of luck and happenstance."¹¹⁹

The *Aldana* court did not, however, confine itself to the narrow issue before it. The *Aldana* court noted that while it would have been possible through judicial fiat to allow extensions in the jurisdictional period, it would have been constitutionally impermissible to allow either party's procrastination to extend the review panel's timing requirements.¹²⁰ The *Aldana* court stated that it was constitutionally impermissible to extend the jurisdictional period because extensions deprived the plaintiff of speedy access to courts and increased the burden already shouldered by the plaintiff.¹²¹ In the *Aldana* court's view, if extensions in the jurisdictional period were allowed, the panel procedure, which was initially conceived as an expeditious tool could inflate up to sixteen months. Such delay would effectively trammel a plaintiff's right of access to court.¹²² On

nation that there was a malpractice insurance crisis in its state. *Id.* at 805-06. *Carter* conceded that, while it was generally opposed to any excessive burden placed on claimants' right to due process, reasonable restrictions were permissible where prescribed by law. *Id.* The *Carter* majority, however, concluded its due process analysis by stating that the pre-litigation burden spawned by the panel procedure "reaches the outer limits of constitutional tolerance." *Id.* at 806. Furthermore, Justice England, concurring in the result, stated in his separate opinion: "It troubles me that persons who seek to bring malpractice lawsuits must be put to the expense of two full trials on their claim. . . ." *Id.* at 807 (England, J., concurring).

The *Carter* court's reservation regarding its review panels proved prophetic because in 1980 the Florida Supreme Court held its panel procedure unconstitutional. *Aldana* 381 So. 2d 231 (Fla. 1980). In *Aldana v. Holub*, the Florida Supreme Court held that its state's panel procedure violated the due process clauses of the United States and Florida Constitutions. *Id.*; see also *McCarthy v. Mensch*, 412 So. 2d 343, 345 (Fla. 1982) (explained the *Aldana* holding).

116. *Aldana*, 381 So. 2d at 231.

117. *McCarthy*, 412 So. 2d at 345.

118. *Aldana*, 381 So. 2d at 238.

119. *Id.* at 236.

120. *Id.* at 238. The *Aldana* court's hands were tied because if it extended the jurisdictional period, it deprived the plaintiff of speedy access to courts and increased the prelitigation burden already shouldered by the plaintiff. *Id.* On the other hand, if it upheld the statute, the defendant would almost certainly be deprived of the use of the panel because the jurisdictional period would expire before the procedure's initiation. *Id.*

121. *Id.* at 238.

122. *Id.*

the basis of its analysis, the *Aldana* court concluded that the Florida legislature's panel enactment was constitutionally defective.¹²³ *Aldana* ultimately held that because the jurisdictional period in the review panel had demonstrated itself to be unfair, arbitrary and capricious in its application, that it was violative of the guarantees of the due process clause.¹²⁴

The jurisdictional periods contained within the Illinois review panel enactment trigger the same due process questions as those that the *Aldana* court addressed in evaluating Florida's enactment. Because the 1985 Illinois enactment permits the parties to use at least three potential means for delay, the procedure has the potential of lasting one-and-one-half years.¹²⁵ Furthermore, one commentator has suggested that a bald opportunity for delay exists in the panel's timing because the procedure is not to convene until the parties are "at issue" on the pleadings.¹²⁶ The "at issue" requirement permits the parties' attorneys to negotiate privately for extensions in the required time frames for answering or otherwise pleading.¹²⁷ Whenever the parties' attorneys arbitrarily grant each other such extensions, the order to convene the panel will not issue because the parties will not have yet been "at issue" on the pleadings.¹²⁸ In this way, the "at issue" requirement can cause the commencement of panel proceedings to be delayed indefinitely.¹²⁹

The flexibility provided through the "at issue" requirement, however, does not confer constitutional license upon the defendant to subject the plaintiff to inordinate delay before the plaintiff is finally entitled to enter the circuit courthouse door. In enacting the panel, the General Assembly attempted to facilitate the speedy determination of truly meritorious cases. While this goal is commendable, speed is not the strong suit of this panel procedure. The panel's potential for abusive delay will undoubtedly have a chilling effect upon all lawsuits, meritorious and non-meritorious alike. The *Aldana* court determined that extension of Florida's constitutionally

123. *Id.*

124. *Id.*

125. No absolute jurisdiction period is commanded by the Illinois review panel enactment. The following time frames, however, have been enumerated: (1) an order to convene the panel must be issued *no later* than 90 days after the parties are at issue on the pleadings; (2) absent good cause for delay, the panel is to convene within 120 days after the order; and (3) the panel is to render its decision within 180 days after it is convened, with provision for one 180 day extension. ILL. REV. STAT. ch. 110, § 2-1013 (1985). In all, the Illinois panel has the potential for dilating to a one-and-one-half year commitment.

126. Chi. Daily L. Bull., April 13, 1985, at 6, col. 3, n.50.

127. *Id.*

128. *Id.*

129. *Id.*

mandated jurisdictional periods was impermissible.¹³⁰ By the same token, the Illinois panel procedure must function within reasonable time frame parameters. Simplified proceedings with tolerable jurisdictional periods imposed upon the parties would insure a more reasonable panel structure. In addition, a type of panel proceeding which does not arbitrarily deprive a plaintiff of fundamental constitutional privileges comports with the principles of fairness underlying the due process clause.

C. Judicial Article

In addition to the due process problems, the 1985 Illinois review panel violates the mandates of the judicial article. In 1975, the Illinois Supreme Court in the case of *Wright v. Central Du Page Hospital* held that the review panel procedure of the 1975 Illinois Medical Malpractice Reform Act violated *inter alia* Article VI, Sections one and nine of the Illinois Constitution.¹³¹ Under Article VI, Section one of the Illinois Constitution, determinations of law are a judicial function.¹³² Under the 1985 Act, the judge presiding over the panel is to make all determinations of law.¹³³ The drafters of the

130. *Aldana*, 381 So. 2d at 236.

131. *Wright*, 63 Ill. 2d 313, 324-25, 347 N.E.2d 736, 743-44.

132. ILL. CONST. art. VI, § 1 (1970) provides: "The judicial power is vested in a Supreme Court, an Appellate Court and Circuit Courts."

133. In *Wright v. Central Du Page Hosp.*, the Illinois Supreme Court interpreted Article I of the judicial article of the Illinois Constitution to mean that determination of law is a judicial function. 63 Ill. 2d at 322, 347 N.E.2d at 739. The *Wright* court perceived the 1975 panel to usurp the constitutional grant of judicial power to the court. *Id.* at 322-23, 347 N.E.2d at 739-40; see also *Malpractice Statute Unconstitutional*, *supra* note 21, at 303. Specifically, the *Wright* court held that the 1975 Act imbued nonjudicial members with the following trinity of judicial powers: (1) the 1975 Act diffused the judge's authority to make rulings on evidentiary matters because it empowered the panel to waive rules of evidence; (2) panelists, within certain limits, stood on equal footing with the judge in deciding legal and factual issues; and (3) the statutory provision which militated that panel members should make decisions "according to applicable substantive law" allowed lay panelists to ascertain law before applying it, rather than applying the law as the judge explained it. *Malpractice Statute Unconstitutional*, *supra* note 21, at 303. In sum, the court held the panel invalid because it allowed secular members of a panel to encroach on constitutionally mandated judicial functions.

The 1985 Illinois Malpractice Reform Act was carefully tailored to avoid the violations of the judicial power provision of the Illinois Constitution that had occurred in the 1975 Act. The 1985 drafters cured the judicial power infirmities in three ways. First, under section 2-1017 of the 1985 Act, the panel is required to make its findings "according to applicable substantive law as determined by the judge on the panel." ILL. REV. STAT. ch. 110, § 2-1017 (1985). This provision avoids the infirmities of the 1975 Act by requiring the judge to make determinations of law, rather than allowing the lay panelist to ascertain the law along with the judge. Second, section 2-1017 negates the problem of judicial and nonjudicial members standing on equal footing; the judge is now clearly the one to designate the applicable law. *Id.* Third, section 2-1016 of the 1985 Act requires the judge to "preside over all proceedings of the panel in the same manner as in civil cases, and shall determine all questions of law, including matters of evidence." ILL. REV. STAT. ch. 110, § 2-1016 (1985). This provision of

1985 panel, therefore, effectively avoided all the usurpations of judicial power that had occurred in the 1975 panel enactment.

The *Wright* court's second constitutional objection to the 1975 panel procedure, however, proved a more significant problem for the drafters of the 1985 Medical Malpractice Reform Act. The *Wright* court had held that in addition to judicial power violations, the panel procedure also violated the original jurisdiction provision of the judicial article.¹³⁴ The original jurisdiction provision provides that the circuit court shall have "original jurisdiction of all justiciable matters . . . [and] shall have such power to review administrative action as provided by law."¹³⁵ The 1975 panels contravened the original jurisdiction provision of the Illinois Constitution, and the 1985 panels are saddled with the same problem.

Prior to *Wright*, the Illinois Supreme Court had, in *Grace v. Howlett*,¹³⁶ examined the constitutional requirement of original jurisdiction under the judicial article. In *Grace*, the court held unconstitutional an automobile insurance statute which required arbitration of claims that did not exceed \$3,000.¹³⁷ This statute compelled the circuit court to submit all such claims to arbitration prior to permitting the litigants to proceed to trial.¹³⁸ The arbitration award was to be entered as a judgment unless it was reversed on appeal at a trial *de novo*.¹³⁹

The *Grace* court noted, however, that one of the original goals of the judicial article was the extermination of the wasteful and duplicative process of a trial *de novo* in the circuit court.¹⁴⁰ Proponents of the arbitration provision in *Grace* tried to distinguish it from the typical case of a trial *de novo*.¹⁴¹ The proponents contended that the arbitration provision did not actually compel a trial *de novo*, but

the 1985 Act avoids the problem of diluting the judge's authority to make evidentiary rulings; the judge is now to determine matters of law and evidence. In sum, all encroachments on judicial power that were present in the 1975 panel procedure were effectively drafted out of the 1985 panel procedure.

For additional interpretation of the *Wright* opinion see Comment, *Pre-Trial Screening of Medical Malpractice Claims Versus the Illinois Constitution*, 10 J. MAR. PRAC. & PROC. 133, 143-47 (1976); Note, *Wright v. Central Du Page Hospital: A Grim Prognosis for Medical Malpractice Review Panels?*, 22 S.D.L. REV. 461 (1977).

134. *Wright*, 63 Ill. 2d at 313, 347 N.E.2d at 736.

135. 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 provided by law.

136. 51 Ill. 2d 478, 283 N.E.2d 474 (1972).

137. *Id.* 51 Ill. 2d at 480, 283 N.E.2d at 476.

138. *Id.* at 482, 283 N.E.2d at 476.

139. *Id.*

140. *Id.* at 489, 283 N.E.2d at 480.

141. *Id.* at 490, 283 N.E.2d at 480.

was instead an acceptable pretrial procedure.¹⁴² The *Grace* court, however, refused to accept this argument.¹⁴³ Rather, the court found that because the arbitration award was to be entered as a judgment and could only be reversed on appeal, the mandatory submission of all claims to arbitration could not be analogized to an acceptable pretrial procedure.¹⁴⁴ In contrast to an acceptable pre-trial device, the arbitration adjudicated the rights of the parties and compelled an "appeal" to the circuit court in the form of a prohibited trial *de novo*.¹⁴⁵

While the Illinois Supreme Court in *Wright* explicitly stated that the 1975 panels were an unconstitutional transgression of the original jurisdiction provision of the judicial article, it did not articulate the panels' specific original jurisdiction violations. Rather, the *Wright* court relied upon the original jurisdiction violation as a necessary corollary of the panels' judicial power infirmities. The *Wright* panels and the *Grace* arbitration system, however, had many common characteristics.¹⁴⁶ Both procedures interjected a preliminary adjudicatory process after the circuit court obtained jurisdiction over the controversy.¹⁴⁷ In essence, a trial *de novo* was conducted only after a party had rejected the finding of the panel in the arbitration.¹⁴⁸ Neither the arbitration decision nor the panel's finding, however, was admissible at trial.¹⁴⁹ Therefore, while the court was not the initial adjudicator of the parties' rights and liabilities after it had obtained jurisdiction, it was required to perform in both cases a complete trial *de novo* if any party rejected the initial adjudicator's findings.¹⁵⁰

Many of the qualities of the 1985 review panels are similar to both the *Grace* arbitration procedure and the *Wright* review panels. The 1985 panel is similar in that (1) it interposes a preliminary adjudicatory process after the court has obtained jurisdiction; (2) where parties reject the panelists' findings, the circuit court must conduct what appears to be a prohibited trial *de novo*; and (3) the panel's decision is not admissible at trial. These characteristics make the 1985 panels a legislative sheep cloaked in an unconstitutional wolf's clothing. The panel is labeled a pretrial screening device, but for all intents and purposes it appears to infringe seriously on the constitutional grant of original jurisdiction to the circuit

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 490-91, 283 N.E.2d at 480-81.

146. *Malpractice Statute Unconstitutional*, *supra* note 21, at 311.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

court. The panel procedure, in order to be valid under this interpretation of the original jurisdiction provision of the judicial article, would have to be revised so as to comport with valid pretrial procedures.

D. Trial by Jury

In addition to a violation of the judicial article, *Wright* also held that the review panel procedure impermissibly burdened a plaintiff's constitutional right to a jury trial.¹⁵¹ The Illinois Constitution guarantees the right of trial by jury. The constitutional issue present in *Wright* was whether the pretrial requirement of mandatory screening panels imposed such a formidable burden on a claimant that he was effectively stripped of his right to a jury trial.¹⁵² In *Wright*, the Illinois Supreme Court relied on the report of the constitutional committee on the bill of rights and the prior Illinois Supreme Court case of *People v. Lobb*¹⁵³ for its interpretation of the right to trial by jury.¹⁵⁴ These historical interpretations of the right to a jury trial are equally applicable in the constitutional analysis of the 1985 panel system.

During the deliberation of the constitutional committee on the bill of rights, the framers of the 1970 Illinois Constitution considered whether to eliminate or modify the right to a jury trial in civil cases.¹⁵⁵ The framers specifically discussed the problem of delay existent in civil cases, and the possibility of expediting litigation through mandatory arbitration in personal injury suits.¹⁵⁶ In the final vote on the matter, however, the Constitutional Convention decided to include with modification, the right to a jury trial in civil cases.¹⁵⁷ Additionally, the spokesman for the committee on the bill of rights expressed serious doubts as to whether the right to a jury trial should yield to any form of compulsory arbitration.¹⁵⁸

The meaning of the right to jury trial provision was further explained in the Illinois Supreme Court case of *People v. Lobb*.¹⁵⁹ In

151. *Wright*, 63 Ill. 2d at 323-24, 347 N.E.2d at 740-41.

152. *Id.*

153. 17 Ill. 2d 287, 161 N.E.2d 325 (1959).

154. *Wright*, 63 Ill. 2d at 323-24, 347 N.E.2d at 740-41.

155. 3 PROCEEDINGS OF THE SIXTH ILLINOIS CONSTITUTION CONVENTION VERBATIM TRANSCRIPTS 1426 (1972). Justice Underwood of the Illinois Supreme Court, urged the framers of the 1980 Illinois Constitution to constitutionally provide that the General Assembly could eliminate or circumscribe the right to jury trial in civil cases. *Id.* at 1428. Justice Underwood's urging was compelled by his concern over inordinate delay in civil cases. *Id.*

156. *Id.* at 1426-34.

157. *Id.*

158. *Id.*

159. 17 Ill. 2d 287, 298-99, 161 N.E.2d 325, 331-32 (1959).

Lobb the court articulated a list of requirements mandated by the right to jury trial as (1) the right to have the facts at issue decided, (2) under the supervision of a judge, (3) by a unanimous verdict of twelve properly selected impartial jurors.¹⁶⁰ The *Lobb* court further opined that the right to jury trial is somewhat malleable as long as the requisite elements are retained.¹⁶¹ The elasticity of the jury trial concept expressed in *Lobb*, when combined with the framers' disinclination to accept any constitutional arbitration system, suggests that a pretrial device might be held valid so long as it is not as encompassing as mandatory arbitration. The 1985 review panel conceived by the legislature, however, comes dangerously close to placing the same onerous burden on the jury trial right as that prohibited by mandatory arbitration.

In 1980 the Pennsylvania Supreme Court in *Mattos v. Thomas* maintained the view that the practical effect of Pennsylvania's panel system was to strip the plaintiff of his constitutional right to jury trial.¹⁶² Profuse statistical data presented to the *Mattos* court illus-

160. *Id.* at 298, 161 N.E.2d at 331.

161. *Id.* at 299, 161 N.E.2d at 332.

162. *Mattos v. Thompson*, 491 Pa. 385, 395-97, 421 A.2d 190, 194-96 (1980). *Mattos* was actually the second time the Pennsylvania Supreme Court had considered the constitutionality of its panel system. The first time the Pennsylvania Supreme Court, in *Parker v. Childrens Hospital of Philadelphia*, upheld its panel provision stating that the Act was too new for the court to determine whether the panels imposed an unconstitutional burden on the right to jury. 483 Pa. 106, 121, 394 A.2d 932, 940 (1978). One member of the *Parker* court, however, felt the panels should have been found unconstitutional at that time. Justice Larsen in his colorful dissent stated:

The Medical Malpractice Act of 1976 is an unworkable mess and the Majority of this Court is perpetuating this sad condition. It is a piece of social legislation which has not achieved a single one of its purposes. One thousand two hundred and seventy cases (1,270) have been filed with the administrator of the Act yet only two of the cases have been disposed of by trial by the seven person arbitration panel. This backlog is growing by leaps and bounds each year. The backlog will soon be greater, time wise, than any one of Pennsylvania's sixty-seven county court backlog. The only thing this Act has successfully done is create a bureaucracy which impedes the resolution of disputes of its citizens. The poor citizens (both plaintiffs and defendants) must now undergo two lengthy trials, endure two court backlogs and pay double the expenses which are not uncommonly in the \$20,000 to \$30,000 range. Additionally, it is humanly impossible for one person (administrator) to manage, control and make all legal rulings on the pleadings of well over one thousand cases—hence the cases will not be disposed of. Lastly, as a practical matter, it is almost impossible to form an arbitration panel. Two health care providers (Doctors, etc.,) are required to sit on the arbitration panel and no doctor, worth his salt, will be able to devote the necessary two or three weeks plus serve on the panel. The legislature sincerely meant well when they created this Act; but it just hasn't worked out and yet, its burdens and unworkability will continue. As Mr. Justice Blackmun of the United States Supreme Court stated in a reference to an aspect of Pennsylvania Law, "the law is a ass—a idiot."

Id. at 116, 394 A.2d at 945-46 (Larsen, J. dissent, citations omitted, footnotes omitted).

trated the preeminent failure of the Pennsylvania panels.¹⁶³ The delays in the system were so lengthy that the right to jury trial became essentially unavailable.¹⁶⁴ The *Mattos* court concluded, therefore, that Pennsylvania's pretrial system constituted a unconstitutional infringement on the right to jury trial.¹⁶⁵

The Pennsylvania experience demonstrates that complicated review panels as pretrial screening devices are not a serviceable alternative dispute resolution forum for medical malpractice cases. Furthermore, under either Pennsylvania or Illinois constitutional analysis, the panel system violates an individual's fundamental right to trial by jury. The Illinois panel procedure is tantamount to a full-blown trial. Malpractice cases are inherently complex, costly, and arduous to try. A condition precedent which would require two trials for a claimant to receive a final adjudication of his claim imposes in these cases an unjustifiable burden on the claimant and makes the jury trial practically unavailable for him. The Illinois panel procedure, which has many of the same attributes as mandatory arbitration, violates the right to jury trial as the framers of the Illinois Constitution foresaw this right in 1970.

V. PRACTICAL PANEL PROBLEMS ENCOUNTERED IN OTHER STATES

In addition to constitutional questions triggered by the Illinois panel enactment, comparable panel procedures in at least three other states have proved to be a miserable failure. For example, in 1976 Rhode Island had enacted a three member panel very similar to the present Illinois system.¹⁶⁶ The three member panels functioned in Rhode Island for four years and eventually proved to be extremely unsuccessful.¹⁶⁷ Of the 266 panels which convened in that four year period, only 56 had resolved the controversies before them.¹⁶⁸ The presiding justice of the Rhode Island Superior Court, in a letter to Rhode Island Governor J. Joseph Garrahy, decried the panel's inability to achieve the objective for which it was designed.¹⁶⁹ The Rhode Island legislature thereafter properly noted

163. *Mattos*, 491 Pa. at 392-95, 421 A.2d at 194-95.

164. For instance, from May 1979 until May 1980 a total of 3,452 cases had been filed with the review panel. *Id.* at 396, 421 A.2d at 195. Seventy three percent of those cases were unresolved at the time of the *Mattos* trial. *Id.* The court noted other lengthy delays and then stated: "Such delays are unconscionable and irreparably rip the fabric of public confidence in the efficiency and effectiveness of our judicial system." *Id.*; see also *Grube v. Toncelliti*, 326 Pa. Super. 339, 473 A.2d 1379 (1984); *Heller v. Franksten*, 504 Pa. 528, 475 A.2d 1291 (1984) (explains *Mattos*).

165. *Mattos*, 491 Pa. at 396, 421 A.2d at 196.

166. *Boucher v. Sayeed*, — R.I. —, 459 A.2d 87 (1983).

167. *Id.* at 89.

168. *Id.*

169. *Id.*

the failure of Rhode Island's panel system and, in response, replaced its system with a simplified procedure consisting of a Supreme Court Justice who was to hold a preliminary hearing within ninety days of the defendant's answer.¹⁷⁰

Similarly, a Florida trial court questioned the validity of Florida's panel and noted that the procedure's high costs managed to weed out meritorious as well as non-meritorious claims.¹⁷¹ At least 72 other Florida trial courts tested the constitutional validity of the procedure.¹⁷² In the wake of these numerous challenges, the Florida Supreme Court recanted its initial support of Florida's panel procedure because it observed that the constitutionally mandated jurisdictional period repeatedly lapsed prior to the initiation of panel proceedings.¹⁷³ The Florida Supreme Court aptly noted that the parties subjected to its panel procedure were "innocent victims of insidious defects which occasionally intrude upon the judicial system — prejudice and unavoidable delay caused by a congested court docket."¹⁷⁴

Finally, a federal court in a diversity case brought in Pennsylvania reluctantly applied the state's screening panel procedure, observing that "a record that disclosed only nine arbitration hearings out of 2,466 claims does not describe a state arbitration system that works exceptionally well, moderately well, or even modestly well. . . . Rather, it describes a system that, though theoretically sound, is actually a resounding flop."¹⁷⁵ The Pennsylvania Supreme Court, which had initially upheld the state's panel procedure, finally reversed its approbation because the lengthy delays inherent in the procedure rendered it impractical as well as unconstitutional.¹⁷⁶

Congestion and delay appear to be the prominent traits of the panel experience in states which have adopted the panel system. While the state court opinions assessing panel systems outside Illinois have no binding legal effect on Illinois courts, the practical failure of these systems whispers an ominous delphic note to the Illinois General Assembly. The experience in these other states vividly demonstrates that the panel proceedings have the potential to cause an undesirable obstruction in an already overburdened judicial system.

170. *Id.* at 89-90. In *Boucher*, the Rhode Island Supreme Court held that, because there was no malpractice insurance crisis in its state, the panel Act violated the plaintiff's constitutional right to equal protection. *Id.* at 93-94.

171. Comment, *Medical Malpractice Screening Panels: A Judicial Evaluation of their Practical Effect*, 42 U. PITT. L. REV. 939, 957 (1981) (citing *Kelly v. Rubin*, No. 78-15303 Dade County Ct., Fla. Oct. 12, 1979).

172. *Id.*

173. *Aldana*, 381 So. 2d 231, 236-38 (Fla. 1980).

174. *Id.* at 236.

175. *Edelson v. Soricelli*, 610 F.2d 131, 136 (3d Cir. 1979).

176. *Mattos*, 491 Pa. 385, 395-97, 421 A.2d 190, 195-96 (1980).

The magnitude of this obstruction negates the underlying goal of the Illinois legislation, which is to facilitate speedy dispositions of meritorious cases. Revision of the Illinois panel system is necessary to avoid the same congestion problems encountered by these other states.

VI. RADICAL LEGISLATIVE SURGERY RECOMMENDED TO SAVE ILLINOIS REVIEW PANELS

The maladies present in the 1985 review panel system render it constitutionally and practically infirm unless legislative surgery is performed imminently. The experience of other states indicates that the panels contain fundamental deficiencies which exacerbate the problems already present in the overtaxed judicial system. The problems inherent in medical malpractice review panels are three-fold: The judicial system cannot practically tolerate too many additional burdens; all plaintiffs are entitled to a speedy determination of their claims; and, all defendants are required to answer for their negligence with as little harassment as possible. Finding a solution which balances the interests of the plaintiff and the defendant without imposing additional burdens upon the judicial system is difficult. Inevitably, the panels' systemic problems cause inordinate delays for legitimate as well as illegitimate claims.

The imposition of a pre-trial device aimed at facilitating the speedy determination of meritorious cases and at discouraging the capricious filing of non-meritorious ones is an admirable goal. The formulation of such a device, however, is a thorny problem. The 1985 Illinois review panel amounts to a slightly modified version of the constitutionally invalid 1975 panels. The legislature's 1985 product is an inappropriate solution. What Illinois needs is a greatly simplified medical screening procedure. Such a procedure would place less stress on the already overburdened judicial system while still providing the pre-trial screening device sorely needed in medical malpractice cases.

One solution is to adopt a procedure possessing some of the characteristics of the preliminary hearing utilized in felony criminal proceedings.¹⁷⁷ Preliminary hearings in criminal cases are used to determine whether there is probable cause for believing that a crime has occurred and that the accused was probably guilty of the crime.¹⁷⁸ An analogous preliminary hearing in malpractice cases would establish only whether there is reasonable cause for the parties to proceed to trial and whether the health care professional im-

177. 1 ILL. INST. OF CONTINUING LEGAL EDUC., PROSECUTION OF A CRIMINAL CASE 2.2-2.9 (1979).

178. *Id.* at 2.3.

plicated in the plaintiff's claim was probably negligent. A malpractice preliminary hearing that is streamlined in its operation and truncated in its scope is strongly recommended. The parties should be required to present just enough evidence to establish the mere probability of negligence or non-negligence. Certainly, the extent of the parties' evidentiary presentation should be less than that expected at trial. In addition, the use of hearsay evidence should be encouraged so that expert opinions can be read into the record without the necessity of having expert witnesses testify. Finally, the proceeding should be terminated as soon as the probability of negligence is established. All of these recommendations would streamline the panel proceedings.

VII. CONCLUSION

The medical malpractice screening panel is the General Assembly's attempt to deal with the medical malpractice crisis. It is the legislature's mechanism for both culling frivolous lawsuits and expediting the settlement of malpractice suits in pre-trial stages. The plain effect of the panel is to add a procedural step to the litigation process. The innovative attributes of the panel have broad constitutional implications. In light of the panel's constitutional infirmities, its survival is questionable.

In 1976 the Illinois Supreme Court, in *Wright v. Central Du Page Hospital*,¹⁷⁹ held the legislature's 1975 panel unconstitutional. In *Wright*, however, the Illinois Supreme Court limited its holding to the panels in question.¹⁸⁰ Several times since it held the 1975 panel unconstitutional, the Illinois Supreme Court has strongly indicated that the legislature was not precluded from devising a constitutional panel system.

In 1985, the Illinois General Assembly tried to breathe new life into its unconstitutional 1975 panel enactment. On December 19, 1985, in *Bernier v. Burris*, the Circuit Court of Cook County, Illinois declared the 1985 review panel enactment unconstitutional. The problem with the 1985 panel enactment is that the legislature produced a panel so similar to the 1975 product that its efforts at resuscitation fell short of the constitutional panel system it had hoped to produce. In essence, the burdens imposed by the panel potentially violate three guarantees provided under the Illinois Constitution. First, the potential for numerous extensions in the panel's jurisdictional period may create a chilling effect upon prospective plaintiffs that deprives them of the guarantees contemplated by the tenets of

179. 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

180. *Id.*

the due process clause. Second, the panel procedure interjects a preliminary adjudicatory device after the circuit court has obtained jurisdiction. The existence of this procedure compels the circuit court to conduct, in effect, a wasteful and duplicitous trial *de novo* in contravention of the mandates of the judicial article. Third, malpractice cases are inherently complex, costly, and arduous to litigate, and a condition precedent to trial which would necessitate two full trials before a final adjudication imposes an unconscionable burden upon plaintiffs in malpractice cases and deprives them of the guarantee of a jury trial.

The imposition of a pre-trial device aimed at facilitating the speedy determination of meritorious cases and at discouraging the capricious filing of non-meritorious ones is an admirable goal. However, because of the constitutional problems existent in the 1985 panel system, the Illinois Supreme Court should hold these panels, as enacted, unconstitutional. Furthermore, even if the Illinois Supreme Court upholds the new panel procedure as a constitutional response to the state's malpractice crisis, the long term survival of a system whose plain effect is to add a complicated procedural step in the litigation process is questionable. Therefore, this comment suggests that the Illinois General Assembly should wield its legislative scalpel to remove the cancerous, and potentially fatal, complexity from the 1985 panel enactment.

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