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PRE-TRIAL SCREENING OF MEDICAL MALPRACTICE CLAIMS VERSUS THE ILLINOIS CONSTITUTION

INTRODUCTION

The issue of the cost and availability of medical malpractice insurance has suddenly ruptured into a front page news item. While there have long been indications that the malpractice insurance market was experiencing some stress, especially in New York and California, the rapidity with which the problems of a few localities has mushroomed into a national "crisis" has been unexpected.

The cause of the "crisis" is the vast increase in malpractice litigation which has occurred in the past decade.¹ The causes of this increase in litigation are numerous and well-documented.² This increase in litigation has resulted in a quadrupling of insurance premium rates in some areas of the country. Doctor discontent with these rising rates is causing the real crisis—doctor strikes, work slowdowns, the inability of some physicians to obtain or afford insurance, and the resulting, possibly catastrophic, loss of medical services available to the public.

1. Ninety percent of all malpractice claims brought in the United States have been brought since 1964. See the Staff of the House Wednesday Group, *The Medical Malpractice Insurance Crisis* (unpublished pamphlet, January, 1975). Today, one out of every three physicians can expect a claim of malpractice to be filed against him in his career. Sheehan, *The Medical Malpractice Crisis In Insurance: How It Happened and Some Proposed Solutions*, 11 *FORUM* 80, 86 (1974).

2. A Senate Subcommittee has concluded that the following were causes for the increase of malpractice suits:

(a) The majority of claims arise from injuries allegedly sustained during treatment or surgery. Therefore certain medical specialists such as orthopedic surgeons, neurosurgeons, anesthesiologists, obstetricians, and gynecologists take greater risks.

(b) A growing national trend toward court actions for grievances that were not generally the subject of court actions. Contributing to this is the high mobility of the public which inhibits growth of trust in physicians.

(c) Today's poor public image of physicians, ranging from "country doctor making house calls in the rain" to "super-successful businessman." This attitude of the public leads to more suits and higher jury awards.

(d) The breakdown of rapport between physician and patient. The family doctor is no longer the family friend. Busy physicians have made the medical practice very impersonal. Growing specialization contributes to this breakdown.

(e) The increased medical load carried by physicians is a definite factor in the rise of malpractice claims. Therefore the potential for error increases. In addition, Medicare and Medicaid have produced skyrocketing demands for medical services, while the number of physicians has not increased.

(f) Other factors include the publicity given to higher malpractice judgments and exposure via television of malpractice stories. SENATE SUBCOMMITTEE ON EXECUTIVE REORGANIZATION, 91st CONG., 1st SESS., *A STUDY ON MEDICAL MALPRACTICE: THE PATIENT VERSUS THE PHYSICIAN* 1, 1-6 (1969) [hereinafter cited as the RIBICOFF STUDY].

While the increase in premium rates is the main reason for the "crisis," the questions involved are much too complex to be easily resolvable. Most doctors, when not on the defensive, agree that there should be some form of compensation available to the negligently injured patient.³

That litigation is the key factor in premium rates is evidenced by the startling fact that out of every malpractice premium dollar paid, approximately seventeen cents goes to the injured plaintiff, while approximately sixty cents goes to cover the costs of litigation.⁴ Therefore, if the amount of malpractice litigation can be reduced, malpractice premium rates would also decline; as premium rates decline, so would doctor discontent; and as doctor discontent declines, so would the "crisis" itself. Many states, responding to the influence of lobbying and the media, have enacted hastily drawn and relatively untried statutory remedies.⁵ Some of these statutes provide for pre-trial screening of medical malpractice lawsuits.

The purpose behind the creation of medical-legal screening panels is to reduce the amount of malpractice litigation. Such panels have been in existence in the United States since 1957.⁶ The Supreme Court of Minnesota has endorsed a screening panel approach to medical malpractice claims:

The public's vital interest in the just and efficient disposition of medical malpractice claims might best be advanced by a method beyond the province of our own role and function as a reviewing court. The interrelated problems of spurious claims and the failure of just claims could be ameliorated if an interprofessional screening committee were established in this state. . . .⁷

Any proposal to lessen the legal costs involved in malpractice actions must reflect a delicate balance between relieving the competent health care provider from the pressure of potential malpractice suits and guaranteeing the injured patient protection and compensation from acts of negligence and incompetence.⁸

3. See generally Caswell, *A Surgeon's Thoughts on Malpractice*, 30 TEMP. L.Q. 391 (1957).

4. Twenty cents to twenty-five cents goes to insurance company overhead; "cost of litigation" includes court costs, trial preparation, and attorney's fees. Sheehan, *The Medical Malpractice Crisis In Insurance: How It Happened and Some Proposed Solutions*, 11 FORUM 80 (1974).

5. In the past twelve months, twenty-two states have enacted legislation in an effort to cope with the situation. 5 A.B.A. INSURANCE, NEGLIGENCE AND COMPENSATION LAW SECTION (1975).

6. Pima County, Arizona was the first area to utilize such a panel. It was not created by statute but rather was voluntarily created by local medical and bar associations. Documentary Supplement, *Medical-Legal Screening Panels as an Alternative Approach to Medical Malpractice Claims*, 13 WM. & MARY L. REV. 695, 706 (Spring 1972) [hereinafter cited as Documentary Supplement].

7. *Anderson v. Florence*, 228 Minn. 2d 351, 365, 181 N.W.2d 873, 881 (1970).

8. Mallor, *A Cure for the Plaintiff's Ills?*, 51 IND. L.J. 103, 106 (1975).

Several states have attempted to strike this balance by enacting statutes which establish pre-trial screening panels.⁹ This comment will analyze these statutes and compare them to approaches utilized in other areas of the country. The comment then notes some serious constitutional obstacles facing these statutes, focusing on a recent decision by the Illinois Supreme Court which held the Illinois statute unconstitutional.¹⁰

PRE-TRIAL SCREENING PROCEDURE

Medical-legal screening panels are created by statute,¹¹ by court rule,¹² and by voluntary cooperation of local bar and medical associations.¹³ The screening panel approach defies concise definition because panels have been proposed for widely divergent purposes¹⁴ and with various compositions.¹⁵

Composition of Panels

Most statutorily-created panels consist of one judge, one attorney, and one physician, with each member having one vote.¹⁶ The voluntarily-created panels generally consist equally of doctors and attorneys.¹⁷ Panel members usually serve without compensation. The statutorily-created panels have lists from which possible panelists are drawn, and when a panel must

9. Arkansas, ARK. STAT. ANN. ch. 26, §§ 34-2601—34-2612 (Bobbs-Merrill Supp. 1976) (screening panel voluntary) [hereinafter cited as *Arkansas*]; Florida, WEST'S FLA. STAT. ANN. §§ 768.133-768.134 (Supp. 1976) (mandatory) [hereinafter cited as *Florida*]; Illinois, ILL. REV. STAT. ch. 110, §§ 58.2-58.10 (Supp. 1976) (screening panel mandatory) [hereinafter cited as *Illinois*]; Indiana, IND. CODE §§ 16-9.5-9-1—16-9.5-1-10 (Burns Supp. 1975) (mandatory) [hereinafter cited as *Indiana*]; Massachusetts, MASS. GEN. LAWS ch. 362, § 5 (Supp. 1975), MASS. ANN. LAWS ch. 231, §§ 60B-60D (Supp. 1975) (screening panel mandatory) [hereinafter cited as *Massachusetts*]; New Hampshire, N.H. REV. STAT. ANN. § 519-A (Supp. 1973) (voluntary) [hereinafter cited as *New Hampshire*]; New York, N.Y. JUDICIARY LAW ch. 657, § 148A (McKinney 1974) (screening panel mandatory) [hereinafter cited as *New York*].

10. Wright v. Central Du Page Hospital Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

11. See note 9 *supra*.

12. See, e.g., New Jersey, N.J. S. Ct. Rule 4:21 (1974).

13. For the most current complete listing of areas of the country employing such panels, see *Symposium, Introduction: The Indiana Act in Context*, 51 IND. L. REV. 91, 98 n.36 (1975).

14. The purposes of such panels include, but are not limited to, the following: screening spurious claims before they reach the trial stage, reducing the total number of cases going to trial, promoting settlements, and encouraging cooperation between physicians and attorneys.

15. Various panels include, in varying proportions, clergy, laymen, judges, judicial referees, and attorneys.

16. States with panels composed as such are New York, Massachusetts, Florida, and Illinois. See note 9 *supra*.

17. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE 225 (Appendix, Baird, Munsterman & Stevens, *Alternatives to Litigation* (1973) [hereinafter cited as H.E.W. REPORT]).

be convened, names are chosen from these lists.¹⁸ The voluntarily-created panels generally have their panelists either appointed by the chairmen of the local bar and medical associations or elected in accordance with association by-laws.¹⁹

Panel Procedures

The panels created by voluntary cooperation generally prefer that claims be brought before them prior to the suit being filed.²⁰ Some of the statutorily-created panels adhere to this procedure,²¹ while others are not activated until after suit is filed.²² The jurisdiction of voluntarily-created panels is generally limited to claims against members of the participating medical society and to claims based on a tort theory.²³ In contrast, the statutorily-created panels have jurisdiction over both parties and over any malpractice action. Submission of claims to voluntarily-created panels is, of course, not mandatory, while submission of claims to statutorily-created panels is generally mandatory.²⁴ Both systems provide for "pre-trial" discovery.²⁵

At the hearing stage, the contrast between the voluntarily-created panels and the statutorily-created panels is great. The statutorily-created panel hearings are mini-trials; the adversary process and the rules of evidence prevail.²⁶ The voluntarily-created panels, on the other hand, provide for informal proceedings,²⁷ which offer several advantages. For example, physicians often point to cross-examination as the legal procedure they most dislike,²⁸ and although voluntarily-created panels allow for cross-examination, the rules frequently provide that it must be polite,

18. See, e.g., *Illinois*, ch. 110, § 58.3; *New York*, ch. 657, § 148(a) (2).

19. H.E.W. REPORT, *supra* note 17, at 284.

20. *Id.* at 288.

21. See, e.g., *Arkansas, Florida, Indiana, Massachusetts, and New Hampshire*, *supra* note 9.

22. See, e.g., *Illinois and New York*, *supra* note 9.

23. H.E.W. REPORT, *supra* note 17, at 288.

24. See note 9 *supra*. The New Jersey Supreme Court has emphasized the voluntary nature of its plan:

In our view, Rule 4:21 is not a rule in the traditional sense, since there is no compulsion involved. Rather, we believe Rule 4:21 is similar to a voluntary service which both parties may utilize if they so desire.

Grove v. Seltzer, 56 N.J. 321, 323, 266 A.2d 301, 302 (1970); see also *Marsello v. Barnett*, 50 N.J. 577, 236 A.2d 869 (1967).

25. H.E.W. REPORT, *supra* note 17, at 290; *Illinois*, ch. 110, § 58.6; *New York*, ch. 657, § 148(a) (3) (a).

26. In *Illinois*, the rules of evidence are followed "except as the panel at its discretion may determine otherwise." *Illinois*, ch. 110, § 58.6(1).

27. H.E.W. REPORT, *supra* note 17, at 290. Testimony is generally not under oath. One exception, however, is the *New Hampshire* panel.

28. The physician's training seems to be the primary source of his contempt for cross-examination—such questioning does not seem scientific. See generally Haines, *The Medical Profession and the Adversary Process*, 11 OSGOOD HALL L.J. 41 (1973); Mallor, *A Cure for the Plaintiff's Ills?*, 51 IND. L.J. 103, 112 (1975).

dignified, and inoffensive to the physician.²⁹ Consequently, informal procedures provide an opportunity for a meaningful exchange between the litigants, their attorneys, and insurance company representatives outside the adversary atmosphere of the courtroom.³⁰ This would appear to be more conducive to out-of-court settlements than the adversary atmosphere created by the statutorily-created panels.

Findings of Screening Panels

Voluntarily-created panels generally determine whether the facts show any substantial evidence of malpractice,³¹ and such determinations are merely advisory. They have no binding effect and cannot be introduced into evidence in a subsequent trial.³² In contrast, the statutorily-created panels make findings directly on the issue of liability.³³ In addition, some of the state plans call for the panel to make findings on the issue of damages if negligence is found.³⁴

Currently, there is no jurisdiction in which the panel decision has any binding effect, nor is there any jurisdiction other than New York in which the panel decision is admissible in any subsequent trial. In New York, the panel decision is admissible in a subsequent trial at the request of either party, although it is not conclusive and is accorded only such weight as the jury or trial court choose to ascribe to it.³⁵

Nearly all panels provide or attempt to provide the winning party with expert witnesses should the losing party decide to go to trial.³⁶ Under the now invalid Illinois statute, a losing party who went on to trial and was subsequently found liable was subject to being assessed the costs and fees of the other party for both the panel appearance and the trial.³⁷

29. H.E.W. REPORT, *supra* note 17, at 290.

30. Comment, *The Medical Malpractice Mediation Panel in the First Judicial Department of New York: An Alternative to Litigation*, 2 HOFSTRA L. REV. 261, 270 (1974) [hereinafter cited as *The Panel in New York*].

31. H.E.W. REPORT, *supra* note 17, at 292-93.

32. *Id.*

33. The only exception is *Massachusetts*, *supra* note 9.

34. Massachusetts and Indiana do not resolve the issue of damages. The New York plan includes a "confidential figure scheme" in which the panel judge dismisses the amounts asked in the complaint as meaningless and requires each side to submit to him, in confidence, a figure at which they would like to settle and a figure above or below which they will not settle. The judge then encourages settlement within this range. See *The Panel in New York*, *supra* note 30, at 267.

35. *New York*, ch. 657, § 148 (a) (8).

36. New Jersey will provide the claimant with expert witnesses only if he agrees in advance not to institute legal proceedings if the panel finds against him. A plaintiff who elects this option waives his right to trial should the panel find against him. *Grove v. Seltzer*, 56 N.J. 321, 266 A.2d 301 (1970).

37. *Illinois*, ch. 110, § 58.8 (4).

THE SCREENING PANEL AS AN EFFECTIVE DETERRENT
TO LITIGATION

The assumption that screening panels will decrease legal costs and increase efficiency is premised on the theory that a finding of malpractice will result in quick settlement, and that a contrary disposition will result in a voluntary dismissal of the claim. This, however, necessarily depends on the professional good faith and cooperation of all concerned.

In areas served by voluntarily cooperating medical and bar associations, screening panels have already proven their potential to reduce the amount of malpractice litigation. New Mexico found that with the adoption of the voluntary screening panel, it dropped from its position as seventh-ranked state in number of malpractice suits filed per physician to forty-eighth.³⁸ Pima County, Arizona, has also experienced a high degree of success.³⁹

Data on the results of court-associated plans is scarce. For two years New York's court-associated panel operated in only two counties, with less spectacular results than in New Mexico and Arizona.⁴⁰ In New York, however, commentators have perceived additional benefits from the use of the panel even where settlement was not reached. Such benefits include a narrowing of the issues, a clarification of the positions, and a realistic view of the merits due to the assistance of an impartial medical opinion. These factors have dampened the parties' inclination to continue with the lawsuit.⁴¹

Other panels have been dismal failures. New Jersey is a prime example.⁴² New Jersey's results seem partially due to the fact that the state suffers a lack of cooperation between attorneys and physicians,⁴³ a situation that results in a failure

38. Note, *The Montana Plan For Screening Medical Malpractice Claims*, 36 MONT. L. REV. 321, 322 (1975).

39. Documentary Supplement, *supra* note 6, at 715. Out of sixty-two cases filed in Pima County, twenty were decided for the patient and all twenty were settled out of court; of the forty-two cases where the panel found for the doctor, only three went to trial and of these three, all found in favor of the doctor. *Id.* at 718-20.

40. *The Panel in New York*, *supra* note 30, at 276. Between September, 1971 and January, 1973, forty-two percent of all malpractice claims submitted to the panel have been settled before trial. Four percent have been discontinued, and the remaining fifty-four percent have gone to trial. Settlement of cases has resulted in a savings of approximately five trial days per case (the average length of malpractice trials is 5.5 days, H.E.W. REPORT, *supra* note 17, at 312). N.Y. Legislative Doc. No. 19, 18 REPORT OF THE JUDICIAL CONFERENCE 323 (1973) as cited in *The Panel in New York*, *supra* note 30, at 278.

41. *Id.* at 278.

42. Out of 309 cases filed in New Jersey, only 91 were brought before the panel; of these 91, all were settled out of court, but the remaining 218 all went to trial. See Documentary Supplement, *supra* note 6, at 715.

43. *Id.*

to encourage submission of claims to the panel. It would seem that voluntarily-created panels in less populous areas have a higher degree of success. This is probably due to the fact that cooperating bar and medical associations have more control over their members in less populous areas than do associations in populous areas.⁴⁴

However, even in areas with smoothly operating panels, a major obstacle prevents a lowering of malpractice insurance premiums. This obstacle is the failure of insurance companies to compute their rates on a state by state basis.⁴⁵ Instead, states are grouped geographically for purposes of premium computation. Thus, the physicians practicing in a state which enjoys a successful screening panel will not receive expected lower malpractice insurance rates so long as that state continues to be grouped for the purpose of insurance rate-making with a state that has not established effective panels.⁴⁶

MANDATORY SCREENING PANELS FROM A CONSTITUTIONAL PERSPECTIVE

Since submission of claims to voluntarily-created panels is neither legislatively nor judicially mandated, and since the decisions of such panels have no legal effect, such panels present no constitutional problems. But the constitutionality of a legislatively mandated pre-trial screening procedure has been cast in serious doubt by the decision of the Illinois Supreme Court in *Wright v. Central Du Page Hospital Association*.⁴⁷ Affirming a circuit court's decision,⁴⁸ the court held the panel procedures unconstitutional as violating 1) the constitutional doctrine of separation of powers and 2) plaintiff's constitutionally protected

44. *Id.* at 721.

45. *Id.* at 717.

46. *Id.*

47. 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

48. *Wright v. Heitzler*, Civil No. 75L-21088 (Ill. Cir. Ct. Nov. 28, 1975). The circuit court held the panel unconstitutional on a number of grounds. It found that the statute vested essentially judicial functions in non-judicial personnel, i.e., a doctor and a lawyer. The court then held that the panel was unconstitutional because it was "special legislation" in violation of ILL. CONST. art. IV, § 13 (1970). The statute was also unconstitutional because it violated plaintiff's constitutional guarantees of equal protection and due process of law under both the Illinois and United States Constitutions. The provision of the statute assessing a twice-losing party with the entire costs and fees of both panel hearing and trial also denied plaintiff's his equal protection and due process rights under both constitutions. The same provision was also unconstitutional because it arbitrarily imposed a penalty, and artificial and undue burdens, on persons seeking access to justice and legal remedy in the courts, a violation of ILL. CONST. art. I, § 12 (1970). The statute also violated plaintiff's constitutionally protected interests in trial by jury, and was so vague, uncertain, and indefinite as to be unintelligible and incapable of being understood by men of reasonable intelligence, and therefore violated plaintiff's due process rights under both constitutions.

right to trial by jury.⁴⁹ *Wright* is of national import because there is no other reported appellate case in any state challenging the constitutionality of mandatory screening procedures. The remaining portions of this comment will analyze this decision and discuss it in terms of its effect upon future efforts in Illinois to provide a pre-trial mechanism for screening medical malpractice cases.

*The Separation of Powers Doctrine and the Nature
of Judicial Power: Non-Judicial Personnel
Performing Judicial Functions*

The Illinois medical malpractice screening panel, which was composed of one judge, one lawyer, and one physician,⁵⁰ was to have made findings on the issues of liability and damages based on its application of the substantive law.⁵¹ Rules of evidence were to have been followed "except as the panel in its discretion may determine otherwise."⁵² The supreme court held that these panel functions were essentially "judicial functions" and that these provisions of the Medical Malpractice Act therefore violated the Illinois Constitution, article VI, §§ 1 and 9 by vesting judicial power in non-judicial personnel.⁵³

The key issue in the court's argument is the definition of the term "judicial function," which has generally been defined as the power which adjudicates and protects the rights and interests

49. In the same decision the court also invalidated the \$500,000 damage limitation on medical malpractice recoveries as contained in ILL. REV. STAT. ch. 70, § 101 (Supp. 1976), because it constituted "special legislation" which is prohibited by ILL. CONST. art. IV, § 13 (1970). It was "special legislation" because it denied recovery on an arbitrary basis and thus granted a special privilege to defendants in medical malpractice cases. Justice Underwood, joined by Justice Ryan, dissented on this issue, arguing that there was a "rational basis" for the classification created by the damage limitation, the rational basis being the existence of a medical malpractice crisis, and therefore the damage limitation was not arbitrary.

The court also held unconstitutional section 401(a) of the Illinois Insurance Code, ILL. REV. STAT. ch. 73, § 1013(a) (1975), which prohibited malpractice insurance carriers from refusing to renew any policy at the rates existing on June 10, 1975, unless the insurance company first obtained the permission of the Illinois Director of Insurance. This provision also constituted "special legislation" because it arbitrarily failed to apply to policies written after the specified date, i.e., insurance companies did *not* have to obtain permission to raise rates or refuse to renew policies written *after* the specified date.

50. ILL. REV. STAT. ch. 110, § 58.3 (1975).

51. *Id.* at § 58.7(1).

52. *Id.* at § 58.6(1).

53. ILL. CONST. art. VI, § 1 (1970) provides: "The judicial power is vested in a Supreme Court, an Appellate Court and Circuit Courts." Section 9 of the same article provides: "Circuit Courts shall have original jurisdiction of all justiciable matters . . ." The power to adjudge, determine, and enter a judgment is judicial and can be employed only by judicial authority. *Agran v. Checker Taxi Co.*, 412 Ill. 145, 105 N.E.2d 713 (1952).

of individual citizens.⁵⁴ Accordingly, the application of principles of law is inherently a judicial function.⁵⁵ In applying this definition of "judicial function" to the Illinois screening panel, two considerations must be analyzed.

The first consideration is to determine at what point to draw the line between powers which are strictly judicial and can be vested nowhere except in the courts, and powers which are quasi-judicial and hence may be vested elsewhere. There are, of course, various boards and commissions which adjudicate the private rights of citizens.⁵⁶ The constitutionality of the statutes creating these bodies has been upheld on the ground that the exercise of quasi-judicial powers is merely incidental to the primary function of the administrative agencies, namely, the administration and enforcement of the law.⁵⁷ However, since the screening panel was not administering or enforcing the laws of an administrative agency, its functions were not quasi-judicial.

The second consideration is whether the panel functions could properly be called "judicial functions" when its decision was not conclusive and had no binding legal effect.⁵⁸ The word "adjudicate" means to settle *finally* the rights and duties of the parties to a court case on the merits of the issues raised or to enter on the records of a court a *final judgment*, order, or decree of sentence.⁵⁹ According to this definition, the panel was not performing a judicial function. However, concerning the definition of judicial functions as enunciated by Judge Cooley,⁶⁰ the Illinois Supreme Court has held that:

We do not understand that under this definition, or under any definition of the term 'judicial powers,' it is necessary that

54. *People v. Bruner*, 343 Ill. 146, 150, 175 N.E. 400, 404 (1931).

55. *Id.*

56. The Industrial Commission is an administrative body, *Ferguson v. Industrial Comm.*, 397 Ill. 348, 74 N.E.2d 539 (1947). It is not a court, *Trigg v. Industrial Comm.*, 364 Ill. 581, 5 N.E.2d 394; and is without judicial power or functions, *Morris v. Central West Casualty Co.*, 351 Ill. 40, 183 N.E. 595 (1932). It can only make such orders as are within the powers granted to it by the legislature, *Raffaella v. Industrial Comm.*, 326 Ill. 166, 157 N.E. 206 (1927).

57. *Grand Trunk Ry. v. Indus. Comm.*, 291 Ill. 167, 125 N.E. 748 (1919); *Klafter v. Board of Medical Examiners*, 259 Ill. 15, 102 N.E. 193 (1913); *People v. Apfelbaum*, 251 Ill. 18, 95 N.E. 193 (1911). "[The Illinois Constitution, art VI, § 1] was not intended to limit the legislatures power to establish administrative commissions, such as the Industrial Commerce Commission, which exercise quasi-judicial power." *Committee Comments*, ILL. CONST. art. VI, § 1 (1970).

58. ILL. REV. STAT. ch. 110, § 58.8(4) (1975) provides:

Whenever the parties have not unanimously agreed to be bound by a determination of a medical review panel, or have not unanimously accepted the determination of a panel, . . . the case shall proceed to trial as in any other civil case. . . .

59. BLACK'S LAW DICTIONARY 63 (4th ed. 1968).

60. See text accompanying note 54 *supra*. Judge Cooley's definition is that adopted by the Illinois Supreme Court in *People v. Bruner*, 343 Ill. 146, 175 N.E. 400 (1931).

the adjudication between the parties shall be conclusive of their rights put in issue; but, if the party or officer is clothed with the power of adjudicating upon and protecting the rights or interests of contesting parties, and that adjudication involves the construction and application of the law, and affects any of the rights or interest of the parties, though not finally determining the rights, it is still a judicial proceeding, or the exercise of judicial functions.⁶¹

Since the panel functions include the construction and application of the law, and since the panel does affect the interest of a twice-losing party on the issue of court costs,⁶² the supreme court was correct in holding that the panel's functions were judicial.

Even if the court had somehow held that the panel's functions were not judicial, the panel's composition would have still rendered the panel unconstitutional. The Illinois Constitution requires that judges devote full time to their judicial duties;⁶³ consequently a statute requiring a judge to perform non-judicial duties would be manifestly unconstitutional. This is emphasized in the case of *People ex rel. Christianson v. Connell*.⁶⁴ In *Christianson*, the legislature had passed a bill which provided that a circuit judge could invite prospective parties in a divorce proceeding to attend an informal conference with him in chambers, presumably to avert the divorce and attempt reconciliation. The supreme court ruled this provision unconstitutional, holding:

There are many areas of conflict and of litigation in which the participation of a judge as mediator or conciliator might be desirable. *The volume of personal injury litigation might be reduced, for example, or labor disputes averted, by preliminary mediation before a judge. . . .* But that result cannot be reached unless our constitutional doctrine of separation of powers is first altered.⁶⁵

It is apparent that the composition of the panel rendered it unconstitutional in any event. Either the panel performed a judicial function or it did not. If it did, the presence of non-judicial panelists was constitutionally fatal; if it did not, the presence of a judge was unconstitutional. It would have taken a spectacular feat of mental gymnastics to have logically escaped this conclusion.

61. *People ex rel. Kern v. Chase*, 165 Ill. 527, 532, 46 N.E. 454, 458 (1896).

62. ILL. REV. STAT. ch. 110, § 58.9(3) (1975).

63. ILL. CONST. art. VI, § 13(b) (1970) provides in part: "Judges and Associate Judges shall devote full time to judicial duties."

64. 2 Ill. 2d 332, 118 N.E.2d 262 (1954).

65. *Id.* at 340, 118 N.E.2d at 269.

The Denial of Plaintiff's Right to Trial by Jury

The Illinois Supreme Court in *Wright* also held that the panel procedure, as a mandatory prerequisite to trial by jury of any malpractice claim, was an impermissible restriction of the right to trial by jury as guaranteed by the Illinois Constitution.⁶⁶ The court reviewed the proceedings of the 1970 Illinois Constitutional Convention concluding that the right to trial by jury is not so inflexible as to render unchangeable every characteristic of the common law jury system. However, the court found that the panel procedure, as a *prerequisite* to a jury trial, was unconstitutional as a violation of this right.

The reasoning behind this decision leaves something to be desired. The court held:

Because we have held that these statutes providing for medical review panels are unconstitutional, it follows that the procedure prescribed therein as the prerequisite to jury trial is an impermissible restriction on the right of trial by jury guaranteed by article I, section 13, of the Illinois Constitution. In so holding, however, we do not imply that a valid pretrial panel procedure cannot be devised.⁶⁷

It is difficult to understand how the conclusion that the panel violates the right to a jury trial follows from holding that the panel is unconstitutional for other reasons. Nevertheless, it is not difficult to justify the court's decision that the panel procedure, as a prerequisite to trial by jury, unconstitutionally restricts this right.

The Medical Malpractice Act in no way denies the right to a jury trial.⁶⁸ The key question, however, involved in the court's decision is whether the condition placed upon that right—that the plaintiff must first submit this claim of malpractice to the panel—constitutes an *infringement* of the right. There is a split of authority on this issue.

In the *Application of Smith*,⁶⁹ the Pennsylvania Supreme Court held that a mere condition placed upon the right to trial by jury—that the plaintiff must first go through arbitration—did not violate the right because a jury trial was available before the rights and interests of the parties were finally determined. The court held that:

All that is required is that the right of appeal for the purpose of presenting the issue to a jury must not be burdened by the

66. *Wright v. Central Du Page Hospital Ass'n*, 63 Ill. 2d 313, 324, 347 N.E.2d 736, 741 (1976). ILL. CONST. art. I, § 13 (1970) provides: "The right of trial by jury as heretofore enjoyed shall remain inviolate."

67. *Wright v. Central Du Page Hospital Ass'n*, 63 Ill. 2d 313, 324, 347 N.E.2d 736, 741 (1976) (emphasis added).

68. See note 58 *supra*.

69. 381 Pa. 223, 112 A.2d 625, *appeal dismissed*, 350 U.S. 858 (1955).

imposition of onerous conditions, restrictions or regulations which would make the right practically unavailable.⁷⁰

In *Grace v. Howlett*,⁷¹ the Illinois Supreme Court, in passing upon similar legislation calling for compulsory arbitration, held that despite the availability of a trial *de novo*, the legislation unconstitutionally violated the right to trial by jury. Although the issue of the constitutional availability of trials *de novo* played an important part in this decision,⁷² *Grace* nonetheless supports the decision in *Wright* that the right to trial by jury is violated when a condition is imposed upon it.

THE FUTURE OF PRE-TRIAL SCREENING OF MEDICAL MALPRACTICE CLAIMS IN ILLINOIS AFTER *Wright*

Wright's Effect on Pre-trial Screening Panels

Although the court in *Wright* stated that by its decision it did not intend to imply that a screening panel could not be constitutionally created in Illinois, it has essentially precluded the possibility that an *effective* panel can be created. The court's decision that mandatory screening of medical malpractice claims as a prerequisite to a jury trial violates the right to trial by jury means that any screening panel procedure in the future will necessarily have to be on a voluntary basis. And even if a voluntary procedure was enacted, a question could be raised concerning the *defendant's* right to a jury trial. Using the court's own reasoning, if a plaintiff voluntarily brought his claim before a screening panel, there is no way that a defendant could be required to appear and defend because such a requirement would infringe upon his right to a trial by jury. In light of the New Jersey experience,⁷³ it is difficult to imagine a voluntary panel procedure in Illinois that would be an effective alternative to costly malpractice litigation.

In addition to reducing the prospective procedure from a mandatory to a voluntary basis, *Wright* also requires either the removal of the non-judicial panelists, or a change in the functions of the panelists, or a drastic change in the panel's function itself. Regardless of the method of this change, the end result is that the judge is the only panelist constitutionally permitted to apply the substantive law and the rules of evidence and procedure.

70. *Application of Smith*, 381 Pa. 223, 227, 112 A.2d 625, 629 (1955).

71. 51 Ill. 2d 478, 283 N.E.2d 474 (1972).

72. *Id.* at 489-90, 283 N.E.2d at 487-88; cf. Justice Underwood's dissent, 51 Ill. 2d at 512, 283 N.E.2d at 505.

73. See text accompanying note 42 *supra*.

Possible Alternatives Under Wright

With these restrictions in mind, is a legislatively-created pre-trial screening concept still viable in Illinois? One possible alternative is to leave the non-judicial members on the panel, but restrict them to finding the facts of the case. The judge on the panel would perform all the judicial functions such as applying the substantive law to the facts of the case, determining and applying the rules of evidence, and generally conducting the hearing. Under *Wright*, such a procedure could be constitutionally feasible only if it were voluntary; a mandatory proceeding, being unknown to the common law when the first Illinois Constitution was enacted, would infringe upon the right to a jury trial.⁷⁴

Another possible alternative is to have a judge screen malpractice claims by himself, a procedure which would obviously eliminate the problem of non-judicial personnel performing essentially judicial functions. In form, this alternative would resemble a preliminary hearing in a criminal case and therefore be the equivalent of a *civil* preliminary hearing. The judge would determine whether the facts as shown by a preponderance of the evidence demonstrated a substantial probability that malpractice had occurred. In the absence of expert medical advice, the judge, in determining the appropriate standards of care to be applied, might utilize organizational standards such as those promulgated by Professional Standards Review Organizations.⁷⁵

If the legislature did enact such a pre-trial screening procedure, would it be violative of the right to trial by jury? Traditionally, parties to litigation are not entitled to a jury trial unless there exists a genuine dispute over a factual issue. In addition, a litigant, upon motion of an opposing party, may be required to take part in various pre-trial procedures, such as summary judgment hearings and pre-trial conferences, as mandatory prerequisites to a jury trial. These procedures do not violate the right to trial by jury. Is it then possible

74. The constitutional provision guaranteeing that "the right to a jury trial, as heretofore enjoyed, shall remain inviolate," means that any individual who brings a cause of action for which a jury trial was available under the common law at the time the constitution was enacted, is entitled to a jury trial today. *Berk v. County of Will*, 34 Ill. 2d 588, 218 N.E.2d 98 (1966). Therefore, since a person injured by a doctor's negligence was entitled to a jury trial under the common law, his right may not be violated. Workman's Compensation legislation is distinguished because the right to a jury trial is fundamentally a due process right, and an injured workman is given a "quid pro quo," i.e., the employer loses his defenses, in place of the injured workman's abolished cause of action and its accompanying rights.

75. For a discussion of the PSRO concept, see generally *PSRO: Status Report on Medical Peer Review Under the 1972 Social Security Act*, 6 LOYOLA U.L.J. 90 (1975).

that a mandatory civil preliminary hearing for medical malpractice claims would not violate the right to a jury trial? The provision of the Illinois Constitution guaranteeing this right⁷⁶ has been interpreted to mean that the right shall remain inviolate as it was enjoyed under the common law at the time the constitution was enacted.⁷⁷ Since a civil preliminary hearing for medical malpractice claims did not exist at that time, it would seem that such a procedure could be held unconstitutional unless it was voluntary.

Another possible constitutional attack which could be leveled at a civil preliminary hearing would be that it constitutes special legislation.⁷⁸ From Illinois case law emerge three criteria used to determine whether a particular piece of legislation constitutes special legislation: 1) the classification cannot be arbitrary or unreasonable;⁷⁹ 2) it must be based on a rational difference of condition or situation existing in the persons or objects upon which the classification rests;⁸⁰ and 3) the legislation must apply equally to all persons or objects affected by the difference of condition or situation.⁸¹

A civil preliminary hearing would most likely withstand constitutional scrutiny with respect to the second and third criteria. The rational difference in condition between medical malpractice claims and other tort claims is the existence of the medical malpractice crisis itself; as to the third criterion, the hearing would apply equally to all medical malpractice claims. Whether such legislation would meet the first criterion is a question only the supreme court can answer.

CONCLUSION

Wright almost certainly precludes the possibility of legislatively establishing a medical malpractice pre-trial screening panel modeled after the successful voluntarily-created panels in other areas of the country. However, this may be a blessing in

76. ILL. CONST. art. I, § 13 (1970).

77. See note 74 *supra*.

78. ILL. CONST. art. IV, § 13 (1970) provides that:

The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination.

This constitutional provision does not prohibit the legislature from establishing classifications, because "perfect uniformity of treatment is neither practical nor desirable." *Grasse v. Dealer's Transport Co.*, 412 Ill. 179, 193, 106 N.E.2d 124, 132 (1952).

79. *Wright v. Central Du Page Hospital Ass'n*, 63 Ill. 2d 313, 329-30, 347 N.E.2d 736, 743 (1976).

80. *Illinois Ass'n of Fire Fighters v. City of Waukegan*, 37 Ill. 2d 423, 425, 226 N.E.2d 606, 608 (1967).

81. *Grace v. Howlett*, 51 Ill. 2d 478, 487, 283 N.E.2d 474, 483 (1972).

disguise. The key to the success of these panels is the element of voluntary cooperation between the local bar and medical associations. The panels which are mandated by statute or court rule do not have nearly the same degree of success as do voluntary panels.⁸² The mandatory panels are neither as efficient nor as effective as the voluntary panels, and based on the available data, there is good reason to doubt that they could ever enjoy such success.

However, the situation is not hopeless. Voluntary cooperation, with a little effort, is possible to achieve in the populous states, although it may be difficult to achieve on a state-wide basis. Indeed, if the state-wide medical and bar associations would encourage their local affiliates to attempt to set up pre-trial screening panels, such panels could be far more effective than any legislatively created system, voluntary or mandatory.

The establishment of such local panels would benefit all parties concerned. Doctors would benefit by avoiding time-consuming, embarrassing, and costly trials. Lawyers would benefit because they could discover at an early point in time whether their client's claim had any merit, thus saving potential loss of time, effort, and expense of trying and losing a case taken on a contingency fee basis. Finally, and most importantly, the public would benefit because insurance rates would eventually decline which would lower the cost of medical services (or, at least, slow the rate of increase) and help prevent the loss of medical services through doctor strikes. The establishment of local panels would not harm anyone and, with any luck at all, could go a long way toward relieving the medical malpractice crisis.

Larry L. Johnson

82. See text accompanying notes 39-44 *supra*.