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Constitutional Law-Right to Jury Trial-Delegation of Judicial Functions to Nonjudicial Medical Review Panel Held Violative of State Constitution-Wright v. Central DuPage Hospital Ass'n

Constitutional Law—RIGHT TO JURY TRIAL—DELEGATION OF JUDICIAL FUNCTIONS TO NONJUDICIAL MEDICAL REVIEW PANEL HELD VIOLATIVE OF STATE CONSTITUTION—*Wright v. Central DuPage Hospital Ass'n,* 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

Jean Mary Wright brought an action in the circuit court of Cook County, Illinois, seeking damages from Central DuPage Hospital Association, Dr. John Heitzler, American Hospital Supply Corporation, and V. Mueller & Company for injuries sustained in the defendant hospital while under the care of Dr. Heitzler. In addition, Ms. Wright sought a declaratory judgment that recent amendments to the Illinois Civil Practice Act[1] were

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1. Medical Malpractice Act § 1, ILL. REV. STAT. ch. 110, §§ 58.2-58.10 (1975). The following portions of the act are relevant to this note:

§ 58.2 Procedures in medical malpractice cases

In all cases in which the plaintiff seeks damages on account of injuries sustained by reason of medical, hospital or other healing art malpractice, the provisions of Sections 58.3 through 58.10 shall be applicable. Sections 58.3 through 58.10 shall not apply to any other cases.

§ 58.3 Formation of medical review panel

In each case filed, the court shall order convened a medical review panel to which the case shall be assigned for hearing and determination. Such order shall be issued no sooner than 120 days nor later than one year after the parties are at issue on the pleadings. The medical review panel shall consist of one circuit judge, one practicing physician, and one practicing attorney selected as provided in Section 58.5.

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§58.6 Medical review panel procedures

(1) The judge on the panel shall preside over all proceedings of the panel and shall determine all procedural issues, including matters of evidence. The panel shall convene with notice to all parties and shall proceed as a body to hear evidence and argument on the question of liability and on the question of damages. The provisions of this Act concerning procedure in civil cases shall be followed insofar as practicable. The law of evidence shall be followed, except as the panel in its discretion may determine otherwise.

(2) Proceedings before the panel shall be adversary, and each party may call and cross examine witnesses and introduce evidence as at a trial in the circuit court. The panel shall have the power of subpoena, to be exercised as in the circuit court. The panel, however, may call witnesses, examine evidence, call for additional or particular evidence, and may examine or cross examine witnesses as it may determine to be appropriate.

(3) The panel shall consider the pleadings, the evidence, including discovery materials, hospital and medical records, affidavits and such witnesses and exhibits as the panel or the parties may call or introduce into evidence.

(4) Proceedings of the panel may be conducted in any county in the judicial circuit, as determined by the panel with notice to all parties if not in the county in which venue lies.

§58.7 Decisions of medical review panels

(1) The panel shall make its determination according to the applicable

substantive law. Its determination on the issue of liability and, if liability is found, on the issue of fair and just compensation for damages, shall be made in a written opinion. The panel shall state its conclusions of fact and its conclusions of law. A dissenting member may file a written dissent.

(2) The panel shall notify all parties when its determination is to be handed down, and, within 7 days of its decision, shall serve a copy of its opinion and any dissent on each party and each attorney of record. The panel shall file its opinion with the Clerk.

§ 58.8 Effect of decision of medical review panel

(1) The parties may, by unanimous written agreement, elect to be bound by the determination of a medical review panel at any time. In such event, the determination of the panel shall be binding and conclusive, and judgment may be entered thereon.

(2) In cases where the determination of the panel is unanimous, and where the parties have not unanimously agreed in writing to be bound by the determination of the panel, each party must file with the Clerk his written acceptance or rejection of the determination within 28 days of receipt of service of the written opinion. Any party not timely filing a rejection of the determination shall be deemed to have accepted it. If the determination is accepted by all parties, the Court may enter judgment thereon.

(3) Whenever the parties have unanimously agreed to be bound by the determination of the panel, the Court shall enter judgment thereon unless the parties shall unanimously agree that no judgment be entered.

(4) A determination of a medical panel shall not be admissible at any subsequent trial in the circuit court. 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 panel judge shall conduct a pretrial conference promptly upon reasonable notice pursuant to Supreme Court Rules governing pretrial conferences, and the case shall proceed to trial as in any other civil case, except that any judge who served on a medical review panel in the case may not preside at the trial.

(5) Whenever a unanimous determination of a medical review panel is rejected by a party, each party that has accepted the determination may request any medical society which has supplied names for the roster of practicing physicians for that panel to provide an expert witness for consultation and, if necessary, for testimony at the trial. Upon such request, the medical society shall make its best good faith efforts to provide a qualified physician to consult with and, if requested, to testify at the trial.

§ 58.9 Expenses of litigation

(1) Non-judicial members of medical review panels shall serve without compensation; except that they shall receive their actual expenses for travel and other costs incurred in the performance of their duties.

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(3) Where a party who has rejected a unanimous determination of the medical review panel does not prevail on the trial of the case and has not been granted a post-trial motion to upset the result of the trial, the trial court on motion of the prevailing party shall conduct a hearing to determine whether the reasonable attorneys fees of the prevailing parties and the costs of the medical review panel and the costs of trial shall be summarily taxed to the rejecting party in accordance with Section 41 of this Act. Such motion may not be made or granted if both a party plaintiff and a party defendant have rejected the determination of the medical review panel.

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(5) If a party shall reject a unanimous determination of the medical review panel, his filing of such written rejection shall be deemed to constitute a refiling

in violation of the state constitution.[2]

The amended portions of the act provide for the formation and operation of medical malpractice review panels, each composed of one circuit court judge, one practicing physician, and one practicing attorney. All cases in which plaintiffs seek damages for injuries sustained from "medical, hospital, or other healing art malpractice" are submitted to the panel for attempted resolution. If the contesting parties do not unanimously agree with the decision of the panel, the act allows suit to be filed with the circuit court to proceed to trial in the customary manner.

The circuit court found that these provisions violated article VI, sections 1 and 9 of the Illinois Constitution by delegating essentially judicial functions to nonjudicial personnel, and article I, section 13 by impairing the protected right to trial by jury. On appeal, the Supreme Court of Illinois affirmed in all respects relevant to this note.[3]

I. BACKGROUND

Various substitutes for the traditional system of dispute reso-

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of his complaint, if plaintiff, or his answer, if defendant, for the purposes of any motion as hereinafter provided, pursuant to Section 41 of this Act.

§ 58.10 Supervisory rules of Supreme Court

The Supreme Court may adopt rules not inconsistent with Sections 58.2 through 58.9 of this Act to govern procedures to be used in selecting medical review panels and rosters and in the hearing and determination of cases by such panels. The Supreme Court may adopt rules increasing the size of medical review panel rosters in the respective judicial circuits.

2. This note deals only with the issues of the delegability of judicial functions to nonjudicial personnel and the right to trial by jury. The instant case also consolidated separate actions filed in the circuit court of Cook County by Hartford Casualty Insurance Company and The Medical Protective Company, both of which sought declaratory judgments holding invalid Medical Malpractice Act § 3, ILL. REV. STAT. ch. 73, § 1013a (1975), dealing with the restriction of malpractice policy rate increases or cancellations by the Director of Insurance. Ms. Wright also contested the constitutionality of ILL. REV. STAT. ch. 83, § 22.1, altering the statute of limitations in favor of the physician, and ILL. REV. STAT. ch. 70, § 101, limiting the maximum amount recoverable as a result of medical malpractice to $500,000.

For background on the attempts of other legislatures to enact similar legislation and the judicial response thereto, see secondary authorities cited in notes 69, 73 *infra*.

3. The Supreme Court of Illinois vacated only the circuit court's finding of unconstitutionality relating to Medical Malpractice Act § 1, ILL. REV. STAT. ch. 110, § 58.2a (1975) (a provision dealing with releases from liability as a condition of medical treatment), a section unimportant for the purposes of this note.

Both the circuit and supreme courts also found in favor of Ms. Wright's other two contentions and in favor of the two insurance companies by declaring that Medical Malpractice Act § 3, ILL. REV. STAT. ch. 83, § 22.1; ch. 70, § 101; and ch. 73, § 1013a (1975), constituted special legislation contrary to Illinois Constitution art. IV, § 13. 63 Ill. 2d 313, 325-32, 347 N.E.2d 736, 741-44 (1976).

lution by trial have been attempted. As discussed below, such attempts have met with mixed results in different jurisdictions, and have been challenged as unconstitutional on grounds of improper delegation of judicial power and denial of the right to jury trial. Judicial and legislative treatment of one alternative, arbitration, is particularly relevant to the instant case, since it is a commonly approved example of nonjudicial, nonjury trial resolution of disputes. Although the Illinois statute under consideration in this note is not an arbitration statute, enough similarities exist to merit a brief examination of arbitration in a constitutional framework.

A. Constitutionality of Arbitration Statutes

Courts initially viewed agreements to arbitrate with distrust, fearing in such accords a dangerous encroachment into the judicial realm, and uniformly held arbitration agreements void and unenforceable.[4] The judiciary's growing unwillingness to interfere with private individuals' contractual rights, however, combined with an increasing number of state statutes protecting the right to form arbitration agreements, gradually changed the disposition of the courts.[5] Recently, statutes guaranteeing the enforceability of arbitration agreements have consistently been upheld when constitutionally challenged as impermissible delegations of judicial functions.[6]

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4. U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, MEDICAL MALPRACTICE: REPORT OF THE SECRETARY'S COMM'N ON MEDICAL MALPRACTICE app. 316 (1973) [hereinafter cited as COMM'N REPORT].

5. Perry v. Cobb, 88 Me. 435, 34 A. 278 (1896) involved two shippers who signed a written agreement that established them as co-partners in insuring each other for lost cargo and provided that the two should determine the amount of such loss without a resort to the courts. The Supreme Court of Maine held that the agreement was not strictly an arbitration contract, since it did not provide for a disinterested third party to arbitrate, and thus skirted the nondelegability of judicial functions issue. *Id.* at 436, 34 A. at 279.

The Supreme Court of Pennsylvania refused to find unconstitutional a state statute that permitted voluntary arbitration agreements and held that parties who entered such contracts waived their rights to jury trial and appeal. Cutter v. Richley, 151 Pa. 195, 25 A. 96 (1892).

Some years later, a California court of appeals summarized what had become the accepted opinion regarding contractual arbitration agreements:

> [An arbitration contract] does not authorize individuals by agreement to oust superior courts of their jurisdiction to try civil actions. . . . It merely recognizes the right of individuals to enter into binding contracts requiring the submission to arbitration of differences existing between them with respect to the terms of the agreement.

Snyder v. Superior Court of Amador County, 24 Cal. App. 2d 263, 265, 74 P.2d 782, 784 (1937).

6. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) (federal

Attempts to invalidate arbitration agreements as a violation of the right to trial by jury have also been unsuccessful. Grounding its finding on the fact that a jury trial is a right that can be waived, the New York Court of Appeals in *Berkovitz v. Arbib & Houlberg*[7] found that parties to an arbitration agreement voluntarily consent to waive the jury right. Facing a similar issue in a constitutional challenge to that state's procedure for mediating malpractice claims,[8] the Supreme Court of New Jersey upheld agreements enforcing the panel's decisions when the parties voluntarily agree to be bound, despite significant procedural disadvantages should a party refuse to agree.[9]

Compulsory arbitration statutes that require the parties to submit to arbitration and its results are at the opposite end of the spectrum: courts view such statutes as suspect and generally find some basis to hold them unconstitutional.[10] A recent Supreme Court of Illinois decision invalidated the compulsory arbitration provision of the state's no-fault automobile insurance statute partially on the ground that it violated the right to jury trial.[11]

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diversity action by corporation to avoid arbitration agreement with buyer of its products proved unsuccessful because parties intended to contract to arbitrate such a dispute); Doyle v. Giuliucci, 62 Cal. 2d 606, 401 P.2d 1, 43 Cal. Rptr. 697 (1965) (father could not void contract entered into with medical group on behalf of his child providing for arbitration of any controversy); Tuschman Steel Co. v. Tuschman, 181 N.E.2d 322 (C.P. Ohio, 1961) (action to enforce arbitration agreement not violative of constitutional provision guaranteeing that courts shall be open to every person for redress of injury).

7. 230 N.Y. 261, 130 N.E. 288 (1921).

8. The New Jersey Plan, established by rule of the Supreme Court of New Jersey, requires that before the panel will provide expert witnesses for the claimant at any subsequent trial caused by the defendant's rejection of the panel's findings, the claimant must sign a binding agreement, similar to an arbitration contract, not to litigate if the finding in his or her behalf is unfavorable. N.J. Ct. C.P.R. 4:21-7. Because expert witnesses are essential to establish a cause of action in a malpractice suit and are difficult to obtain due to the professional cohesiveness of physicians, a powerful incentive to sign the agreement exists: even if the claimant prevails before the panel, it will be extremely difficult to obtain a judgment in court without the provided witnesses. Thus, the claimant undergoes significant pressure to surrender his right to a subsequent jury trial should the panel's determination be in favor of the defendant.

9. Grove v. Seltzer, 56 N.J. 321, 266 A.2d 301 (1970).

10. *See, e.g.*, Henderson v. Ugalde, 61 Ariz. 221, 147 P.2d 490 (1944) (statute forcing parties to arbitrate without consent unconstitutional).

11. Grace v. Howlett, 51 Ill. 2d 478, 283 N.E.2d 474 (1972). The case turns on the Judicial Act of 1962, retained by the court's interpretation in article VI of the 1970 Illinois Constitution, which abolished trials de novo. *Id.* at 489-90, 283 N.E.2d at 480-81. Since the no-fault statute permitted a party dissatisfied with the result of the arbitration panel to appeal by a trial de novo, the court held that it violated the intent of article VI of he constitution. Although this reassning is at best incomplete, the violation of the right to jury trial apparently results from a constitutional breach of article VI, making the case questionable precedent for the proposition that a compulsory arbitration statute would be a derogation of the right to trial by jury in Illinois.

Exceptions to this general rule exist, however. The most obvious example of a permissible restriction on the right to jury trial appears in compulsory workmen's compensation acts. Such statutes are usually upheld under the rationale that state constitutional guarantees to the right of trial by jury apply to causes of action as they existed at common law, and that workmen's compensation statutes abolished old causes of action and created new ones.[12] Pennsylvania has enacted provisions requiring arbitration of all civil controversies of $1,000 or less, regardless of the parties' willingness or consent to do so.[13] Constitutional challenges to the arbitration statute, including the charge of denial of the right to a jury trial, were rejected by the Supreme Court of Pennsylvania.[14] The court held that since the statute did not close the courts completely to a litigant by making the decision of the arbitration board a final determination, but rather permitted an appeal by trial de novo, the jury trial right was preserved.[15]

Adoption of the Uniform Arbitration Act by Illinois in 1961 broadened permissible arbitration rights and enabled parties to arbitrate any existing or future claims by written agreement.[16] Recognizing in the act a legislative intent to discourage litigation and foster voluntary resolution of disputes by arbitration, Illinois courts have consistently upheld arbitration agreements when validly executed.[17] Summarized by an appellate court of Illinois, it

12. *See* Brady v. Place, 41 Idaho 747, 242 P. 314 (1925); Warren v. Indiana Tel. Co., 217 Ind. 93, 26 N.E.2d 399 (1940); Branch v. Indemnity Ins. Co. of North America, 156 Md. 482, 144 A. 696 (1929). Further justification appears in a mutual surrender of rights and defenses: the employee gives up the right to recover beyond the statutory limit and the employer is prevented from invoking the defense of no negligence.

13. PA. STAT. ANN. tit. 5, § 21 *et seq.* (Purdon Supp. 1976-1977).

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

15. *Id.* at 230-31, 112 A.2d at 629-30.

16. Uniform Arbitration Act § 1, ILL. REV. STAT. ch. 10, §§ 101-123 (1975). Subsequent to the decision invalidating malpractice mediation panels in the instant case, an amendment was passed excluding from the scope of the Uniform Aribitration Act "any agreement between a patient and a hospital or health care provider to submit to binding arbitration . . . ." P.A. 79-1361 § 9, ILL. ANN. STAT. ch. 10, § 101 (Smith-Hurd Supp. 1977). A new act was substituted that specifically allows parties to a malpractice controversy to sign and enforce an arbitration agreement. Malpractice Arbitration Act § 1, ILL. ANN. STAT. ch. 10, §§ 201-214 (Smith-Hurd Supp. 1977). Forced by the Supreme Court of Illinois to abandon the mandatory submission of malpractice claims to a mediation panel, the legislature thus displayed its continued intention to design an alternative to the traditional court process for settling malpractice cases.

17. *E.g.*, Flood v. Country Mut. Ins. Co., 41 Ill. 2d 91, 242 N.E.2d 149 (otherwise valid arbitration agreement between automobile insurer and insured did not extend to specific issues under dispute); Ramonas v. Kerelis, 102 Ill. App. 2d 262, 243 N.E.2d 711 (arbitra-

is "a well recognized principle that courts should look with favor upon arbitration as a method of settling controversies."[18]

B. Delegation of Judicial Functions to Nonjudicial Personnel

1. Precedent in Illinois

The Illinois Constitution provides for a separation of powers between the legislative, executive, and judicial branches of state government and stipulates that "[n]o branch shall exercise powers properly belonging to another."[19] State judicial power is vested in a supreme court, appellate court, and circuit courts,[20] the latter assuming original jurisdiction of all justiciable matters with limited exceptions accorded to the supreme court.[21]

Judicial response to legislative attempts to encroach on the jurisdiction of the courts has been strict. The Supreme Court of Illinois has defined judicial power as "an exclusive and exhaustive grant vesting all such power in the courts,"[22] reflecting a much earlier decision that "the jurisdiction of the circuit courts, so far as conferred by the constitution, cannot be taken away, nor can it be changed or abridged by an act of the legislature."[23] Proper jurisdiction of the courts encompasses all "inherently judicial functions," defined in *People v. Bruner* to include "[t]he interpretation of statutes, the determination of their validity, and the application of the rules and principles of the common law, among others . . . ."[24] Distinguishing a Pennsylvania case, the Illinois Supreme Court in *Grace v. Howlett* stated that a compulsory arbitration statute for automobile insurance claims interfered with the original jurisdiction of the circuit court.[25]

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tion agreement that covered future as well as existing controversies when contract entered into did not oust courts of jurisdiction).

18. William B. Lucke, Inc. v. Spiegel, 131 Ill. App. 2d 532, 535, 266 N.E.2d 504, 507 (1970).

19. ILL. CONST. art. II, § 1.

20. *Id.* art. VI, § 1.

21. *Id.* art. VI, § 9. The entire section reads:

> 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 Couuts shall have such power to review administrative action as prescribed by law.

22. Agran v. Checker Taxi Co., 412 Ill. 145, 149, 105 N.E.2d 713, 715 (1952).

23. Birkowitz v. Lester, 121 Ill. 99, 106, 11 N.E. 860, 863 (1887).

24. People v. Bruner, 343 Ill. 146, 158, 175 N.E. 400, 405 (1931).

25. Grace v. Howlett, 51 Ill. 2d 478, 490, 283 N.E.2d 474, 480 (1972). The basis of the court's opinion, however, was that because the statute provided for an appeal by a party

2. Precedent in other jurisdictions

Malpractice mediation panels exist in various forms in eleven states.[26] New Hampshire,[27] Florida,[28] and New York[29] have created malpractice review panels similar to that of Illinois. Constitutional provisions affecting the delegation of judicial functions under which such statutes were enacted, however, differ among the states.

New Hampshire's Constitution contains a separation of powers article that provides that "the legislative, executive, and judicial [powers] ought to be kept as separate from, and indepen-

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dissatisfied with the board's determination, proceedings before the arbitration board could not be likened to pretrial procedure and were violative of the Judicial Act of 1962, which abolished trials de novo. Note 11 *supra. See also* Cocalis v. Nazlides, 308 Ill. 152, 139 N.E. 95 (1923); White Eagle Laundry Co. v. Slawek, 296 Ill. 240, 129 N.E. 753 (1921). These cases found that executory agreements to arbitrate any dispute that may arise under the agreement and that preclude the individual's resort to the courts are void and unenforceable. The court in *Grace, Cocalis,* and *Slawek,* however, did not deal with the constitutionality of a mediation panel whose decisions are not binding and do not limit access to the courts, failing the assent of the parties in each case.

26. Miike, *State Legisltures Address the Medical Malpractice Situation,* 8 J. LEGAL MED. 25, 26 (1975).

27. N.H. REV. STAT. ANN. ch. 519-A:1 to -A:10 (1974). Malpractice claims must first be submitted to a mediation panel composed of a layman, a physician, and a judicial referee, who is usually a judge of one of the courts of original jurisdiction. The procedure before the panel is informal and controlled by the referee. The panel is requied to apply the appropriate state laws in reaching its decision and to make a finding of damages if the determination is in favor of the claimant. Both parties must file an acceptance or rejection of the panel's decision within 30 days: if both agree to the finding, it is legally enforceable; if one or both reject the decision, the claimant my instigate litigation in the appropriate court. Findings of the panel are not admissible in any subsequent court proceedings.

28. FLA. STAT. ANN. § 768.44, .47 (West Supp. 1977). A circuit court judge (referee), a licensed physician, and an attorney compose the malpractice mediation panel to which claims must initially be submitted. After the complaint is filed, the defendant has 20 days to respond. If no answer is filed, the jurisdiction of the panel ceases, making direct entry into the courts possible. If the defendant does respond, the panel is required to determine if actionable negligence occurred. If the parties agree, the panel may then continue mediation to assist the parties in reaching a settlement. If either party rejects the panel's determination, the claimant may instigate litigation in the usual manner. The conclusion of the panel, but not its specific findings of fact, is admissible in subsequent proceedings. The judicial referee has "exclusive authority to rule on all matters of law and the admissibility of relevant evidence as may be adduced by the parties." *In re* Transition Rule 21, 316 So. 2d 38, 39 (Fla. 1975).

29. N.Y. JUD. LAW § 148-a (McKinney Supp. 1976-1977). The medical malpractice panel is composed of a supreme court justice, a physician, and a lawyer, with the justice presiding over the panel's sessions. Malpractice claims are submitted first to the panel for an informal hearing on the issues. If the panel reaches a disposition, an appropriate order to that effect is entered. If no decision is tendered, the case is remanded to its regular place on the court's calendar. In the event either party does not concur with the panel's determination, the claimant can bring an action in the usual manner. A unanimous written recommendation of the panel is admissible in any subsequent court proceedings.

dent of, each other, as the nature of a free government will admit . . . ."[30] Although not as strict in its definition of the division of powers as the similar Illinois provision,[31] the article has been interpreted by New Hampshire courts to have essentially the same effect as its Illinois counterpart, with only some additional leeway for an overlapping of powers.[32] The New Hampshire Constitution is substantially more liberal than that of Illinois in the role assigned the legislature to outline the jurisdiction of the courts. New Hampshire has no autonomous unified court of original jurisdiction, and several of the courts in which litigation originates are dependent upon the legislature for the regulation of their jurisdiction.[33]

The Constitution of Florida enunciates a separation of powers doctrine virtually identical to that of Illinois.[34] Original jurisdiction for all cases not cognizable by the county courts vests in the circuit courts.[35]

New York's Constitution contains no specific separation of powers section. With the exception of certain courts established to handle matters specifically outlined in the constitution,[36] "general original jurisdiction in law and equity" lies with the supreme court.[37] A general section in the article on the judiciary, however, gives the legislature "the same power to alter and regulate the jurisdiction and proceedings in law and in equity that it has heretofore exercised,"[38] thus affording the legislature in certain circumstances greater authority to modify the original jurisdiction of the various courts than exists in any of the three states previously discussed.

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30. N.H. CONST. pt. 1, art. 37.

31. Note 19 and accompanying text *supra.*

32. *See, e.g., In re* Opinion of the Justices, 86 N.H. 597, 166 A. 640 (1933).

33. N.H. CONST. pt. 2, art. 76-77, 80.

34. FLA. CONST. art. 2, § 3 provides: "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."

35. *Id.* art. 5, § 5. Article 5, § 6 establishes a county court in each county and gives the legislature power to prescribe by general law the jurisdiction of these courts. Presently the county courts have original jurisdiction over all actions at law where the amount in controversy does not exceed $2,500. FLA. STAT. ANN. § 34.01 (West 1974). The majority of malpractice claims exceed this sum, however, and original jurisdiction of such suits would thus lie with the circuit court under FLA. CONST. art. 5, § 5.

36. N.Y. CONST. art. VI, § 9 (Court of Claims); §§ 10-11 (County Court); § 12 (Surrogate's Court); § 13 (Family Court); § 15 (Civil and Criminal Courts in New York City); § 16 (District Courts); § 17 (Town, Village, and City Courts).

37. *Id.* § 7(a).

38. *Id.* § 30.

Medical malpractice review panels have not been declared unconstitutional in any other jurisdiction, including the three discussed above, on the ground that judicial functions have been delegated impermisibly to nonjudicial personnel.

C. Interferences with the Right to Trial by Jury

The seventh amendment guarantee of the right to trial by jury in suits at common law has not been applied to the states through the due process clause of the fourteenth amendment.[39] Consequently, states are not required to apply federal law respecting the jury right to malpractice claims.[40] Every state but one, however, has a constitutional provision ensuring the right to trial by jury in civil actions.[41] With the exception of workmen's compensation statutes, a statute enacting a system of compulsory arbitration for general civil cases would probably be declared unconstitutional in nearly every state.[42] The constitutionality of state laws that provide for methods of mediation amounting to less than compulsory arbitration remains in doubt.

1. Precedent in Illinois

The Illinois Constitution provides that "[t]he right of trial by jury as heretofore enjoyed shall remain inviolate."[43] This has been interpreted to incorporate the right to jury trial as it existed at common law when the first Illinois constitution was adopted.[44]

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39. Wagner Elec. Mfg. Co. v. Lyndon, 262 U.S. 226 (1923); G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 542 (9th ed. 1975); *see* Montana Co. v. St. Louis Mining & Milling Co., 152 U.S. 160 (1894); Walker v. Saurinet, 92 U.S. 90 (1876).

40. Like many other state laws that have established malpractice review panels, the Illinois statute does not answer the question of whether a claim brought under diversity jurisdiction would also first have to be presented to the mediation panel before advancing to federal district court. It is clear, however, that once a malpractice action is brought under Illinois law in federal district court, the seventh amendment jury right guarantee will apply. It is beyond the scope and purpose of this note to discuss the potentially different impact the federal guarantee to a jury trial might have on mediation panel proceedings.

41. *See* 8 STAN. L. REV. 410, 413 n.25 (1956).

42. 8 STAN. L. REV. 410 (1956). Pennsylvania is possibly the only exception. Notes 13-15 and accompanying text *supra*.

43. ILL. CONST. art. 1, § 13.

44. People v. Bruner, 343 Ill. at 146, 175 N.E. at 401; George v. People, 167 Ill. 447, 47 N.E. 741 (1897). In *George*, the court, referring to the state constitutions of 1818, 1848, and 1870, stated:

> We do not think there is any substantial difference between the provisions incorporated in the three constitutions. The right of trial by jury was the same under one constitution as under the other. The right protected by each constitu-

The Supreme Court of Illinois in *People v. Kelly*[45] reiterated the components of the common law jury right as requiring twelve impartial, qualified jurors who should unanimously decide the facts in controversy under the direction and superintendence of a judge; but the court also stated that "[i]t is well settled that the object of a constitutional provision guaranteeing the right of a trial by jury is to preserve the substance of the right rather than to prescribe the details of the methods by which it shall be exercised and enjoyed."[46] As was held in a later Illinois case, "the right of trial by jury is not so inelastic as to render unchangeable every characteristic and specification of the common law jury system. Flexibility for the adjustment of details remains, as long as the essentials of the system are retained."[47]

As noted previously, the court found in *Grace v. Howlett* that a compulsory arbitration statute interfered with the right to trial by jury.[48] In the instant case, however, the Illinois court confronted for the first time a statutory scheme providing for the mandatory mediation of claims with provision for a resort to the customary channels to instigate litigation, rather than an appeal, should the parties fail to agree.

2. *Precedent in other jurisdictions*

Constitutional provisions in New Hampshire,[49] Florida,[50] and

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tion was the right of trial by jury as it existed at common law.

Id. at 455, 47 N.E. at 743.

The setting of damages was not a function reserved for the jury under the common law. The Illinois Supreme Court has held:

> At common law an assessment of damages is an inquest of office, usually performed by the sheriff upon a writ of inquiry of damages, or might be assessed by the court. It has been distinctly held that assessment of damages is not a trial, and does not come within the provisions of the constitution.

O'Brian v. Brown, 403 Ill. 183, 193, 85 N.E.2d 685, 691 (1949). Customary practice in Illinois, however, is to the contrary. *See* Pierre v. Eastern Air Lines, Inc., 152 F. Supp. 486, 488 (N.D. Ill. 1957).

45. 347 Ill. 221, 179 N.E. 898 (1931).

46. *Id.* at 224, 179 N.E. at 899.

47. People v. Lobb, 17 Ill. 2d 287, 299, 161 N.E.2d 325, 332 (1959).

48. 51 Ill. 2d at 489-90, 283 N.E.2d at 480-81. For an explanation of the limitation of this opinion as precedent respecting the right to trial by jury, see note 11 *supra*.

49. N.H. CONST. pt. 1, art. 20.

> In all controversies concerning property—and in all suits between two or more persons, except in cases in which it has been heretofore otherwise used and practiced, and except in cases in which the value in controversy does not exceed five hundred dollars, and title of real estate is not concerned the parties have a right to a trial by jury and this method of procedure shall be held sacred, unless,

New York[51] ensuring the right to trial by jury are in all essential respects similar to that of Illinois. The Supreme Court of New Hampshire has stated that "[t]he constitutional right of jury trial is not infringed if a reasonably unfettered right of appeal from a justice to a jury court is allowed."[52] Thus, the legislature may design alternative methods of adjudication, provided that a jury trial is ultimately available to the parties. Such precedent may in part be responsible for the lack of any constitutional challenge to New Hampshire's malpractice mediation panel.

The Supreme Court of Florida established early precedent that the guarantee of a jury trial would be strictly construed: "It shall 'remain inviolate.' This term does not merely imply that the right of jury trial shall not be abolished or wholly denied but that it shall not be *impaired.*"[53] Such precedent, however, has not prevented the court from participating in the establishment of the Florida malpractice mediation panel, which requires a claimant to first file with the panel and attempt arbitration with the defendant before being permitted to resort to a jury trial. *In re Transition Rule 21*[54] sets out procedural rules adopted by the Supreme Court of Florida for the operation of the panel. A recent appeal challenging the constitutionality of the malpractice statute on equal protection grounds and as an abridgement of free access to the courts was unsuccessful.[55] The court's opinion made no mention of the denial of the right to trial by jury. The concurring opinion compared the mediation panel procedure to a required pretrial settlement conference, a procedure common in many jurisdictions before litigation progresses to trial.[56]

The New York malpractice mediation panel was originally established by judicial action on an experimental basis,[57] and was

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in cases arising on the high seas and such as relates to mariners' wages the legislature shall think it necessary to alter it.

50. FLA. CONST. art. 1, § 22. "The right of trial by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law."

51. N.Y. CONST. art. 1, § 2. "Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law."

52. Perkins v. Towle, 58 N.Y. 425 (1878).

53. Flint River Steam Boat Co. v. Roberts, 2 Fla. 102 (1848) (emphasis in original).

54. 316 So. 2d 38 (Fla. 1975).

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

56. *Id.* at 807.

57. The Appellate Division, First Department, of the Supreme Court of New York established an experimental panel procedure for the handling of medical malpractice claims on August 31, 1971. N.Y. CT. R. § 636.1 (McKinney 1976).

later enacted into law by the legislature.[58] Recently the statute was challenged on constitutional grounds in *Halpern v. Gozan*[59] by a physician who alleged that the introduction at trial of the panel's finding of his negligence so prejudiced the jurors as to deprive him of his right to trial by jury. In rejecting this contention and upholding the constitutionality of the statute, the court concluded that "the new [mediation panel] law, if carefully pursued and thoughtfully articulated does not represent an incursion upon constitutional guarantees, but rather, reflects the proper extension of legislative prerogatives."[60]

II. INSTANT CASE

The court relied on article VI, sections 1 and 9 of the Illinois Constitution, which vests general judicial authority in a state court system and original jurisdiction for all justiciable matters in the circuit courts, to find that use of the malpractice panel was unconstitutional in that it granted essentially judicial functions to nonjudicial personnel.[61] The major issue in the delegability of judicial functions was who is authorized to apply the substantive law to findings of fact. The appropriate statutory section provides that "[t]he panel shall make its determination according to the applicable substantive law."[62] Such language, the court con-

58. N.Y. JUD. LAW § 148-a (McKinney Supp. 1976-1977).

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

60. *Id.* at 749.

61. Wright v. Central DuPage Hosp. Ass'n, 63 Ill. 2d at 321-22, 347 N.E.2d at 739-40 (1976).

The court noted with apparent approval that the Illinois Civil Practice Act requires the judge member of the panel to "preside over all proceedings of the panel" and to "decide all procedural issues, including matters of evidence" in the framework of an adversary proceeding in which witnesses are examined and evidence is introduced "as at a trial in the circuit court." Medical Malpractice Act § 1, ILL. REV. STAT. ch. 110, § 58.6(1)-(2) (1975).

The court's opinion, perhaps unwittingly, echoes an ambiguity contained in this subsection of the statute. While the circuit judge is authorized to determine all procedural matters including questions of evidence, the concluding sentence of the subsection provides that "[t]he law of evidence shall be followed except as the panel in its discretion may determine otherwise." *Id.* § 58.6(1). The court does not overtly recognize in its opinion the existence of a conflict in meaning, but simply assumes that the latter provision take precedence over the judge's prerogative to decide procedural and evidentiary matters, and interprets this limitation on the judge's power as another opportunity for the nonjudicial members of the panel to usurp a judicial function. 63 Ill. 2d at 322, 347 N.E.2d at 739. Another interpretation not considered by the court that would permit an internally consistent reading of the statute would be that the physician and lawyer members of the panel serve as advisors to the judge on such procedural matters, but that any decision to vary from the law of evidence must have the concurrence of the judge.

62. Medical Malpractice Act § 1, ILL. REV. STAT. ch. 110, § 58.7(1) (1975).

cluded, implied that the physician and lawyer members of the panel had equal authority with the circuit judge to decide matters of law; thus, the possibility existed that nonjudicial members of the panel could overrule the judge in the application of principles of law, an inherently judicial function, thereby violating the separation of powers provision of the state constitution.[63]

The court based its holding that the malpractice review panel violated the right to trial by jury in article I, section 13 of the Illinois Constitution. Quoting *People v. Lobb*,[64] the court interpreted the right to a jury trial to be that right as it existed under common law, which "is the right to have the facts in controversy determined, under the direction and superintendence of a judge, by the unanimous verdict of twelve impartial jurors . . . ."[65] Unsuccessful attempts at the last Illinois Constitutional Convention to modify the jury trial right influenced the court to strictly construe the *Lobb* standards.[66]

Unlike the court's analysis in regard to the nondelegability of judicial functions, its reasoning respecting the right to jury trial was not so categorically final. The court concluded that as long as the essentials of the common law right remain, flexibility exists in administering the right in practice, and details of the system can be adjusted.[67] At no time did the court specifically state that the procedure outlined for the malpractice review panel was itself a violation of the right to jury trial under article I, section 13. Rather, the court found for unstated reasons that the holding of unconstitutionality for improper delegation of judicial functions implied that the statute was also "an impermissible restriction on the right of trial by jury guaranteed by" the Illinois Constitution.[68]

III. Analysis

The Supreme Court of Illinois did not dispose of the instant case in a vacuum of concern about the issues involved: recent marked increases in medical malpractice suits and awards in

63. In support of its finding, the court cited People v. Bruner, 343 Ill. 146, 175 N.E. 400 (1931) and Agran v. Checker Taxi Co., 412 Ill. 145, 105 N.E.2d 713 (1952). Notes 22, 24 and accompanying text *supra*.

64. 17 Ill. 2d 287, 161 N.E.2d 325 (1959).

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

66. 63 Ill. 2d at 323, 347 N.E.2d at 740.

67. *Id.* at 324, 347 N.E.2d at 740-41 (relying on People v. Lobb, 17 Ill. 2d at 299, 161 N.E.2d at 332). For text of material from *Lobb* quoted in the instant case, see text accompanying note 47 *supra*.

68. 63 Ill. 2d at 324, 347 N.E.2d at 741.

Illinois and other states have created a well-publicized crisis in medical care that promises serious detriments to the patient.[69] Insurance rates for malpractice coverage have increased dramatically,[70] resulting in the threat that many physicians will limit or curtail their practices.[71] Such increases are caused at least in part by a geometric progression in the magnitude of personal injury awards.[72] The response of state legislatures has been impressive; virtually every state has studied the malpractice problem, and most have enacted various legislative proposals to assist in the provision of reasonably priced malpractice insurance and to speed up the traditional litigation process for malpractice claims.[73] Eleven states have passed statutes establishing mal-

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69. *E.g.*, NEWSWEEK, June 9, 1975, at 58; U.S. NEWS & WORLD REPORT, Jan. 20, 1975, at 53. For a comprehensive background of the complex issues surrounding the cause and drastic rise of malpractice suits, the problem of malpractice insurance, and suggested solutions, see COMM'N REPORT, *supra* note 4. Other helpful publications of a general nature on medical malpractice include: R. GOTS, THE TRUTH ABOUT MEDICAL MALPRACTICE (1975); D. HARNEY, MEDICAL MALPRACTICE (1973); A. HOLDER, MEDICAL MALPRACTICE LAW (1975).

70. "Premiums for dentists rose 115 percent between 1960 and 1970; those for hospitals, 262.7 percent; those for physicians other than surgeons, 540.8 percent; and those for surgeons, 949.2 percent." COMM'N REPORT, *supra* note 4, at 13. It is not unusual for a physician to pay from $5,000 to $12,000 per year for malpractice insurance coverage. Keeton, *Compensation for Medical Accidents*, 121 U. PA. L. REV. 590, 595 n.16 (1973).

71. Note, *Ohio's Rx for the Medical Malpractice Crisis: The Patient Pays*, 45 U. CIN. L. REV. 90, 90 n.1 (1976).

72. One survey has reported the average recovery per claim in California over a several year period: $5,000 in 1969; $7,500 in 1973; $12,000 in 1975; and $25,000 projected in 1980. Mill, *Malpractice Litigation: Are Solutions in Sight?*, 232 J.A.M.A. 369 (1975).

73. Miike, *supra* note 26, at 25. In language cited in Carter v. Sparkman, 335 So. 2d 802 (Fla. 1976), the Florida legislature indicated its purposes in establishing a medical mediation panel procedure:

> WHEREAS, the cost of purchasing medical professional liability insurance for doctors and other health care providers has skyrocketed in the past few months; and
>
> WHEREAS, it is not uncommon to find physicians in high-risk categories paying premiums in excess of $20,000 annually; and
>
> WHEREAS, the consumer ultimately must bear the financial burdens created by the high cost of insurance; and
>
> WHEREAS, without some legislative relief, doctors will be forced to curtail their practices, retire, or practice defensive medicine at increased cost to the citizens of Florida, and
>
> WHEREAS, the problem has reached crisis proportion in Florida,
>
> NOW THEREFORE * * *

Id. at 805. Similar reasons were cited by the Supreme Court of New York in Halpern v. Gozan, 381 N.Y.S.2d 744, 746 (Sup. Ct. 1976) for the enacting of New York's law. Briefs filed by amici curiae in the instant case and cited by the court pointed to similar problems in Illinois. 63 Ill. 2d at 321, 347 N.E.2d at 739.

For other recent surveys of state legislative responses to the malpractice crisis, see Comment, *Recent Medical Malpractice Legislation—A First Checkup*, 50 TUL. L. REV. 655 (1976); Comment, *An Analysis of State Legislative Responses to the Medical Malpractice*

practice mediation panels that provide in varying degrees for the prescreening or arbitration of claims.[74] Issues that are so widespread and directly affect every person who requires medical services demand the careful attention of the courts.

In addition to the compelling nature of the underlying issues, court review of the constitutionality of a legislative act requires judicial caution. The Supreme Court of Florida, in holding that state's malpractice mediation panel constitutional, provided:

> It is incumbent on this Court when reasonably possible and consistent with constitutional rights to resolve all doubts as to the validity of a statute in favor of its constitutional validity and if possible a statute should be construed in such a manner as would be consistent with the constitution, that is in such a way as to remove it farthest from constitutional infirmity.[75]

The New York Supreme Court, upholding the state statute creating mediation panels, concluded that an act of the legislature should be declared unconstitutional only if such a finding is inescapable.[76]

The Supreme Court of Illinois did not refer in the instant case to this customarily strict standard in declaring unconstitutional the malpractice mediation panel procedure. Perhaps the court felt its conclusions were so clear-cut that reference to the standard of construction was unnecessary. Also possible was the realization that exercising customary judicial caution before declaring the malpractice statute unconstitutional would require the court to undertake a more rigorous examination of the issues than it was willing to make. Although the court in its forthright but cursory treatment of the issues discussed in this note[77] attempted to convey the impression that the outcome of the case should be obvious, closer examination reveals that the court could have interpreted the statute to be reasonably consistent with the Illinois Constitution.

Crisis, 1975 DUKE L.J. 1417 (entire issue devoted to malpractice problems). For symposium discussions of recent legislative changes that have occurred in Indiana, Texas, and Montana, see Symposium, *The 1975 Indiana Medical Malpractice Act*, 51 IND. L.J. 91 (1975); Student Symposium, *A Study of Medical Malpractice in Texas*, 7 ST. MARY'S L.J. 732 (1976); Gibbs, *The Montana Plan for Screening Medical Malpractice Claims*, 36 MONT. L. REV. 321 (1975).

74. Miike, *supra* note 26, at 26, 30 (Arkansas, Florida, Illinois, Indiana, Massachusetts, Michigan, Nevada, New York, Ohio, Tennessee, and Wisconsin).

75. Carter v. Sparkman, 335 So. 2d at 805.

76. Halpern v. Gozan, 381 N.Y.S.2d at 749 (Sup. Ct. 1976).

77. The court was more comprehensive in its discussion of Medical Malpractice Act § 4, ILL. REV. STAT. ch. 70, § 101 (1975), relating to the maximum amount recoverable from a malpractice claim, perhaps because a strong dissent was voiced on this issue.

A. Delegability of Judicial Functions

The Illinois Constitution is exact in its grant of judicial authority to the state court system and original jurisdiction to the circuit courts.[78] Illinois case law generally has been strict in dealing with division of powers questions.[79]

Faced with a novel factual and legal situation, the court responded by mechanically applying constitutional principles to a situation for which they were not comfortably applicable. Although the holding could be viewed as a reasonable application of analogous precedent to a new and pressing problem, in light of the malpractice crisis and the court's responsibility to resolve constitutional doubts in favor of the legislature's actions, the court should have attempted to construe the malpractice act with greater imagination and sounder reasoning.

The procedure governing the Illinois malpractice mediation panel is a cross between binding compulsory arbitration and an arbitration agreement:[80] it forces all claims to be submitted to a mediation panel as in compulsory arbitration, but like contractual arbitration arrangements it enforces a judgment only when all the parties agree to be bound by the result. Had certain factors been properly analyzed, however, the court should have construed the mediation panel as closer in form to the arbitration agreement.

The following chart demonstrates the possible situations that could arise under the medical malpractice panel statute.

Reaction of Parties	Panel's Decision	Result	Comment
Unanimous written agreement to abide by panel's decision before panel decides	2 to 1 or 3 to 0	Conclusive — judgment will be entered thereon unless the parties agree that no judgment be entered.	
Unanimous written agreement to accept decision of panel already rendered	2 to 1 or 3 to 0	Conclusive — unless the parties unanimously reject the decision.	
No unanimous agreement	3 to 0	Party must reject the decision within 28 days If rejected: matter proceeds to trial. If not rejected: decision is conclusive.	Parties not rejecting get expert witnesses at trial supplied by panel. If rejecting party loses at trial, may have to pay all costs.

78. Notes 19-21 and accompanying text *supra*.
79. Notes 22-25 and accompanying text *supra*.
80. Notes 5-10 and accompanying text *supra*.

No unanimous agreement	2 to 1	Case automatically proceeds to trial in usual manner. Judge conducts pretrial conference.

The court found that since the panel was required to make its determination "according to the applicable substantive law,"[81] the physician and lawyer members of the panel could prevail over the opinion of the judge and thereby usurp an inherently judicial function.[82] Given the prior acceptance by Illinois courts of voluntary arbitration agreements, this reasoning is invalid.[83] If the parties agree to be bound by the panel's finding either before or after its determination, the resultant procedure operates similarly to arbitration by voluntary agreement, which does not require the involvement of a judge.[84]

If the parties do not agree to be bound by the panel's decision, the situation is removed from the realm of the analogous arbitration agreement. In this situation, however, the judicial function is not usurped. If the panel decision is unanimous, the judge member of the panel could not be in a minority position, and any party rejecting the decision within twenty-eight days can force the proceeding to trial. If the judge (or any other member of the panel) disagrees with the majority decision, the case automatically proceeds to trial in a court of original jurisdiction unless the parties subsequently agree to abide by the result. In the event of such agreement by the parties, the situation is once again analogous to the voluntary arbitration agreement, a contract that is constitutionally permitted in virtually every jurisdiction.[85] This analysis eliminates the court's objection that the physician and lawyer members of the panel could prevail over judicial authority.

The court also could have interpreted the mediation panel proceeding to be analogous to a mandatory pretrial conference.[86] Provisions of the Illinois Civil Practice Act establishing the mal-

81. Medical Malpractice Act § 1, ILL. REV. STAT. ch. 110, § 58.7 (1975).

82. Notes 62-63 and accompanying text *supra*.

83. *See* notes 16-18 and accompanying text *supra*.

84. *See* notes 5-6 and accompanying text *supra*.

85. Notes 5-9, 16-18 and accompanying text *supra*.

86. This approach was suggested by a concurring justice in Carter v. Sparkman, 335 So. 2d 802, 807 (Fla. 1976).

practice panel[87] were added to the section governing pretrial procedure,[88] suggesting a legislative intent to classify proceedings of the malpractice panel as pretrial in nature. Court rules governing pretrial conferences permit the circuit court to hold such a conference in any civil case to consider, among other specifically mentioned objectives, "any . . . matters which may aid in the disposition of the action."[89] The circuit court is further directed to enter an order stipulating the agreements made by the parties and delineating any issues for trial not decided during the conference.[90] Striking parallels exist between pretrial conferences and mediation panel proceedings.[91]

The Supreme Court of Illinois in *Grace v. Howlett*[92] rejected the contention that a system of compulsory arbitration under the state's no-fault automobile statute was analogous to a mandatory pretrial conference. The decision, however, was based on the fact that if a claim proceeded to trial, the court would be reviewing a final judgment on *appeal* in violation of the Judicial Article of 1962 that abolished trials de novo.[93] The malpractice mediation panel does not make any conclusive determinations unless both parties agree, and any further action that is undertaken in the circuit court is brought not as an appeal but as a normal case filed in the court of original jurisdiction.[94] In the instant case the court did not refer to its decision in *Grace*, likely because of the above distinction.

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87. Medical Malpractice Act § 1, ILL. REV. STAT. ch. 110, §§ 58.2-58.10 (1975).

88. *Id.* § 58.1.

89. ILL. PRAC. ACT & R. ch. 110A, § 218(a)(5)(Smith-Hurd 1976).

90. *Id.* § 218(b).

91. The purpose of the malpractice mediation panel, like that of a pretrial conference, is to encourage parties to reach agreement on all possible issues. When the parties cannot agree, however, the claim proceeds to trial in the normal manner. Mediation panel proceedings, like unresolved issues discussed in pretrial conference, are also not admissible in a subsequent trial. Medical Malpractice Act § 1, ILL. REV. STAT. ch. 110, § 58.8(4) (1975).

92. 51 Ill. 2d 478, 283 N.E.2d 474 (1972).

93. *Id.* at 489-90, 283 N.E.2d at 480-81; notes 11, 25 *supra*. The dissenting judge in *Grace* challenged the application of the Judicial Article of 1962 to an appeal from the arbitration board as being an unwarranted extension of the prohibition against an appeal de novo. 51 Ill. 2d at 512, 283 N.E.2d at 491-92. An adoption of the dissent's reasoning on this point alone might have resulted in an entirely different holding in which the arbitration board could have continued to function in certain automobile accident disputes.

94. Even if the court determined that an action instituted in the district court after the parties failed to agree at the mediation panel level were, in effect, a trial de novo, the arguments voiced by the dissenting justice in Grace v. Howlett, 51 Ill. 2d at 512, 283 N.E.2d at 491-92 would be even more persuasive that such trials de novo were not contemplated in the Judicial Article of 1962 abolishing them, and therefore would be excluded from the prohibition.

One important reservation should be mentioned when attempting to cast panel proceedings in the light of a pretrial conference. Language in the mediation panel statute directs the judge to conduct a pretrial conference in the event the parties cannot agree and the panel's finding is not unanimous.[95] This indicates that the legislature did not intend the mediation panel procedure to be a pretrial conference as such. The close similarity both in purpose and procedure between the two proceedings, however, would have allowed the court to reasonably construe the malpractice panel act as consistent with the state constitution.

B. Mediation Panels and the Right to Jury Trial

Although the court found that the statute violated the right to jury trial, it relied heavily on its finding that the statute unconstitutionally delegated judicial functions. After limited discussion of the jury trial issue, the court finally concluded, rather weakly, that "*[b]ecause* we have held that these statutes providing for medical review panels are unconstitutional [due to an impermissible delegation of judicial functions], *it follows* that the procedure prescribed therein as the prerequisite to jury trial is an impermissible restriction on the right of trial by jury . . . ."[96] The court cited precedent that the retention of the essentials of the right to jury trial, even though details in procedure are adjusted, protects this constitutional prerogative.[97] As if to underscore its deliberate effort to afford the legislature leeway in designing future malpractice litigation procedures, the court concluded that "[i]n so holding, however, we do not imply that a valid pretrial panel procedure cannot be devised."[98]

The court's recognition that valid mediation procedures could be devised is reasonable in light of recently established precedent from other jurisdictions. A recent unsuccessful constitutional challenge to New York's mediation panel procedure was based not on interference with obtaining a jury trial, but on the fact that panel findings, admissible in court, unduly prejudice the jury and prevent a fair determination.[99] The Illinois statute pre-

95. Medical Malpractice Act § 1, ILL. REV. STAT. ch. 110, § 58.8(4) (1975).

96. 63 Ill. 2d at 324, 347 N.E.2d at 741 (emphasis added).

97. People v. Lobb, 17 Ill. 2d at 299, 161 N.E.2d at 332.

98. 63 Ill. 2d at 324, 347 N.E.2d at 741.

99. Halpern v. Gozan, 381 N.Y.S.2d 744 (Sup. Ct. 1976). In Florida, a state in which the right to trial by jury is also strictly construed (note 53 and accompanying text *supra*) a recent case challenging the constitutionality of a mediation panel procedure similar to that of Illinois did not even raise the issue of interference with this right, and the court

cludes such a challenge by banning the record of mediation panel proceedings from a subsequent trial.[100] The Supreme Court of Pennsylvania, in holding that state's compulsory arbitration statute constitutional, maintained that "there is no denial of the right of trial by jury if the statute preserves that right to each of the parties by the allowance of an appeal from the decision of the arbitrators or other tribunal."[101] The Illinois law ensures the parties the right to trial by jury if no consensus is reached with the mediation panel; only if all parties agree to bind themselves to the panel's determination is the jury right forgone.[102]

Decisions in Florida and New York upholding similar legislation creating malpractice mediation panels had not been handed down when the Supreme Court of Illinois declared the Illinois statute unconstitutional. Had these decisions been available, the court might have held differently. Although the court did not specify the kind of pretrial panel that would be permissible,[103] it in essence volunteered that if a malpractice panel procedure could be created that did not contravene the constitution on any other ground, panel proceedings would not violate the jury clause of the Illinois Constitution.

C. Implications of the Court's Decision

The most immediate impact of the court's decision is the reinstitution of the traditional tort claims process for malpractice suits in Illinois. A return to the former means of litigation carries with it the significant risk that personal injury awards will continue to escalate, hiking insurance rates for malpractice coverage still further and giving physicians incentive to limit their practices or leave the profession altogether.[104]

A second result of the court's decision is the surrender of significant benefits that could be secured by use of the panel procedure. Admittedly, the mediation panel is no panacea for the variety of problems surrounding the malpractice crisis. For those who reject panel determinations and proceed to trial, the mediation procedure presents an additional hurdle in an already complicated and expensive adjudication procedure. Others may even

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upheld the entire statute as constitutional. Carter v. Sparkman, 335 So. 2d 802 (Fla. 1976).

100. Medical Malpractice Act § 1, ILL. REV. STAT. ch. 110, § 58.8(4)(1975).

101. *In re* Smith, 381 Pa. 223, 230, 112 A.2d 625, 629 (1955) (citations omitted).

102. *See* notes 81-85 and accompanying text *supra*.

103. For an indication that some form of pretrial panel procedure for malpractice suits would be acceptable, see note 96 and accompanying text *supra*.

104. Notes 69-72 and accompanying text *supra*.

be discouraged from proceeding further at all. But the advantages of the malpractice mediation panel seem to significantly outweigh the potential detriments. Panels are composed of experts who, unlike members of a jury, are accustomed to dealing with complex medical malpractice questions and are thus able to effectively screen out nonmeritorious claims. As a result of their expertise, the informal nature of panel proceedings, and built-in incentives for the parties to settle, panel members are able to dispose of claims with a significantly higher degree of efficiency than the courts. In New York, cases that had been on the court's docket for nearly a decade were quickly resolved and displayed a substantially higher settlement rate than before the mediation panel was introduced.[105] On the average, settlement of cases has resulted in a savings of five trial days per case.[106] Quicker disposition and avoidance of lengthy legal proceedings promises tremendous reduction in the expense of handling malpractice claims. Projections of such savings has caused at least one insurance company to reduce its premiums for malpractice insurance in New York by two percent.[107] Potentially damaging publicity to physicians charged with malpractice is minimized by the more private nature of mediation panel proceedings, and the difficulty of securing expert witnesses to testify in behalf of meritorious claimants at trial is overcome.[108]

Malpractice mediation panels similar to that enacted in Illinois offer an attractive alternative to litigation: by means of an inexpensive process, nonmeritorious claims are discouraged while justifiable claims are either quickly settled or propelled into trial with expert testimony ensured. Particularly important in the light of this note is the additional fact that under most mediation panel statutes, including that of Illinois, the courts and a jury trial remain available to the parties, thus guaranteeing basic constitutional rights.

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105. Comment, *The Medical Malpractice Mediation Panel in the First Judicial Department of New York: An Alternative to Litigation*, 2 HOFSTRA L. REV. 261, 275-76 (1974).

106. *Id.* at 278.

107. Comment, *Medical Malpractice in New York*, 27 SYRACUSE L. REV. 657, 795 (1976) (citing STATE OF NEW YORK, REPORT OF THE SPECIAL ADVISORY PANEL ON MEDICAL MALPRACTICE 126-27 (1976)).

108. *See* Medical Malpractice Act § 1, ILL. REV. STAT. ch. 110, § 58.8(5) (1975), which provides:

> Whenever a unanimous determination of a medical review panel is rejected by a party, each party that has accepted the determination may request any medical society which has supplied names for the roster of practicing physicians for that panel to provide an expert witness for consultation and, if necessary, for testimony at trial.