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Virginia's Medical Malpractice Act: A Constitutional Analysis

VIRGINIA'S MEDICAL MALPRACTICE ACT: A CONSTITUTIONAL ANALYSIS

In 1977, Virginia's Medical Malpractice Act[1] became effective. The Virginia Supreme Court has since convened numerous panels for preliminary review of malpractice claims which alleged victims otherwise would have filed directly in court.[2] The Virginia Act provides that an individual may not file a medical malpractice action in court without first giving written notice of the claim to the health care provider defendant.[3] The written notice will automatically stay the filing of suit for ninety days.[4] Within sixty days of claimant's notice, either party may request the Virginia Supreme Court to select a panel to review the claim.[5] Upon the request of claimant or health care provider, the review panel will conduct a hearing on the merits of the claim.[6] The panel must send its written opinion on the issue of liability to both parties[7] within five days of the conclu-

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[1] VA. CODE §§ 8.01-581.1 to 8.01-581.20 (1977 & Supp. 1980).

[2] Virginia Supreme Court, Executive Secretary, *Medical Malpractice Review Panel Statistics*, Dec. 31, 1979 [hereinafter cited as *Review Panel Statistics*]; *see* text accompanying notes 3-9 *infra*. As of December 31, 1979, the Virginia Supreme Court had convened a total of 266 medical malpractice review panels. *Id.*

[3] VA. CODE § 8.01-581.2 (1977). The claimant's notice to the health care provider of a medical malpractice claim must reasonably describe the alleged act of malpractice and specify when it occurred. *Id.* Neither the claimant nor the health care provider may bring suit in court on the malpractice claim within ninety days of the date of notice. *Id. But see* note 5 *infra*. Notice is given as of the time the claimant mails a notification to the health care provider. Virginia Supreme Court, *Medical Malpractice Rules of Practice*, rule 2(a), Aug. 6, 1979 (revised rules effective August 15, 1979) [hereinafter cited as *Rules of Practice*]. A "health care provider" is any person, corporation, facility or institution licensed to provide health care services in Virginia. VA. CODE § 8.01-581.1.1 (1977).

[4] VA. CODE § 8.01-581.2 (1977).

[5] *Id.* The Chief Justice of the Virginia Supreme Court receives all requests for review of malpractice claims, and selects a review panel. *Id. Rules of Practice, supra* note 3, rule 3(a). Three attorneys, three health care providers, and a circuit judge acting as chairman comprise each panel. *Rules of Practice, supra* note 3, rule 3(a). If neither party requests a hearing within 60 days of notice to the health care provider, the claimant may proceed directly to court. *See* VA. CODE § 8.01-581.2 (1977).

[6] VA. CODE § 8.01-581.5 (Supp. 1980). If one party requests review of the malpractice claim but neither party requests a hearing, the panel will evaluate the merits of the claim on the basis of documentary evidence submitted to it by the parties. *Id.* § 8.01-581.4.

In 1979, the Virginia legislature amended section 8.01-581.5 to make a panel hearing mandatory upon the request of either party. *See id.* § 8.01-581.5. The original statute provided that, when a party requested a hearing, the review panel had discretion to either grant the hearing or deny it and issue an opinion based on documentary evidence alone. *See* VA. CODE § 8.01-581.5 (1977).

[7] VA. CODE § 8.01-581.6.5 (Supp. 1980). The review panel may recommend: (1) no liability on the part of the health care provider; (2) liability for failure to comply with the appropriate standard of care; (3) that the health care provider's negligence was not the proximate cause of claimant's injury; or (4) that the claim involves an issue of fact for determination

sion of the hearing.[8] A claimant or health care provider who is dissatisfied with the panel's decision may file suit in court within sixty days of issuance of the opinion.[9] In a subsequent trial, the panel's opinion is admissible in evidence but is not conclusive on the issue of liability.[10] While the Virginia Medical Malpractice Act has not yet been challenged, case law from other states indicates that the statute may be subject to attack on constitutional grounds.

A number of state courts have addressed the issue of whether medical malpractice review legislation similar to the Virginia Act infringes upon rights guaranteed by the federal and state constitutions.[11] Malpractice claimants have challenged the review panels on three separate grounds. First, claimants have alleged that establishment of the panel review procedure violates the constitutional separation of powers principle by delegating judicial functions to non-judicial officers.[12] Secondly, claimants have argued that a statutorily required hearing before filing suit in court denies malpractice victims equal protection of the laws.[13] Finally, the panel hearings allegedly deny due process rights by obstructing claimants' constitutional right of access to the courts[14] and invading the province of

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by a trier of fact. VA. CODE §§ 8.01-581.7.1—8.01-581.7.4 (1977); *see* text accompanying notes 48-49 *infra*. The panel must issue its opinion within 30 days of receipt of all the evidence. VA. CODE § 8.01-581.7 (1977).

[8] VA. CODE § 8.01-581.7.C (1977).

[9] *Id.* § 8.01-581.9 (1977). In the event that there is no hearing, the claimant may take advantage of an alternative statute of limitations, bringing suit within 120 days of the oroginal notice to the health care provider. *Id. But see* note 3 *supra*.

[10] VA. CODE § 8.01-581.8 (Supp. 1980); *see* text accompanying notes 86-87 *infra*. Either party may call any panel member except the chairman to testify at trial. VA. CODE § 8.01-581.8 (Supp. 1980); *see* note 16 *infra*. Virginia's Medical Malpractice Act does not limit the scope of a panel member's examination. *See* VA. CODE § 8.01-581.8 (Supp. 1980); text accompanying note 89 *infra*.

[11] *See* Eastin v. Broomfield, 116 Ariz. 576, 570 P.2d 744, 748 (1977); Wright v. Cent. Du Page Hosp. Ass'n, 63 Ill.2d 313, 347 N.E.2d 736, 741 (1976); Johnson v. St. Vincent Hosp., Inc., 404 N.E.2d 585, 589 (Ind. 1980); Everett v. Goldman, 359 So.2d 1256, 1265-67 (La. 1978); Attorney Gen. v. Johnson, 282 Md. 274, 385 A.2d 57, 65-77 (1978); Paro v. Longwood Hosp., ___ Mass. ___, 369 N.E.2d 985, 989-91 (1977); State *ex rel.* Cardinal Glennon Memorial Hosp. v. Gaertner, 583 S.W.2d 107, 110 (Mo. 1979); Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657, 663-67 (1977); Parker v. Children's Hosp., 483 Pa. 106, 394 A.2d 932, 938-44 (1978); State *ex rel.* Strykowski v. Wilkie, 81 Wis.2d 491, 261 N.W.2d 434, 444-46 (1978).

[12] *See* Wright v. Cent. Du Page Hosp. Ass'n, 63 Ill.2d 313, 347 N.E.2d 736, 739 (1976); Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657, 667 (1977); Parker v. Children's Hosp., 483 Pa. 106, 394 A.2d 932, 943 (1978); State *ex rel.* Strykowski v. Wilkie, 81 Wis.2d 491, 261 N.W.2d 434, 439 (1978); text accompanying notes 22-34 *infra*.

[13] *See* Everett v. Goldman, 357 So.2d 1256, 1266 (La. 1978); Attorney Gen. v. Johnson, 282 Md. 274, 385 A.2d 57, 78-79 (1978); Paro v. Longwood Hosp., ___ Mass. ___, 369 N.E.2d 985, 989 (1977); Harrison v. Schrader, 569 S.W.2d 822, 825-26 (Tenn. 1978); State *ex rel.* Strykowski v. Wilkie, 81 Wis.2d 491, 261 N.W.2d 434, 439 (1978); text accompanying notes 35-66 *infra*.

[14] *See* Everett v. Goldman, 359 So.2d 1256, 1269 (La. 1978); Paro v. Longwood Hosp., ___ Mass. ___, 369 N.E.2d 985, 991 (1977); Harrison v. Schrader, 569 S.W.2d 822, 827 (Tenn. 1978); State *ex rel.* Strykowski v. Wilkie, 81 Wis.2d 491, 261 N.W.2d 434, 439 (1978); text accompanying notes 67-90 *infra*.

the jury so as effectively to deny claimants' right to jury trial.[15]

Claimants first successfully challenged the constitutionality of a medical malpractice statute in a 1976 Illinois suit, *Wright v. Central Du Page Hospital Association.*[16] The Supreme Court of Illinois held that legislation requiring submission of claims to a review panel prior to filing suit in court was constitutionally unsound for three reasons. The *Wright* court found that the Act improperly vested an administrative panel with powers reserved exclusively to the courts by the Illinois Constitution.[17] The court reasoned that proceedings before the panel were adversary in nature[18] and that the statute permitted physician and attorney panel members to make findings of fact and conclusions of law.[19] In addition, the

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[15] *See* Eastin v. Broomfield, 116 Ariz. 576, 570 P.2d 744, 747 (1977); Wright v. Cent. Du Page Hosp. Ass'n, 63 Ill.2d 313, 347 N.E.2d 736, 739 (1976); Attorney Gen. v. Johnson, 282 Md. 274, 385 A.2d 57, 70-71 (1978); Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657, 665 (1977); Parker v. Children's Hosp., 483 Pa. 106, 394 A.2d 932, 938-39 (1978); text accompanying notes 83-90 *infra*

[16] 63 Ill.2d 313, 347 N.E.2d 736 (1976). Claimants have successfully challenged the constitutionality of medical malpractice review legislation in only three states—Missouri, Ohio and Illinois. The Missouri Supreme Court recently held the Missouri statute unconstitutional on the ground that the review procedure denied malpractice claimants their right of access to the courts. State *ex rel.* Cardinal Glennon Memorial Hosp. v. Gaertner, 583 S.W.2d 107, 110 (Mo. 1979). As the sole support for its holding the majority analogized to an Illinois statute, requiring pretrial "arbitration" of intra-family disputes in order to lower the divorce rate, which the Illinois Supreme Court had held to deny access to the courts. *Id.* at 110; *see* People *ex rel.* Christiansen v. Connell, 2 Ill.2d 332, 118 N.E.2d 262 (1954). The *Gaertner* majority found the reasoning in *Christiansen* "persuasive." 583 S.W.2d at 110. Judge Simeone, concurring in *Gaertner,* added that the statute's requirement that a judge sit on the panel was inconsistent with the Missouri Constitution's separation of powers principle. *Id.* at 111. Chief Justice Morgan strongly dissented in favor of sustaining the statute's constitutionality. *See id.* at 112-17.

Virginia's Act similarly provides that a circuit judge will be the panel chairman. VA. CODE § 8.01-581.3 (1977). In Virginia, however, the judge cannot vote except to break a tie. *Id.* The supervisory nature of the judge's duties appears to be the reason that the legislature amended the Act to provide that the panel chairman cannot be called as a witness in a subsequent trial. *See* VA. CODE § 8.01-581.8 (Supp. 1980).

In 1976, the Ohio court of common pleas invalidated legislation requiring preliminary review of medical malpractice claims. Simon v. St. Elizabeth Medical Center, 3 Ohio Op.3d 164, 355 N.E.2d 903 (1976). The court held that statutory provisions for compulsory arbitration and a ceiling on damages unfairly discriminated against medical malpractice victims constituting a denial of equal protection. 355 N.E.2d at 906. Additionally, the court held that the review procedure effectively denied the claimant a jury trial by imposing upon him the additional expense of trying his case to both panel and jury, and the additional burden of rebutting an adverse panel finding at trial. *Id.* at 907-08. The Ohio court's opinion does not, however, offer any compelling reasoning in support of its conclusions.

The supreme courts of Arizona, Indiana, Louisiana, Maryland, Nebraska, New York, Tennessee and Wisconsin have sustained medical malpractice review legislation against constitutional challenge. *See* note 11 *supra.*

[17] 347 N.E.2d at 739-40.

[18] ILL. ANN. STAT. ch. 110, § 58.b(2) (Supp. 1979)(Smith-Hurd). The Illinois legislature repealed section 58.b effective August 28, 1979. *See* ILL. ANN. STAT. ch. 110, § 58.2 (Supp. 1980) (Smith-Hurd).

[19] 347 N.E.2d at 736.

court found that the statutory provision requiring a hearing before a claimant could file his complaint in court abrogated the claimant's right to a jury trial.[20] Finally, the court determined that the statute denied medical malpractice victims equal protection of the laws by placing a $500,000 ceiling on recoverable damages without creating a remedy to substitute for the limitation on a tort claimant's right of recovery at common law.[21] Since Virginia's Medical Malpractice Act is substantively similar to the Illinois statute, a claimant challenging the Virginia Act is likely to make the same separation of powers, equal protection, and due process arguments addressed in *Wright.*

A claimant is likely to challenge the Virginia Act on the ground that it vests judicial powers and duties in an administrative panel,[22] whereas the Constitution of Virginia vests the judicial power of the Commonwealth exclusively in the courts.[23] Under the Virginia Act, three lawyers, three doctors and a circuit judge compose a review panel and make findings on the ultimate issue in the case, the health care provider's liability.[24] Unlike the Illinois statute invalidated in *Wright,* however, the Virginia Act does not permit a panel decision to bind the parties on any question of fact, or on the ultimate issue of liability, under any circumstances.[25] In Illinois, the decision of a review panel became binding if both claimant and health care provider agreed to accept the panel's conclusion.[26] A court could then enter judgment on the basis of the panel opinion alone, without further adjudication of the merits of the claim.[27]

The opinion rendered by a review panel under the Virginia Act is only a recommendation and not a conclusive determination of the health care provider's liability.[28] A panel recommendation is always subject to a contrary finding on the issue of liability by the trier of fact in a court of law.[29] While the recommendation is admissible in evidence at a subse-

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[20] *Id.* at 741.

[21] *Id.* at 743.

[22] *See* text accompanying notes 12, 18-19 *supra.*

[23] VA. CONST. art. III, § 1. According to the separation of powers principle, the judiciary's function is to interpret the laws. Fairbanks, Morse & Co. v. Cape Charles, 144 Va. 56, 63, 131 S.E.2d 437, 439 (1926).

[24] VA. CODE § 8.01-581.3 (1977); *see* note 16 *supra.*

[25] VA. CODE § 8.01-581.8 (Supp. 1980); *see* VA. CODE § 8.01-581.7 (1977).

[26] ILL. ANN. STAT. ch. 110, § 58.8(1) (Supp. 1979) (Smith-Hurd), repealed 1979, *see* note 18 *supra.*

[27] *See id.;* 347 N.E.2d at 736.

[28] VA. CODE § 8.01-581.8 (Supp. 1979).

[29] *See id.* Either party may reject a panel opinion and proceed to trial. *Id.* Although a review panel can apply legal principles to facts and render an opinion, the legislature has not vested in the panel the judicial power which would make that opinion binding and enforceable against claimant or health care provider, and thus has not violated the separation of powers principle. *See* Attorney Gen. v. Johnson, 282 Md. 274, 385 A.2d 57, 65 (1978); Comment, *Constitutional Challenges to Medical Malpractice Review Boards,* 46 TENN. L. REV. 607, 632 (1979) [hereinafter cited as *Constitutional Challenges*]; note 21 *supra.* The panel only makes a recommendation as to liability and has no authority to award damages to a claimant. *See generally* VA. CODE §§ 8.01-581.11—8.01-581.20 (1977 & Supp. 1980).

quent trial,[30] it has no greater weight than expert testimony so that the trier of fact is, theoretically, free to reach a contrary result.[31] In theory, a proper jury instruction will prevent the jury from giving undue weight to a panel opinion so that the jury will not function passively as a "rubber stamp" validating the panel's decision.[32] Under the Medical Malpractice Act, the Virginia Legislature has vested only "quasi-judicial" authority in an administrative panel.[33] Virginia's Constitution does not forbid the limited delegation of power to non-judicial officers because the findings and conclusions made by the panel are always subject to review and reversal in court.[34] Since the opinion of a review panel cannot bind the parties to a medical malpractice claim, a Virginia court will probably find, contrary to the Illinois Supreme Court, that the potential separation of powers problem does not render the Virginia Act unconstitutional.[35]

Even if the Act is valid under the separation of powers clause, medical malpractice claimants may argue that the statute operates to deny them equal protection of the laws in violation of the Virginia Constitution.[36] Claimants' equal protection argument rests on two theories. First, the Act identifies and regulates a single group of tort claimants.[37] Out of all tort victims, medical malpractice claimants alone may not proceed to court, once either party has filed a request for a hearing, until after the review

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Even the claimant who receives a favorable recommendation from the panel must bring an action in court to recover damages.

[30] *See* text accompanying note 10 *supra*.

[31] *See* notes 61 & 87 *infra*.

[32] *See* text accompanying notes 84-87 *infra*. The medical malpractice claimant may argue that the danger of a jury's bias in favor of the party successful before the panel is so great that admission of the opinion in evidence effectively denies claimant a jury trial. *See* State *ex rel.* Strykowski v. Wilkie, 81 Wis.2d 491, 261 N.W.2d 434, 451 (1978); Comiskey v. Arlen, 55 App.Div.2d 304, 390 N.Y.S.2d 122, 125 (1976).

[33] *See* Attorney Gen. v. Johnson, 282 Md. 274, 385 A.2d 57, 63 (1978); State *ex rel.* Strykowski v. Wilkie, 81 Wis.2d 491, 261 N.W.2d 434, 448-49 (1978).

[34] *See* text accompanying note 72 *infra*. There are valid grounds on which to hold the Virginia Act consistent with the separation of powers, despite the suggestion of an early commentator that a statute permitting administrators to decide questions of law and fact on the merits of a malpractice claim was unconstitutional. *See Constitutional Challenge, supra* note 29, at 632; Harlan, *Virginia's New Medical Malpractice Review Panel and Some Questions it Raises*, 11 U. RICH. L. REV. 51, 59 (1976) [hereinafter cited as Harlan]; text accompanying notes 25-34 *supra*.

[35] Judge Simeone, concurring in State *ex rel.* Cardinal Glennon Memorial Hosp. v. Gaertner, 583 S.W.2d 107 (Mo. 1979), recognized that the Missouri Act's requirement that a circuit judge sit on a review panel raised a separation of powers issue. 583 S.W.2d at 111; *see* MO. ANN. STAT. § 538.025.1 (Supp. 1980) (Vernon). The Virginia Act similarly provides that a circuit judge shall be a panel member and gives the judge power to cast a tie breaking vote. VA. CODE § 8.01-581.3 (1977). The crucial question for a Virginia court would appear to be whether the judge who casts a vote to break a tie is merely acting in a procedural capacity, or is performing "non-judicial" functions in violation of the separation of powers clause. *See* note 23 *supra*.

[36] VA. CONST. art. I, § 11; *see* text accompanying note 13 *supra*.

[37] *See* VA. CODE § 8.01-581.2 (1977); *Rules of Practice, supra* note 3, rule 2(a).

board has issued its opinion.[38] Secondly, the Act establishes a $750,000 ceiling on damages recoverable by a medical malpractice victim,[39] which allegedly discriminates against seriously injured claimants while favoring those less seriously injured.[40]

To determine whether a statute denies equal protection to a class of persons courts apply either a "strict scrutiny" or a "rational basis" test.[41] The strict scrutiny test is applicable to legislation which regulates the exercise of a fundamental right[42] or singles out a "suspect" class of persons for special treatment.[43] Those courts which have decided the question uniformly held that legislation regulating the procedure by which a medical malpractice claimant brings his case to court involves neither a fundamental right nor a suspect classification.[44] Thus, a Virginia court would properly apply the rational basis test if faced with an equal protection challenge to the Act.

Where a plaintiff questions the validity of a statute, the rationale basis test raises a presumption of the statute's constitutionality.[45] Absent a showing that the allegedly discriminatory statutory classification is not reasonably related to a legitimate state interest, a court must sustain the statute.[46] Whether the Virginia Act bears a reasonable relation to a valid

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[38] *See* VA. CODE § 8.01-581.2 (1977).

[39] *Id.* § 8.01-581.15.

[40] *See* Seoane v. Ortho Pharmaceuticals, 472 F. Supp. 468, 470 (E.D. La. 1979); Simon v. St. Elizabeth Medical Center, 3 Ohio Op.3d 164, 355 N.E.2d 903, 906 (1976).

[41] Harrison v. Schrader, 569 S.W.2d 822, 825 (Tenn. 1978); *see* Woods v. Holy Cross Hosp., 591 F.2d 1164, 1172-73 (5th Cir. 1979).

[42] Harrison v. Schrader, 569 S.W.2d 822, 825 (Tenn. 1978). The federal and state constitutions afford special protection to fundamental rights, such as the right to vote and the right to travel. 569 S.W.2d at 825.

[43] Harrison v. Schrader, 569 S.W.2d 822, 825 (Tenn. 1978). A "suspect" classification is based on race, religion, alienage or a similar grouping. *Id.; see* note 46 *infra. See generally* Comment, *Compelling State Interest Test and the Equal Protection Clause—An Analysis,* 6 CUM. L. REV. 109 (1975).

[44] Woods v. Holy Cross Hosp., 591 F.2d 1164, 1173 (5th Cir. 1979); Seoane v. Ortho Pharmaceuticals, 472 F. Supp. 468, 472 (E.D. La. 1979); Comiskey v. Arlen, 55 App.Div.2d 304, 390 N.Y.S.2d 122, 129-30 (1976).

[45] Carter v. Sparkman, 335 So.2d 802, 805 (Fla. 1976), *cert. denied,* 429 U.S. 1041 (1977); Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657, 672 (1977); Harrison v. Schrader, 569 S.W.2d 822, 825 (Tenn. 1978); State *ex rel.* Strykowski v. Wilkie, 81 Wis.2d 491, 261 N.W.2d 434, 441 (1978); *see* Aldana v. Holub, 381 So.2d 231, 237 (Fla. 1980).

[46] State *ex rel.* Strykowski v. Wilkie, 81 Wis.2d 491, 261 N.W.2d 434, 441 (1978). The state's burden of proof to sustain a statute is much less when the legislation involves no fundamental right or suspect classification. *See id.* An Ohio court erroneously applied the strict scrutiny test to medical malpractice legislation in Graley v. Satayatham, 74 Ohio 2d 316, 343 N.E.2d 832, 837-38 (1976), holding that proponents of the statute had failed to show a "compelling governmental interest" justifying the unequal treatment of specially classified medical malpractice victims. *Id.* The *Graley* court found that the Ohio statute's special treatment of medical malpractice victims was unrelated to the promotion of public health, so that the statutory classification furthered no legitimate legislative objective. *Id.* at 836, 838. Under the strict scrutiny test, challenged legislation is not sustainable unless the party defending the statute shows a compelling state interest justifying regulation of the

state interest depends upon the legislature's objective in enacting the statute. Virginia's legislature passed the Medical Malpractice Act to encourage extrajudicial resolution of medical malpractice claims and to prevent frivolous claims from crowding court dockets.[47] As of December 31, 1979, 122 Virginia panels had completed review of a malpractice claim and issued a written opinion.[48] Ninety-six panels decided in favor of the defending health care provider, finding no liability, while seventeen ruled in favor of the claimant.[49] Based on these figures, panel decisions appear to favor the health care provider heavily. One possible explanation for the results of the hearings is panel members' bias toward health care providers.[50] An alternative explanation is that many of the claims which come before malpractice review panels are in fact frivolous, and ought not to go to trial.[51]

If the pre-trial hearing procedure operates to decrease the number of medical malpractice cases going to court, either by deterring frivolous claims or by encouraging extra-judicial settlement, Virginia insurers can afford to lower the rates charged health care providers for malpractice

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exercise of a fundamental right, or of the suspect class. *See id.* The strict scrutiny test is inapplicable, however, where a statute involving no fundamental right or suspect classification is challenged on equal protection grounds. *See* text accompanying note 44 *supra*; notes 42 & 43 *supra*. Subsequently, a second Ohio court relied exclusively on the faulty reasoning in *Graley* as the basis for sustaining an equal protection challenge to another provision of the Ohio statute. *See* Simon v. St. Elizabeth Medical Center, 3 Ohio Op.3d 164, 355 N.E.2d 903, 906 (1976); note 16 *supra*.

[47] *Cf.* PA. STAT. ANN. tit. 40, § 1301-102 (Supp. 1980-81) (Purdon) (purpose of Pennsylvania medical malpractice act to make malpractice insurance available at reasonable cost and to enable prompt determination of malpractice victim's rights). *See generally Review Panel Statistics, supra* note 2. During the "malpractice crisis" of the 1970's, the number of medical malpractice cases rose steadily, driving malpractice insurance rates up. Doctors and hospitals passed the increased cost of insurance on to the public, charging more for their services. State legislatures feared that the trend would make health care practically unavailable to persons of low income. *See* Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657, 662 (1977); Abrams v. Brooklyn Hosp., 91 Misc.2d 380, 398 N.Y.S.2d 114, 115 (1977); Parker v. Children's Hosp., 483 Pa. 106, 394 A.2d 932, 936 (1978); Note, *Alternatives to the Medical Malpractice Phenomenon: Damage Limitations, Malpractice Review Panels and Countersuits*, 34 WASH. & LEE L. REV. 1179, 1186-87 (1977) [hereinafter cited as *Alternatives*]; Harlan, *supra* note 34 at 54-55; Margolick, *Mediation Isn't Cure For Patients' Claims*, NAT. L.J., Feb. 4, 1980, at 1 , col. 2-3 [hereinafter cited as *Mediation Isn't Cure*].

[48] *Review Panel Statistics, supra* note 2; *see* text accompanying note 2 *supra*.

[49] *Review Panel Statistics, supra* note 2. Of the 122 panels having completed review of a claim by December 31, 1979, four found that the health care provider's negligence was not the proximate cause of claimant's injuries, and five decided that there existed a material issue of fact properly determinable by a jury. *Id.*; *see* note 7 *supra*. In 60 of the 266 total cases submitted to review panels in Virginia, malpractice claimants either settled with the health care provider prior to trial or voluntarily withdrew their claims, so that the panels never issued an opinion as to liability. *Review Panel Statistics, supra* note 2. In fifteen cases, review panels were dismissed, enabling claimants with clearly meritorious cases to file suit directly in court. *Id.*

[50] *See* text accompanying note 24 *supra;* text accompanying notes 84-85 *infra*.

[51] *See* text accompanying note 47 *supra*; text accompanying note 52 *infra*.

insurance.[52] As a result, health care providers can afford to make health care readily available to the public at reasonable cost by lowering their own rates.[53] When necessary to effect a valid public purpose, the legislature may place a burden upon persons seeking to enter the courts without infringing upon constitutional rights.[54] Thus, a challenger to the Virginia Act will shoulder the substantial burden of showing that the statute is not related to the compelling public purpose of providing lower cost health care in Virginia.[55]

The hypothetical claimant's second equal protection argument is founded upon the Act's limitation on damages recoverable at common law.[56] A statutory limit on damages induces medical malpractice insurers to lower their insurance rates, and theoretically, the cost of health care correspondingly decreases.[57] The limitation on recovery may, however,

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[52] While insurers can afford to lower their medical malpractice insurance rates as the threat of many lawsuits and large recoveries decreases, there is no guarantee that they will do so. State legislatures appear, however, to have faith that competition between insurers will drive rates down and thus effectuate the purposes behind medical malpractice legislation. *See, e.g.*, PA. STAT. ANN. tit. 40, § 1301.102 (Supp. 1979-80) (Purdon).

One way in which the pre-trial review procedure may encourage settlement of claims is by imposing prohibitive extra expenses upon claimants. *See* note 73 *infra.*

[53] *Constitutional Challenges, supra* note 29, at 631; Note, *Delegation of Judicial Functions to Nonjudicial Medical Review Panel Held Violative of State Constitution,* 1977 B.Y.U. L. REV. 189, 207 n.91 [hereinafter cited as *Delegation of Judicial Functions*].

[54] Kimbrough v. Holiday Inn, 478 F. Supp. 566, 574 (E.D. Pa. 1979); Note, *The Constitutional Considerations of Medical Malpractice Screening Panels,* 27 AM. U. L. REV. 161, 170 (1977) [hereinafter cited as *Constitutional Considerations*]; *see* note 49 *supra.* The supreme courts of Maryland, Louisiana, Wisconsin, Nebraska and New York have found a reasonable relation between state medical malpractice statutes and state legislatures' public purpose of decreasing the cost of health care. *See* Everett v. Goldman, 359 So.2d 1256, 1266 (La. 1978); Attorney Gen. v. Johnson, 282 Md. 274, 385 A.2d 57, 78-79 (1978); Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657, 667-68 (1977); Comiskey v. Arlen, 55 App.Div.2d 304, 390 N.Y.S.2d 122, 129-30 (1976); State *ex rel.* Strykowski v. Wilkie, 81 Wis.2d 491, 261 N.W.2d 434, 443 (1978); *accord* Woods v. Holy Cross Hosp., 59 F.2d 1164, 1175 (5th Cir. 1979); text accompanying notes 47 & 52 *supra.*

[55] *See* Seoane v. Ortho Pharmaceuticals, 472 F. Supp. 468, 472 (E.D. La. 1979) (claimant failed to show medical malpractice statute an arbitrary and unreasonable exercise of legislative authority); Paro v. Longwood Hosp., ___ Mass. ___, 369 N.E.2d 985, 988 (1977) (claimant failed to sustain "onerous" burden of showing no rational relation between medical malpractice legislation and public purpose of decreasing health care costs); Comiskey v. Arlen, 55 App.Div.2d 304, 390 N.Y.S.2d 122, 128 (1976) (claimant showed no rational basis for statutory classification).

[56] *See* Wright v. Cent. Du Page Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736, 741 (1976); Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657, 669 (1977). At common law, a tort victim could recover reasonable compensation for his loss. Comment, *A Constitutional Perspective on the Indiana Medical Malpractice Act,* 51 IND. L.J. 143, 148-49 (1975) [hereinafter cited as *Constitutional Perspective*].

[57] *See* notes 47 & 52 *supra;* text accompanying note 52 *supra.* With Virginia's Medical Malpractice Act in effect, a malpractice victim cannot recover more than $750,000 on his claim. VA. CODE § 8.01-581.15 (1977). Insurers therefore need not protect themselves against multi-million dollar recoveries by charging doctors and hospitals high insurance premiums. The Act also may operate to save insurers the costs and fees incurred litigating frivolous claims, and the expense of paying out numerous small recoveries. *See* text accompanying

prevent the seriously injured malpractice victim from receiving full compensation for his loss.

Traditionally, the legislature may not statutorily alter a common law right without substituting an equivalent remedy.[58] Courts have indicated that, since the public purpose behind medical malpractice review statutes is so compelling, the legislature probably can alter common law rights of recovery without providing a reasonable substitute.[59] At least two courts have held, however, that the benefits available to both the individual claimant and the general public under medical malpractice legislation are themselves an adequate substitute for the limitation on claimants' common law recovery of damages.[60] The statutes ensure that the claimant will have a fund out of which to collect a judgment and an expert opinion on the merits of the case,[61] and benefit society by encouraging expeditious resolution of medical malpractice claims.[62] Only the Illinois Supreme Court has reached a contrary result, holding in *Wright* that the potential benefits of the Illinois statute, lowered insurance premiums and health care costs, were an "insufficient substitute" for the statutory modification of common law recovery, and that a limit on recoverable damages was therefore an appropriate reason for invalidating the statute.[63] At least three state medical malpractice statutes place an upper limit on the

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note 52 *supra*.

[58] The "reasonable substitute" test requires that the state supply equivalent rights or benefits to the class of persons affected by the legislature's abrogation of common law rights. *Constitutional Perspective, supra* note 56, at 150.

[59] *See* Attorney Gen. v. Johnson, 282 Md. 274, 385 A.2d 57, 62 (1978) (neither federal nor state constitutions forbid abrogation of common law rights and creation of new rights); Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657, 671 (1977) (dicta that no reasonable substitute necessary for legislature to alter common law right); Comiskey v. Arlen, 55 App.Div.2d 304, 390 N.Y.S.2d 122, 125-26 (1976) (persons have no vested interest in common law rules).

[60] Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657, 671 (1977); Comiskey v. Arlen, 55 App.Div.2d 304, 390 N.Y.S.2d 122, 126 (1976); *see Alternatives, supra* note 47, at 1183; *Delegation of Judicial Functions, supra* note 53, at 209. *But see* Wright v. Cent. Du Page Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736, 742 (1976) (lower insurance premiums and medical care costs an insufficient substitute for statutory limitation on damages recoverable by seriously injured medical malpractice victims).

[61] Everett v. Goldman, 359 So.2d 1256, 1267 (La. 1978); Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657, 671 (1977); Parker v. Children's Hosp., 483 Pa. 106, 394 A.2d 932, 939 (1978). Claimants successfully argued before the Illinois Supreme Court that a patients' compensation fund and an opinion by a panel of "experts" were not a reasonable substitute for the restrictions imposed by medical malpractice legislation. Wright v. Cent. Du Page Hosp. Ass'n, 63 Ill.2d 313, 347 N.E.2d 736, 742 (1976).

[62] *See* text accompanying notes 47-51 *supra*.

[63] 347 N.E.2d at 742. The *Wright* court distinguished the Illinois medical malpractice statute from the Workmen's Compensation Act, reasoning that the latter, by imposing equal burdens and benefits on both employer and employee, provided a reasonable substitute for the limitations placed on an employee's recovery at common law. *Id.* at 742. The court was not convinced, however, that the medical malpractice statute would in fact benefit claimants by decreasing insurance premiums and thus lowering the cost of medical care. *See id.*

amount of damages recoverable by the claimant.[64] Virginia's $750,000 limit allows a substantially greater recovery than the $500,000 ceiling imposed by statutes of other states.[65] Furthermore, one commentator indicates that few medical malpractice claimants in Virginia have suffered such serious injury that reasonable compensation would exceed the statutory limit.[66] Despite the Virginia Act's classification of medical malpractice victims for special treatment, its public purpose compensates for the burden which it imposes upon claimants. Thus, Virginia courts have a sound basis on which to deny an equal protection challenge.

Finally, claimants may challenge the constitutionality of the Virginia Act on the grounds that it operates to delay access to the courts and prevent a fair jury trial, thus denying due process of law in violation of the Virginia Constitution.[67] Although the seventh amendment right to a jury trial is not applicable to the states through the due process clause of the fourteenth amendment,[68] Virginia has preserved that right and the right of access to the courts in its Constitution.[69]

Whether legislation requiring review of all medical malpractice claims prior to trial effectively denies claimants their constitutional rights of access to the courts and trial by jury may depend upon whether a court construes the statute to create a trial substitute or merely to establish a pre-trial proceeding.[70] Virginia's Medical Malpractice Act does not expressly state that either party has the right to a full adjudication on the merits of a claim before the trier of fact, following a hearing. The Act does, however, establish a special statute of limitations for medical malpractice claims[71] and provide that a panel opinion will be admissible in evidence at a subsequent trial.[72] Apparently, the legislature did not intend the Act to substitute for a jury trial, but meant instead that the review procedure would operate similarly to a pretrial conference by encouraging settlement of claims prior to trial.

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[64] ILL. REV. STAT. ch. 70, § 101 (Supp. 1979) (Smith-Hurd), repealed 1979, *see* note 18 *supra*, ($500,000 ceiling); NEB. REV. STAT. § 44-2825 (Supp. 1978) ($500,000 ceiling); VA. CODE § 8.01-581.15 (1977) ($750,000 ceiling). Other statutes prohibit any demand for a specific sum by the claimant. *See, e.g.*, ARIZ. REV. STAT. § 12-566 (Supp. 1979); HAW. REV. STAT. § 671-4 (1976); MASS. GEN. LAWS ANN. ch. 231, § 60C (Supp. 1979).

[65] VA. CODE § 8.01-581.15 (1977); *see* note 60 *supra*.

[66] *See Alternatives, supra* note 47, at 1185-86. Arguably, if the Virginia Act's $750,000 ceiling on recoverable damages denies equal protection to a single claimant with damages exceeding that amount, grounds for a constitutional challenge exist.

[67] *See* VA. CONST. art. I, § 11; text accompanying notes 14-15 *supra*.

[68] Minn. & St. Louis R.R. v. Bombolis, 241 U.S. 211, 217 (1916); Woods v. Holy Cross Hosp., 591 F.2d 1164, 1171 n.12 (5th Cir. 1979).

[69] VA. CONST. art. I, § 11.

[70] *See* State *ex rel.* Cardinal Glennon Mem. Hosp. v. Gaertner, 583 S.W.2d 107, 113 (Mo. 1979); *Constitutional Considerations, supra* note 54, at 176-79.

[71] VA. CODE § 8.01-581.9 (1977), provides that the claimant may pursue his claim within 120 days from the time of notice to the health care provider, or within 60 days of the date a panel issues its opinion, whichever is later.

[72] VA. CODE § 8.01-581.8 (Supp. 1980).

If the parties do not settle a malpractice claim during the pre-trial proceedings, the claimant must take his case to court in order to recover damages. The hearing both delays the claimant in taking his case to court and imposes upon him double costs for expert witness' and attorney's fees.[73] For a claimant of limited means the burden will be substantial.

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[73] It is not in the claimant's interest to request review of his claim before a panel and assume the extra expense of a hearing, unless he hopes to force a quick settlement. However, it will often be to the health care provider's advantage to apply for a hearing either to discourage the claimant bringing a frivolous action, or to settle a meritorious claim. The hearing nevertheless imposes some financial burden on the health care provider, as well as on the claimant. *See* VA. CODE § 8.01-581.10 (1977); *Rules of Practice, supra* note 3, rule 4(c), (d). A health care provider faced with a clearly valid claim may be willing to let the case go directly to trial to save time and expense, especially where claimant's recovery is limited to $750,000. *See* VA. CODE § 8.01-581.15 (1977).

The claimant's alternative to paying twice in order to get his case to trial is to find an attorney who will handle the claim on a contingent fee basis. An attorney is likely to take a strong case for a contingent fee. Conversely, if claimant's case is weak and his attorney refuses a contingent fee, the doubled financial burden may prevent claimant from going to court following a hearing. This result may be consistent with legislative intent to keep frivolous claims out of court. *See* text accompanying note 47 *supra*. However, the claimant with limited financial resources whose attorney estimates only a forty percent chance of success on the claim, and therefore refuses to take the case for a contingent fee, may be unable to go to court although his claim is not frivolous.

In Virginia, claimant and health care provider bear all daily expenses incurred by the seven panel members, but the chairman may distribute those costs between them in his discretion. VA. CODE § 8.01-581.10 (1977); *see Rules of Practice, supra* note 7, rule 4(c), (d). The claimant will generally want to present all relevant evidence to the panel in order to obtain a favorable opinion, but his financial resources may be limited. The claimant who is successful before the panel must go to court to recover from the health care provider because the panel has no authority to award damages. *See* VA. CODE § 8.01-581.7 (1977); VA. CODE § 8.01-581.8 (Supp. 1980). Even though the claimant has a meritorious claim, he may not be able to bear double expenses of expert witness' and attorney's fees. *See* Carter v. Sparkman, 335 So.2d 802, 807-08 (Fla. 1976), *cert. denied*, 429 U.S. 1041 (1977) (England, J., concurring); *Constitutional Considerations, supra* note 51, at 167; Harlan, *supra* note 30, at 55; *Mediation Isn't Cure, supra* note 44, at 34, col. 2.

In Carter v. Sparkman, 335 So.2d 802 (Fla. 1976), claimant argued that the expense and delay caused by the pretrial hearing procedure resulted in a denial of her right of access to the courts. 335 So.2d at 804. The Florida Supreme Court rejected the argument and sustained the statute, but recognized that the extra burden imposed upon a claimant by the required hearing "reaches the outer limits of constitutional tolerance." *Id.* at 806. The Florida Supreme Court recently held that, while the Florida Act had appeared constitutional on its face, the statute had operated in an arbitrary and capricious manner which rendered it unconstitutional. Aldana v. Holub, 381 So.2d 231, 237-38 (Fla. 1980). The court found that the automatic lapse of a review panel's jurisdiction over parties to a medical malpractice claim, ten months after submission of the claim, operated to deny the requesting party's due process "right to mediation." *Id.* at 237. The court held, however, that to extend the jurisdictional time limit would defeat the legislature's plan for an inexpensive summary procedure and deny the claimant's constitutional right of speedy access to the courts. *Id.* at 10-11; *see* FLA. CONST. art. I, § 21. Numerous medical malpractice claims may result in a backlog of scheduled hearings in a state where the pretrial review procedure is mandatory, preventing the claimant from speedily taking his case to court. *See Mediation Isn't Cure, supra* note 47, at 34, col. 1-2. The Virginia Act may, however, be secure from attack since its hearing is not mandatory and therefore fewer claims go before a panel. *See* VA. CODE § 8.01-581.2

Case law authority indicates, however, that the extra financial burden is not so severe as to preclude the claimant from bringing his case to court, and thus holds that there is no indirect denial of a jury trial.[74]

A number of state medical malpractice statutes provide that a hearing before a review panel is a condition precedent to bringing an action in court.[75] State supreme courts have sustained the statutes against due process attack on the grounds that, since claimant and health care provider are free to file an action in court following the hearing, a mandatory review procedure does not deprive the claimant of access to court or a jury trial.[76] Unlike other statutes, the Virginia Act provides that a hearing before a liability review panel prior to trial is not mandatory.[77] Within sixty days of claimant's notice to the health care provider, either party "may" file a request for review.[78] If neither party files a timely request, the claimant may bring suit directly in the appropriate court.[79] Thus, in Virginia, not every medical malpractice claimant will necessarily have to bear the inconvenience of delay and the doubled financial burden imposed by medical malpractice legislation.[80]

Those courts which have ruled on the validity of medical malpractice legislation have consistently held that claimants have no constitutional right to immediate access to court or to jury trial.[81] If the legislature does not deny the claimant's due process rights to notice and a fair hearing, it may postpone access to the courts and a jury trial for a purpose reasona-

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(1977); *Review Panel Statistics, supra* note 2.

[74] Woods v. Holy Cross Hosp., 591 F..d 1164, 1178-79 (5th Cir. 1979); Seoane v. Ortho Pharmaceuticals, 472 F. Supp. 468, 473 (E.D. La. 1979); *see* Kimbrough v. Holiday Inn, 478 F. Supp. 566, 570 (E.D. Pa. 1979); Paro v. Longwood Hosp., ___ Mass. ___, 369 N.E.2d 985, 990-91 (1977).

[75] *See, e.g.*, ARIZ. REV. STAT. § 12-567A (Supp. 1957-79); LA. REV. STAT. ANN. § 40:1299.47A. (1977) (West); MONT. REV. CODES ANN. § 17-1304(1),(3) (Supp. 1977); NEV. REV. STAT. § 41A.070 (1977); N.M. STAT. ANN. § 58-33-15.A. (Supp. 1976-77); PA. STAT. ANN. tit. 40 § 1301.401 (Supp. 1979-80) (Purdon).

[76] Seoane v. Ortho Pharmaceuticals, 472 F. Supp. 468, 473 (E.D. La. 1979); Everett v. Goldman, 359 So.2d 1256, 1267 (La. 1978); Attorney Gen. v. Johnson, 282 Md. 274, 385 A.2d 57, 65 (1978). The Illinois Civil Practice Act provided that if both claimant and health care provider accepted a panel's recommendation on the issue of liability, it would become binding upon them, so that a court could enter judgment on the basis of that opinion without further adjudication. ILL. REV. STAT. ch. 110, § 58.b(1) (Supp. 1979), repealed 1979, *see* note 18 *supra*. The Illinois Supreme Court found that the statute effectively denied a jury trial to the claimant, overlooking the fact that a panel decision could not bind the parties in the absence of unanimous agreement. Wright v. Cent. Du Page Hosp. Ass'n, 347 N.E.2d at 740. Virginia's Act includes no provision comparable to that held unconstitutional in *Wright*. *See Alternatives, supra* note 47, at 1191.

[77] VA. CODE § 8.01-581.2 (1977).

[78] *Id.; Rules of Practice, supra* note 3, rule 2(c).

[79] *See* note 71 *supra*; text accompanying note 73 *supra*.

[80] *See* note 73 *supra*.

[81] Everett v. Goldman, 359 So.2d 1256, 1266 (La. 1978); Comiskey v. Arlen, 55 App.Div.2d 304, 390 N.Y.S.2d 122, 125-26 (1976); *see* State *ex rel.* Cardinal Glennon Mem. Hosp. v. Gaertner, 583 S.W.2d 107, 114 (Mo. 1979) (Morgan, C.J., dissenting).

bly related to a legitimate public need.[82]

Claimants may further allege that admission of a panel opinion in evidence at a subsequent trial denies them their constitutional right to a jury trial on the merits of a medical malpractice claim.[83] Claimants challenging the constitutionality of medical malpractice legislation in other states have argued that admission of the opinion is bound to influence the jury to render an opinion consistent with that of the panel, and that the parties are thus denied a trial before impartial fact finders.[84] Courts which have ruled on this question reject the contention that the panel's recommendation as to the health care provider's liability will bias the jury, and state that a proper jury instruction will enable the jury to make an impartial finding on the basis of all the evidence adduced at trial.[85] Virginia courts should reach a similar result. Admission of a panel opinion in evidence does not prevent the jury from hearing all relevant evidence and making its own findings on the disputed issue of liability[86] because the opinion of a Virginia panel is not determinative of liability.[87]

The Virginia Act further protects against the danger that a jury will give undue weight to a panel opinion by permitting either party to call

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[82] *Ex Parte* Peterson, 253 U.S. 300, 309-10 (1920); Woods v. Holy Cross Hosp., 591 F.2d 1164, 1173 n.16; Morris v. Gross, 572 S.W.2d 902, 905 (Tenn. 1978); *see* text accompanying notes 49-52 *supra.*

[83] *See* VA. CODE § 8.01-581.8 (Supp. 1980) (providing panel opinion on issue of liability admissible in evidence at subsequent trial).

[84] The constitutional right to trial by jury guarantees that all parties before the court will have an impartial group of fact finders to hear and rule on the merits of their claims. *See* Parker v. Children's Hosp., 483 Pa. 106, 394 A.2d 932, 941 (1978). Claimants may object to the admissibility of a panel opinion on the grounds that it is based on evidence which would be inadmissible in court under the rules of evidence, and that it would unduly prejudice the jury in favor of the successful party since panel members are doctors, lawyers and a judge. Parker v. Children's Hosp., 394 A.2d at 941-42.

At a hearing in Virginia, the parties may present evidence and cross-examine witnesses. VA. CODE § 8.01-581.6.2 (Supp. 1980). Rules of evidence, however, do not apply in review proceedings. *Id.* Consequently, a panel may hear and base its opinion upon evidence which would be inadmissible in court, such as hearsay and the opinions of unqualified experts. *See* Baldwin v. Knight, 569 S.W.2d 450, 452-53 (Tenn. 1978) (experts who testified before panel may be called at trial and questioned regarding correctness of panel decision since admission of opinion in evidence does not substitute for expert testimony).

[85] State *ex rel.* Strykowski v. Wilkie, 81 Wis.2d 491, 261 N.W.2d 434, 451-52 (1978). The Wisconsin Supreme Court suggests that a jury be instructed that the panel's findings are not binding upon them and that they may give the findings such weight as they choose. *Id.* at 452; *see* Baldwin v. Knight, 569 S.W.2d 450, 453 (Tenn. 1978). Juries regularly hear potentially prejudicial evidence, and courts are unwilling to assume that all such evidence will affect their impartiality. Halpern v. Gozan, 85 Misc.2d 753, 381 N.Y.S.2d 744, 748-49 (1976); *see* text accompanying notes 30-34 *supra.*

[86] Eastin v. Broomfield, 116 Ariz. 576, 570 P.2d 744, 748 (1977); Parker v. Children's Hosp., 483 Pa. 106, 394 A.2d 932, 941-42 (1978). Case law suggests that the panel opinion should be accorded the same weight given to expert testimony. Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657, 665 (1977); Comiskey v. Arlen, 55 App.Div.2d 304, 390 N.Y.S.2d 122, 130 (1976); Baldwin v. Knight, 569 S.W.2d 450, 453 (Tenn. 1978); *see* text accompanying notes 31 and 61 *supra. But see* note 84 *supra.*

[87] VA. CODE § 8.01-581.8 (Supp. 1980).

any panel member, except the judge acting as chairman, as a witness.[88] Since the Act does not limit the scope of a panel member's testimony at trial, the parties apparently may question the witness as to the basis for the panel's recommendation.[89] Despite some risk that admission of the panel opinion will influence the jury's verdict, public policy favoring pre-trial settlement of medical malpractice claims is strong enough that a Virginia court has good reason to sustain the Act against a due process challenge.[90]

Virginia's Medical Malpractice Act provides for pre-trial review of any claim, at the request of claimant or health care provider, to promote out-of-court settlement of malpractice claims and to clear court dockets of frivolous lawsuits against hospitals and doctors.[91] The Act is not susceptible to invalidation for violating the separation of powers principle since it vests an administrative board only with the limited authority to make a non-binding recommendation as to a health care provider's liability.[92] The Act singles out medical malpractice victims for special treatment, and may operate to delay a claimant's access to court. However, since the discriminatory classification is rationally related to the state's interest in making health care available to the public at reasonable cost, the burden imposed on claimants does not deprive them of equal protection of the laws.[93] Nor does the Act deny due process of law, since malpractice claimants still have access to the courts and the opportunity for a full jury trial on the merits of a claim.[94]

No Virginia court has yet addressed the question whether the pre-trial hearing established by the Medical Malpractice Act is constitutionally sound. If and when that question does arise, there is both case law precedent and sound reasoning upon which a court may rely to sustain the Virginia Act against separation of powers, equal protection, and due process challenges.

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[88] *Id.*

[89] *See* Abrams v. Brooklyn Hosp., 91 Misc.2d 380, 398 N.Y.S.2d 114, 116 (1977). Failure to permit a comprehensive examination of panel members at trial may constitute a denial of due process of law. *Id.;* Curtis v. Brookdale Hosp. Center, 62 App.Div.2d 749, 406 N.Y.S.2d 494, 495-97 (1978). On its face, the Virginia Act permits the party unsuccessful before the panel to call a dissenting panel member as a witness and examine that witness as to the reasons for his dissent. *See* VA. CODE § 8.01-581.8 (Supp. 1980).

[90] *See* Halpern v. Gozan, 85 Misc.2d 753, 381 N.Y.S. 2d 744, 748-49 (1976); text accompanying note 47 *supra.*

[91] *See* text accompanying notes 3-6 and 47 *supra.*

[92] *See* text accompanying notes 28-34 *supra.*

[93] *See* text accompanying notes 47-55 *supra.*

[94] *See* text accompanying notes 76-87 *supra.*