Illinois' Medical Malpractice Review Panel Provision: A Constitutional Analysis

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I. INTRODUCTION

The early 1970’s marked the beginning of what has often been called a medical malpractice crisis. As the frequency and severity of malpractice claims against physicians and hospitals increased rapidly on a nationwide basis, and as the amounts of judgments grew larger, insurance carriers became increasingly reluctant to issue malpractice policies. Those carriers who continued to issue such policies demanded dramatically increased premiums. Some health care providers, faced with rising costs, were forced to curtail or terminate their services. Many states feared that the availability of health care services would decline and that doctors would practice without insurance, thus leaving injured patients with the prospect of uncollectible judgments.


2. See Danzon, supra note 1, at 115. In this context “severity” is the average dollar indemnity per paid claim, including court awards and payments in out-of-court settlements. Id.


5. See Fein v. Permanente Medical Group, 38 Cal. 3d 137, 152, 695 P.2d 665, 680,
In an effort to respond to the special interests of the doctors, hospitals, insurance companies — and, ultimately, consumers — forty-eight states have passed some form of remedial legislation.\textsuperscript{6} Illinois, in 1975, was one of the first states to enact such legislative reform.\textsuperscript{7} However, the Illinois reform was short-lived. In May of 1976, the Illinois Supreme Court declared the act unconstitutional.\textsuperscript{8}

In 1985 the Illinois General Assembly again passed an act designed to solve the myriad of problems associated with medical malpractice.\textsuperscript{9} And, once again, an action has been filed which challenges the constitutionality of the legislation's provisions.\textsuperscript{10}

This note will examine the past and present Illinois medical malpractice legislation. It will first discuss the provisions of the 1975 Reform Act and the reasons why the Illinois Supreme Court declared the act unconstitutional. Next, the provisions of the 1985 legislation will be summarized. Focusing on panel review provisions, which are highly controversial and found in both the old and new acts, the note will discuss judicial treatment of three frequent constitutional challenges to such provisions. The note will conclude with a discussion of how Illinois' new panel review provision will fare under constitutional challenge.

\section*{II. BACKGROUND}

\textbf{A. The Medical Malpractice Legislation of 1975}

The medical malpractice crisis of the 1970's has been attributed to many factors, including an increase in the number of medical claims filed,\textsuperscript{11} an increase in the dollar amounts of judgments ren-

\begin{itemize}
\item[7.] ILL. REV. STAT. ch. 110, §§ 58.2 to 58.10 (1975) (repealed 1979); ILL. REV. STAT. ch. 70, § 101 (1975) (repealed 1979); ILL. REV. STAT. ch. 73, § 1013(a) (1975) (repealed 1979).
\item[9.] ILL. REV. STAT. ch. 110, §§ 2-114, 2-611.1, 2-622, 2-1010, 2-1012 to 2-1020 (1985).
\item[11.] A national survey revealed that the number of claims per physician doubled from
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dered,12 a decrease in trust in doctor-patient relationships,13 and an increase in iatrogenic injuries.14 Since no single factor caused the crisis, early legislative attempts to resolve the problem were difficult and often unsuccessful.15

Illinois, eager to resolve the medical malpractice dilemmas facing its own physicians, hospitals, insurance companies and consumers, became one of the first states to attempt malpractice reform. Medical Malpractice Public Act 79-1434 and Medical Malpractice-Arbitration Public Act 79-1435 (the "1975 Act") became effective November 11, 1975.16 In relevant part, the 1975 Act provided for: (1) the establishment of medical review panels to screen all medical malpractice cases before trial;17 (2) a maximum

approximately 13 per 100 physicians in 1968 to 26 per 100 in 1974. See Report on Medical Malpractice, supra note 4, at 6-12.

12. St. Paul Fire Marine Insurance Co. reports that the national average payment for malpractice claims increased from $6,705 in 1969 to $12,535 in 1974. See Cong. Q. 709 (Apr. 5, 1975); see also Report on Medical Malpractice, supra note 4, at 33 (one percent of all plaintiffs' judgments in 1970 were for amounts in excess of $100,000).


Doctors have also blamed the so-called "Marcus Welby" syndrome, whereby the public has been "media taught" to expect fantastic results from the medical profession. When less-than-perfect results are achieved, the disappointed patient views the doctor's services as substandard and the patient's reactions often result in malpractice suits. Other analysts assert that the effect of modern technology on the practice of medicine has led to the breakdown in the traditional physician-patient relationship. This breakdown weakens the patient's trust of and admiration for the physician, thus making the subjective decision to sue for perceived substandard medical service far easier than when greater trust existed. Those analysts focusing on the rapid advance of medical technology have also pointed out that the increase in the severity of malpractice claims made may be due to the proliferation of complex procedures currently being developed and utilized to combat injury, organ failure and disease.

Id.


15. See State ex rel. Glennon Memorial Hosp. v. Gaertner, 583 S.W.2d 107 (Mo. 1979) (declaring Missouri medical malpractice act unconstitutional); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978) ($300,000 maximum malpractice recovery provision and requirement that physicians obtain malpractice insurance violate equal protection and due process); Graley v. Satayatham, 74 Ohio Op. 2d 316, 343 N.E.2d 832 (C.P. 1976) (Ohio malpractice law violates equal protection); Simon v. Saint Elizabeth Medical Center, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (C.P. 1976) (compulsory mediation provision violates equal protection; admissibility of arbitration panel findings at subsequent trial violates right to trial by jury).


recovery of $500,000 for all losses and damages sustained by reason of medical, hospital or other healing art malpractice; and (3) regulation of medical malpractice insurance rates on policies in existence on June 10, 1975.\textsuperscript{19}

1. Review Panels

The 1975 Act provided that in all medical malpractice cases, the circuit judge would, within 120 days to a year after the filing of a complaint, order the convening of a medical review panel to which a medical malpractice case would be assigned for a hearing and determination.\textsuperscript{20} The medical review panel would consist of one circuit court judge, one practicing physician and one practicing attorney.\textsuperscript{21} The panelists would be chosen from rosters maintained by the chief presiding judge of each judicial circuit.\textsuperscript{22} The rosters would include at least five circuit judges, at least twenty practicing physicians, and at least twenty practicing attorneys.\textsuperscript{23} The 1975 Act provided for assignment from these rosters to the panels on a rotation basis.\textsuperscript{24} The parties, by unanimous agreement, could select as a panelist a physician, an attorney, or a circuit judge whose name did not appear on the roster.\textsuperscript{25} A panelist could refuse to serve on the panel or could be disqualified on the basis of conflicts of interest.\textsuperscript{26}

Proceedings before the panel were to be adversary. Each party could call and cross-examine witnesses and introduce evidence as at a trial in the circuit court.\textsuperscript{27} The panel had the power to subpoena, call witnesses, examine evidence, call for additional or particular evidence and examine or cross-examine witnesses.\textsuperscript{28} The circuit judge was to preside over the proceedings and decide procedural and evidentiary matters while all other matters were to be determined by the panel.\textsuperscript{29} The panel was to make a determination on the issue of liability and, if liability was found, on the issue of

\begin{itemize}
    \item \textsuperscript{18} ILL. REV. STAT. ch. 70, ¶ 101 (1975) (repealed 1979).
    \item \textsuperscript{19} ILL. REV. STAT. ch. 73, ¶ 1013(a) (1975) (repealed 1979).
    \item \textsuperscript{20} ILL. REV. STAT. ch. 110, ¶ 58.3 (1975) (repealed 1979).
    \item \textsuperscript{21} \textit{Id.}
    \item \textsuperscript{22} \textit{Id.} at ¶ 58.4.
    \item \textsuperscript{23} \textit{Id.}
    \item \textsuperscript{24} \textit{Id.}
    \item \textsuperscript{25} \textit{Id.} at ¶ 58.5.
    \item \textsuperscript{26} \textit{Id.}
    \item \textsuperscript{27} \textit{Id.} at ¶ 58.6.
    \item \textsuperscript{28} \textit{Id.}
    \item \textsuperscript{29} \textit{Id.}
\end{itemize}
fair and just compensation for damages.30

The effect of a panel's decision depended on the parties involved in the suit. If the parties agreed in writing to be bound by the determination of the panel, the panel's decision would be binding and conclusive, and judgment would be entered thereon.31 If the parties did not agree to be bound by the panel's determination, the panel judge would conduct a pretrial conference and the case would proceed to trial as in any other civil case.32 The determination of the panel was not admissible at any subsequent trial in the circuit court.33

The expenses of the medical review panel were to be apportioned equally among the parties, except where a unanimous panel decision was rejected by a party losing at the subsequent trial.34 In this instance, a trial court could in its discretion impose attorney fees and litigation costs on the losing party.35

2. Maximum Recovery and Regulation of Medical Malpractice Insurance Rates

In response to spectacular jury awards36 and rising insurance costs,37 Illinois chose to place a ceiling on the amount recoverable in medical malpractice actions. The 1975 Act provided that a plaintiff was entitled to a maximum recovery of $500,000 in any medical malpractice action.38

Furthermore, in an attempt to regulate the increasing costs of medical malpractice insurance so that physicians and hospitals would be better able to pay insurance premiums,39 restrictions were placed on insurance companies.40 The 1975 Act prohibited a medical malpractice insurance company from refusing to renew existing policies at rates established on June 10, 1975, unless the company

30. Id. at ¶ 58.7.
31. Id. at ¶ 58.8.
32. Id.
33. Id.
34. Id. at ¶ 58.9.
35. Id.
36. See Linster, Malpractice: Striking The Reasonable Balance, 43 INS. COUNS. J. 101 (1976). Until 1975, Chicago had never had a malpractice verdict larger than $250,000 against a physician. In 1976, there were three malpractice jury awards in excess of $1,000,000 and one such verdict for $2,500,000. Id.; see also Rathnau, The Illinois Medical Malpractice Acts: Response to Crisis, 65 ILL. B.J. 716, 725 (1977).
37. See supra note 12 and accompanying text.
39. See supra note 12. The increase in judgments awarded to malpractice victims has been linked to an increase in insurance premiums. See Comment, supra note 13, at 849.
40. See supra notes 1-5 and accompanying text.
provided evidence sufficient to justify a rate increase.  

**B. Wright v. Central DuPage Hospital Association**  

In May 1976, the Illinois Supreme Court, in *Wright v. Central DuPage Hospital Association*, declared the 1975 Act unconstitutional. The *Wright* case was a consolidation of separate declaratory judgment actions. In relevant part, the plaintiffs contended that the regulations imposed on insurance companies were unconstitutional since the provisions denied the companies the equal protection and due process rights guaranteed under the fourteenth amendment of the federal Constitution and under section 2 of article 1 of the Illinois constitution. Additionally, the plaintiffs alleged that the imposition of a medical review panel prior to trial and the maximum damage recovery of $500,000 violated their constitutional rights to trial by jury and free access to the courts.

With respect to the regulations imposed on medical malpractice insurance companies, the provision was held unconstitutional on special legislation grounds. Since the provision regulated only policies that were in existence on June 10, 1975, and not those written after that date, the legislation represented a special law in violation of section 13 of article IV of the Illinois constitution.

The *Wright* court also invalidated the medical review panel requirement. The court found that the panel empowered nonjudici...
cial members of the medical review panel with judicial functions in violation of sections 1 and 9 of article VI of the Illinois constitution. Additionally, the panels impaired the plaintiffs' constitutionally protected interests in trial by jury. However, it is important to note that the court stated that by invalidating the instant provisions of the medical malpractice review panel, it did not "imply that a valid pretrial panel procedure cannot be devised."

Finally, the court declared the maximum recovery provision unconstitutional. The court stated that the provision was arbitrary since it denied full recovery to the very seriously injured malpractice victim while not providing him a concomitant quid pro quo.

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49. *Id.* at 322, 347 N.E.2d at 740. Although the statute provided that the circuit judge member of the medical review panel “shall preside over all proceedings of the panel and shall determine all procedural issues, including matters of evidence,” ILL. REV. STAT. ch. 110, § 58.6 (1975) (repealed 1979), all other issues, both factual and legal, were to be decided by the lawyer, physician and judge; thus the same judicial power was vested in all three panel members. Under the provisions of the statute, "the physician and lawyer members of the medical review panel were empowered to make conclusions of law and fact 'according to the applicable substantive law' . . . over the dissent of the circuit judge.” *Wright*, 68 Ill. 2d at 322, 347 N.E.2d at 740 (quoting ILL. REV. STAT. ch 110, § 58.7 (1975) (repealed 1979)); *see also* Comment, supra note 13, at 868-72 (discussing the Wright decision in light of subsequent legislation and caselaw in other jurisdictions).

50. 63 Ill. 2d at 325, 347 N.E.2d at 741. “The right of trial by jury as it existed at common law is the right to have the facts in controversy determined, under the direction and superintendence of a judge, by the unanimous verdict of twelve impartial jurors . . . .” *Id.* at 324, 347 N.E.2d at 740 (citing People v. Lobb, 17 Ill. 2d 287, 298-99 (1959)). The court concluded that the panel procedure was an impermissible restriction on the right to trial by jury guaranteed by article 1, section 13, of the Illinois constitution. *Id.*

51. *Id.*

52. 63 Ill. 2d at 327, 347 N.E.2d at 743. In *Wright*, the plaintiff argued that the $500,000 damage limitation created an arbitrary classification and unreasonably discriminated against “the most seriously injured victims of medical malpractice.” *Id.* at 325, 347 N.E.2d at 741. Defendants responded that such “unequal treatment [was] necessary to deal with . . . the 'medical malpractice crisis' ” and that it was within the legislature's power to set limits on plaintiffs' recoveries even if the result was to deny some plaintiffs full compensation. To support their contentions, defendants compared the malpractice legislation to the limits set in Dramshop Act and Wrongful Death Act recoveries. *Id.* at 326, 347 N.E.2d at 741-42. The court distinguished the medical limitation from wrongful death and dramshop recoveries because the latter acts were “creature(s) of the General Assembly” and could thus be limited by that body. However, medical malpractice actions existed at common law and could not, therefore, be statutorily limited by the legislature. *Id.* at 327, 347 N.E.2d at 742.

53. *Id.* at 327, 347 N.E.2d at 742. Interestingly enough, the court did not hold that tort plaintiffs had a vested right in a common-law cause of action. In fact, where a quid pro quo existed, the legislature was not precluded from abolishing a common-law remedy. The court noted, for example, that provisions limiting monetary recoveries in worker's compensation cases were valid since, in exchange for limits on damages, the injured party was awarded compensation without regard to the employer's negligence and the employer was required to relinquish certain defenses. *Id.*

According to Justice Underwood's dissent, the $500,000 maximum recovery legislation
C. The Medical Malpractice Legislation of 1985

In 1985, Illinois was once again "accelerating through the first stages of a crisis in medical malpractice."54 Congested court rooms,55 frivolous malpractice claims,56 the prevalent use of "defensive medicine,"57 and the increases in jury damage awards58 and insurance rates59 caused the Illinois legislature again to attempt represented a valid exercise of legislative discretion. Justice Underwood found that the legislature had the power, within constitutional limits, to restrict or even eliminate common-law rights, regardless of a concomitant quid pro quo. For Justice Underwood, the more troublesome question was whether the legislation was enacted without any rational basis. Because he felt that serious problems did exist in the medical malpractice field and that the legislation might, in some "imprecise" manner, assure adequate health care at a reasonable cost, Justice Underwood did not hold the legislation unconstitutional. Id. at 333-35, 347 N.E.2d at 745-46 (Underwood, J., dissenting); see also Comment, supra note 13, at 868-72 (discussing the Wright decision at length).

54. REPORT OF THE TASK FORCE ON MEDICAL MALPRACTICE TO GOVERNOR JAMES R. THOMPSON (1985) [hereinafter cited as TASK FORCE]. On November 1, 1984, Governor Thompson appointed eighteen individuals representing a cross-section of expertise to a Medical Malpractice Task Force for the purpose of examining the problems and proposing possible legislative reform. Id. But see Bernier v. Burris, No. 85-6627, slip op. at 2 (Cir. Ct. Cook Cty. Ill. Dec. 19, 1985). "There is no empirical data to support the claim that a medical malpractice insurance crisis exists in the State of Illinois." Id.; see infra notes 96-105 and accompanying text.


56. See TASK FORCE, supra note 54, at 4. The Task Force noted that a "Medical Malpractice Claims Study" released by the Department of Insurance in 1984 indicated that of 3,763 malpractice claims closed between 1980 and 1983, only 1,218 were closed with payment by the defendant. 2,545, or 68%, were settled without payment by the defendant." Id. It was the Task Force's opinion that a significant percentage of the number closed without payment were, in fact, without merit. Id. But see Bernier v. Burris, No. 85-6627, slip op. at 3 (Cir. Ct. Cook Cty. Ill. Dec. 19, 1985).

The report in the Medical Malpractice Claims Study, that "[t]wo-thirds of all claims are closed without any indemnity paid" is misleading. The term "claim" as used in the study includes every complaint, even a single telephone call, even though no court action resulted. Thus, the number of claims closed without any indemnity paid is overstated in the report by over 20%. Id.; see infra notes 96-105 and accompanying text.

57. TASK FORCE, supra note 54, at 31. Defensive medicine involves additional tests, longer stays in hospitals, and consultations with specialists to confirm diagnosis and treatment. The American Medical Association estimates that defensive medicine constitutes 25% of the cost of health care treatment. Id.

58. Id. at 30. In the past nine years the average medical malpractice award has increased, on a national basis, 500%, and in the past eight years the average medical malpractice award in Illinois has increased 600%. Id.; Comment, Medical Malpractice: Will Jumbo Awards Spark Another Insurance Crisis?, 68 A.B.A. J. 1545 (Dec. 1982); Comment, Trends in Million-Dollar Verdicts, 70 A.B.A. J. 52 (Sept. 1984) (certain states are known for their generous juries; leading the list are New York, California, Florida, and Texas, followed by Michigan, Illinois and Pennsylvania).

59. See TASK FORCE, supra note 54, at 30. In a report to the Task Force, John Washburn, the Director of the Illinois Department of Insurance, stated that capacity and


Despite the fact that the 1975 legislation was declared unconstitutional, the 1985 Act in some respects contains even broader provisions. In addition to the review panel provision, which will be the focus of this article, the 1985 Act includes the following provisions:

(1) In all medical malpractice cases, affidavits by the plaintiff's attorney (or the plaintiff, if the proceeding is pro se) are required to accompany the complaint. The affidavits must certify that the affiant has consulted and reviewed the facts of the case with a health professional and that, based on the review and a subsequent written report prepared by the health professional, the affiant believes that a "reasonable and meritorious" cause of action exists.

(2) In all medical malpractice suits in which damages are

affordability problems exist in the Illinois medical insurance industry. "The capacity problem is evidenced by the relatively small number of companies writing medical malpractice coverage, the decreasing availability of higher limits and the decline of reinsurance markets." Id. Illinois currently has three major medical malpractice underwriters: Illinois State Inter-Insurance Company (underwriting approximately 60% of all medical malpractice insurance), Medical Protective Insurance Company (underwriting approximately 20%) and St. Paul Insurance Companies (underwriting approximately 15%). A fourth medical malpractice underwriter, Medical Protective Insurance, has recently adopted a plan which offers only low limit policies. Id. at 9.

The affordability problem is evidenced by the dramatic rate increases requested by medical malpractice insurers and by increased costs of reinsurance. Id. at 30. But see Bernier v. Burris, No. 85-6627, slip op. at 3 (Cir. Ct. Cook Cty. Ill. Dec. 19, 1985). "A sharp decline in the value of investments resulted in a reduction of 'reserves' for the payment of claims. The funding problems now asserted by the insurers are of their own making, not the outgrowth of 'unforeseeable' increases in the number (frequency) and size (severity) in malpractice claims." Id.; see infra notes 96-105 and accompanying text.

60. House Bill 1604 in relevant part amends ILL. REV. STAT. ch. 110, §§ 2-1109, 2-1205, 8-2001 and 8-2003 and adds §§ 2-114, 2-611.1, 2-622, 2-1010, 2-1012 to 2-1020.

61. ILL. REV. STAT. ch. 110, §§ 2-114, 2-611.1, 2-622, 2-1010, 2-1012 to 2-1020 (1985).

62. ILL. REV. STAT. ch. 110, § 2-622 (1985). In an effort to weed out frivolous complaints, the focus in this provision is placed on the attorney and reviewing health professional, who are in better positions to analyze the case and recognize frivolous complaints. A copy of the written report, clearly identifying the plaintiff and the reasons for the reviewing health professional's determination that a reasonable and meritorious cause of action exists, must be attached to the affidavit. Information which identifies the reviewing health professional may be deleted. In the event that allegations and denials in the affidavit are found to be untrue or made without reasonable cause, the plaintiff or his
awarded, the jury must itemize the verdict to reflect the amounts attributable to the economic and noneconomic loss suffered by the victim. A further itemization of the economic loss must be made, reflecting: (a) amounts intended to compensate for necessary health or rehabilitative services, drugs and therapy; (b) amounts intended to compensate for lost wages or earning capacity; and (c) all other economic loss. Each of these subcategories must be further subdivided into past and future expenses.63

(3) In all medical malpractice awards, plaintiff's attorney fees will be structured in the following manner: 33.3% of the first $150,000, 25% of the next $850,000, and 20% of any amount awarded over $1,000,000. The court may review contingent fee arrangements for fairness and, in special circumstances, may increase the compensation.64

(4) All punitive damages are abolished.65

(5) An amount equal to the sum of (1) 50% of the benefits provided for lost wages or disability which become payable to the injured party as a result of the negligence and (2) 100% of all "collateral" sources of income, such as insurance payments made to an injured party as a result of the negligence, may be deducted from the plaintiff's award.66

(6) An election for periodic payments may be made for judgments involving future economic loss. The election pertains only to damages exceeding $250,000 or 50% of such a judgment, whichever is greater.67

attorney is subject to the payment of reasonable expenses, including attorneys' fees, incurred by the other party as a result of the untrue pleading. Id.

63. Id. at ¶ 2-1109. The extensive itemization required by the jury is necessary for the determination of any periodic payments of future damages that may be requested by the defendant. See Id. at ¶ 2-1705; infra note 67 and accompanying text.

64. ILL. REV. STAT. ch. 110, ¶ 2-1114 (1985).

65. Id. at ¶ 2-1115.

66. Id. at ¶ 2-1205. The deductions are qualified as follows:
(a) application to reduce the verdict must be made within 30 days;
(b) the reduction does not extend to any amount that may be recouped through subrogation, trust agreement or otherwise;
(c) the reduction shall not reduce the judgment by more than 50%;
(d) the reduction does not extend to any amounts paid by the plaintiff for insurance premiums up to two years before the plaintiff's injury; and
(e) the reduction does not apply to any payments for medical expenses directly attributable to the defendant's negligence. Id.

67. Id. at ¶¶ 2-1705 to 2-1718. The election may be made, by one or both parties involved in the suit, no less than 60 days before the commencement of the trial. Any objections to such election must be made within 30 days after the election. Id. at ¶ 2-1705. After liability is determined, the trier of fact must establish the periodic installment schedule. Id. at ¶ 2-1706. For all future damages awarded for the remainder of the
(7) In all cases by an original defendant doctor alleging malicious prosecution arising out of medical malpractice claims, the plaintiff doctor need not prove special damages to sustain a cause of action.68

2. Review Panels

The review panel requirement is the only provision common to the 1975 Act and the 1985 Act. The 1985 panel provision resembles the 1975 provision in many respects.69 As in 1975, the 1985 legislature established review panels consisting of one circuit judge, one health professional and one practicing attorney.70 The panels are to be chosen, by the chief judge of each judicial circuit,71 from rosters including at least five circuit judges, at least twenty practicing health professionals and at least twenty practicing attorneys.72 Parties may, by unanimous agreement, choose as a panelist an attorney, health professional, or circuit judge not found on the roster.73 A panel member can refuse to serve on the panel or can be disqualified on the basis of conflicts of interest.74

Proceedings before the panel are adversary, and each party may call and cross-examine witnesses and introduce evidence as at a trial in the circuit court.75 The panel, in accordance with applicable substantive law as determined by the judge on the panel, determines the issue of liability and, if liability is found, the issue of fair and just compensation for damages.76

plaintiff's life, payment shall continue until death or until life expectancy is reached. For all future damages awarded to the victim for a definite number of years, payment shall continue irrespective of the plaintiff's death. Id. at ¶ 2-1713. In the event that the future damages awarded are $500,000 or more, the court may, upon a showing by the plaintiff that his immediate needs are in excess of $250,000, award a greater lump sum award but in no event shall any increase cause more than 50% of the equivalent lump sum award to be distributed. Id. at ¶ 2-1708.

68. Id. at ¶ 2-114. This provision provides the only substantive right acquired by the medical practitioner in the medical malpractice legislation.


70. ILL. REV. STAT. ch. 110, ¶ 2-1013 (1985). Note that the 1985 legislature has chosen the broader term "health professional" as compared to the 1975 legislature's choice of "practicing physician." See supra note 21 and accompanying text.

71. ILL. REV. STAT. ch. 110, ¶ 2-1014 (1985).

72. Id. The health professionals and attorneys chosen to be on the panel must be licensed to practice in Illinois. Id.

73. Id. at ¶ 2-1015.

74. Id.

75. Id. at ¶ 2-1016.

76. Id. at ¶ 2-1017.
The effect of a panel's decision depends on the parties involved in the suit. If the parties unanimously agree to be bound by the determination of the panel, the panel's decision is binding and conclusive.\textsuperscript{77} If the parties are not in agreement with respect to the panel's decision, a party has twenty-eight days to reject a unanimous panel decision before he is deemed to have accepted it.\textsuperscript{78} If a party rejects a unanimous panel decision, or if the decision of the panel is not unanimous, the panel judge conducts a pretrial conference and the case proceeds to trial.\textsuperscript{79} The determination of the panel is not admissible at any subsequent trial.\textsuperscript{80}

Although the 1975 and 1985 panel provisions are similar, the effect of the \textit{Wright} decision is clearly discernible in the 1985 Act. \textit{Wright} declared review panels unconstitutional because they infringed on the plaintiffs' rights to "separation of powers" by vesting judicial functions in nonjudicial personnel\textsuperscript{81} and because they violated the plaintiffs' constitutionally protected interests in trial by jury.\textsuperscript{82} In response to the separation of powers holding, the 1985 Act states that review panels shall follow the law of evidence as determined by the judge.\textsuperscript{83} Additionally, it provides that the panel shall make its determination according to the applicable substantive law as determined by the judge.\textsuperscript{84} Finally, the 1985 Act provides that the panel shall state its conclusions of fact and the judge his conclusions of law.\textsuperscript{85} The 1985 Act thus separates the judicial and nonjudicial functions of the panel in an attempt to preclude a nonjudicial panel member from exerting any judicial authority.

In response to the \textit{Wright} finding that the 1975 panel provision impaired plaintiffs' rights to trial by jury, the 1985 Act provides

\textsuperscript{77} Id. at ¶ 2-1018.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} Id. \textit{But see} Bernier v. Burris, No. 85-6627, slip op. at 5 (Cir. Ct. Cook Cty. Ill. Dec. 19, 1985). "'Determinations' made by Review Panels have the force of judgments." \textit{Id.}; see infra notes 96-105 and accompanying text.
\textsuperscript{83} ILL. REV. STAT. ch. 110, ¶ 2-1016 (1985). Note that the nonjudicial members of the panel have no authority to decide matters of evidence. \textit{Id.}
\textsuperscript{84} Id. at ¶ 2-1017. Note that the judge alone determines the applicable substantive law. \textit{Id.}
\textsuperscript{85} Id. at ¶ 2-1016. Note that the judge still participates in fact-finding matters. It is the nonjudicial members of the panel, the attorney and health professional, who are precluded from determining matters of law. \textit{Id.}
guidelines to ensure that a review panel will not unduly delay or burden a plaintiff's access to the courts. Under the 1985 Act, a court must, no later than 90 days after a complaint has been filed, order a review panel to convene. Furthermore, the panel must convene within 120 days of such order unless good cause is shown for extending the date. Finally, the panel must render its decision within 180 days of convening. By contrast, the 1975 legislation provided only that a judicial order to convene a panel was to issue no sooner than 120 days nor later than one year after the complaint was filed.

As a further assurance that the panel requirement will not unduly burden a plaintiff's access to the courts, the 1985 Act places the costs of convening the review panel on the administrative office of the Illinois courts rather than on the parties. However the 1985 Act, like the 1975 Act, does impose the costs of an opposing party's attorney and litigation fees on a party who rejects a unanimous panel decision and subsequently loses at trial. Unlike the 1975 legislation, however, the 1985 Act does not provide for judicial discretion in imposing this penalty.

Despite the fact that the 1985 Act reflected a legislative attempt to cure the constitutional deficiencies of the 1975 legislation, the 1985 Act's constitutionality is presently at issue. On June 25, 1986, the time limitation for reaching a decision, imposed on the panel, could result in the panel being discharged before it reached a decision, and is a denial of due process of law, in violation of Article I, Section 2 of the Illinois Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

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87. ILL. REV. STAT. ch. 110, ¶ 2-1013 (1985)
88. Id.
89. Id.
90. ILL. REV. STAT. ch. 110, ¶ 58.3 (1975) (repealed 1979).
91. ILL. REV. STAT. ch. 110, ¶ 2-1019 (1985). But note that parties must still pay for the expenses and attorneys' fees involved in presenting a claim before the panel. Id.
92. ILL. REV. STAT. ch. 110, ¶ 58.9 (1975) (repealed 1979). See supra notes 34-35 and accompanying text.
93. ILL. REV. STAT. ch. 110, ¶ 2-1019 (1985). If a party rejects a unanimous decision, and loses at a subsequent civil trial, the trial court on motion of any prevailing party shall summarily tax to the rejecting party the costs, reasonable attorneys' fees and expenses of the prevailing party incurred in connection with the review panel and the trial. Such motion may not be made or granted if both the prevailing and non-prevailing party have rejected the determination of the medical review panel.
94. ILL. REV. STAT. ch. 110, ¶ 58.9 (1975) (repealed 1979).
95. ILL. REV. STAT. ch. 110, ¶ 2-1019 (1985).
1985, Bernice Bernier filed suit in the Circuit Court of Cook County. The plaintiff alleged, in pertinent part, that the requirement of panel review as a condition precedent to a jury trial violated the plaintiff’s right to trial by jury, as guaranteed under the seventh amendment to the federal Constitution and section 13 of article 1 of the Illinois constitution. Additionally, the complaint alleged that the provision constituted special legislation in violation of article IV, section 3 of the Illinois constitution and vested judicial power in nonjudicial members, violating article VI, section 1 of the Illinois constitution. Furthermore, since nonjudicial members were to be paid out of funds received by the court administrator for the operation of the courts, the plaintiff alleged that the provision created fee officers in violation of Illinois constitution article VI, section 14. Finally, since the provision deprived medical malpractice victims of a jury determination and imposed substantial costs on any party rejecting a unanimous panel decision and subsequently losing at trial, the complaint alleged that the provision violated the plaintiff’s rights to due process and equal protection as guaranteed under the fourteenth amendment to the federal Constitution and article I, section 12 of the Illinois constitution.

In Bernier v. Burris, the circuit court declared the provision unconstitutional. The court found that the review panel provision violated the plaintiff’s rights to trial by jury and free access to the courts, and that the provision was also in violation of the equal protection and due process provisions. Moreover, the court held, the panel review provisions impermissibly created special legislation and fee officers and impermissibly vested judicial authority in review panels. An appeal to the Illinois Supreme Court is currently pending.

98. Id. at 11.
99. Id. at 13.
100. Id. at 11-12.
102. Id. at 7.
103. Id. at 7-8.
104. Id. at 7.
III. ANALYSIS: THE JUDICIAL RESPONSE TO MEDICAL MALPRACTICE REVIEW PANEL PROVISIONS

Although Illinois was one of the first states to enact a medical malpractice reform act, legislatures in forty-eight states have enacted remedial legislation designed to end, or at least curtail, the medical malpractice crisis. Many state courts have decided the constitutionality of medical malpractice reform legislation, as did the Illinois Supreme Court in the Wright case. Since the review panel provision is one of the most important, and controversial, provisions of any medical malpractice reform legislation, its constitutionality has frequently been challenged. Review panels are usually challenged on three grounds: separation of powers, right to trial by jury, and equal protection.

A. Separation of Powers

With respect to the separation of powers argument, the Illinois Supreme Court struck down the 1975 Act because the act impermissibly vested judicial authority in nonjudicial panel members. Since the Wright decision, plaintiffs in other states have often challenged medical malpractice legislation on similar grounds.

106. See supra note 6; see also Chapman, Are the New States' Malpractice Laws Working to Protect You?, 8 LEGAL ASPECTS OF MED. PRAC. No. 5, at 41 (May 1980) (discussing medical malpractice legislation).


These cases indicate that courts consider two factors in deciding separation of powers challenges: first, whether an act impermissibly vests judicial functions in nonjudicial members,110 and second, whether the act makes the panel decision final and binding on the parties.111

The Illinois legislature has resolved many of the separation of powers problems found in the 1975 Act. For example, the 1985 Act clearly separates the powers of the judiciary from the duties of the nonjudicial members by having the judge decide all matters of law and the panel all matters of fact.112 The panel is only entitled to apply the law as determined by the judge on the panel.113 Furthermore, the 1985 Act provides for a trial de novo following a panel proceeding.114 The 1985 Act does allow the parties, by unanimous written agreement, to be bound by the panel determination.115 However, nothing in the act requires the parties to accept the panel decision.116 The act does not prevent a medical malpractice victim from filing his claim in a circuit court or taking his case to a jury.117 The only possible legal consequence of the medical review panel determination is that one of the parties may have to pay the other’s fees.118 However, this provision does not in any manner affect the substantive outcome of the case. As a result, the panel decision is not binding on the parties, since they may either reject or accept the finding. In light of recent cases, which have upheld panel proceedings as being neither final nor binding,119 the

110. See, e.g., Wright v. Central DuPage Hosp. Ass’n, 63 Ill. 2d 313, 322, 347 N.E. 2d 736, 740 (1976). But see Attorney Gen. v. Johnson, 282 Md. 274, 290, 385 A.2d 57, 66 (1978) (finds Wright reasoning unpersuasive; the mere performance by a nonjudicial body of a function that would in another context be considered purely judicial cannot alone support a conclusion that the separation of powers principle has been violated).

111. See, e.g., Attorney Gen. v. Johnson, 282 Md. 274, 287, 385 A.2d 57, 61 (1978) (panel proceeding does not impermissibly transgress separation of powers doctrine because parties are not bound by the panel decision and the panel cannot enforce its decision); Linder v. Smith, 629 P.2d 1187, 1194 (Mont. 1981) (no violation of separation of powers doctrine because panel decisions are advisory and unenforceable by the panel).


113. Id.

114. Id. at ¶ 2-1018.

115. Id.

116. Id.

117. Id.

118. Id. at ¶ 2-1019.

Illinois act should withstand the two-pronged separation of powers analysis.

B. Right to Trial by Jury

Plaintiffs challenging review panel provisions often argue that a panel proceeding before trial creates an extra financial burden and long delays, thus infringing on the plaintiff's rights to trial by jury and free access to the courts. Most courts reviewing these challenges have found that the "reasonable" burden imposed on the plaintiff by the panel proceeding is not unconstitutional in light of the legislative goals. However, some courts have invalidated medical malpractice legislation on the basis that it imposes "unreasonable" burdens on the plaintiffs. Invalidation usually occurs if an act appears to impose substantial financial burdens and excessive time delays on a plaintiff, or if an act which has been in effect for a number of years is proved ineffective.


121. See, e.g., Attorney Gen. v. Johnson, 282 Md. 274, 304, 385 A.2d 57, 75 (1978) ("The trial by jury . . . may be subjected to new modes, and even rendered more expensive, if the public interest demands such alteration.") (emphasis in original); Linder v. Smith, 629 P.2d 1187, 1190 (Mont. 1981) (requiring plaintiffs to begin the jury trial process by submitting their claims to a panel is a permissible interference with the right to trial by jury).

122. See, e.g., State ex rel. Glennon Memorial Hosp. v. Gaertner, 583 S.W.2d 107, 110 (Mo. 1979) (citing People ex rel. Christiansen v. Connell, 2 Ill. 2d 232, 118 N.E.2d 262 (1954)) (panel proceedings impose a useless and arbitrary delay upon a plaintiff's right of access to the courts). However, the Missouri statute provided for panel proceedings prior to the filing of a claim.

123. See, e.g., State ex rel. Glennon Memorial Hosp. v. Gaertner, 583 S.W.2d 107, 110 (Mo. 1979) (requirement of panel proceeding before filing of claim unconstitutional); Eastin v. Broomfield, 116 Ariz. 576, 587, 570 P.2d 744, 754 (1977) (provision requiring pretrial bond from party challenging a panel's decision unconstitutional).

124. In Mattos v. Thompson, 491 Pa. 385, 393-96, 421 A.2d 190, 195 (1980), the court invalidated the state's panel provision after reviewing data which revealed the ineffectiveness of the legislation. The evidence showed that from April 6, 1976 to May 31, 1980, a total of 3,452 cases had been filed with the administrator; only 936 of these cases had been resolved, settled or terminated; 73 percent of cases filed had not been resolved. Six of the original 48 cases filed in 1976 remained unresolved despite the passage of four years. As of May 31, 1980, 38 percent of the claims filed in 1977, 65 percent of the claims filed in 1978 and 85 percent of the cases filed in 1979 remained unresolved. Id.; see also Aldana v. Holub, 381 So. 2d 231, 236 (Fla. 1980) (court used statistical analysis in deciding constitutionality of statute). But see Simon v. Saint Elizabeth Medical Center, 355 N.E.2d 903, 908 (Ohio 1976). The Simon court declared the panel provision unconstitutional.
For example, the Arizona Supreme Court found that the imposition of a $2,000 bond prior to the filing of a medical malpractice claim denied parties access to the courts. The bond requirement, according to the court, burdened a nonindigent's access to the court and denied an indigent access altogether. Because of this impermissible financial burden, the court declared the bond provision unconstitutional. Subsequent case law, however, has usually upheld such legislation, despite allegations of unreasonable financial burdens and excessive delays. Courts supporting the legislation often rely on provisions which limit the amount of costs to be assessed against a party or which provide the courts with discretionary authority in assessing costs.

Since the Illinois legislation is much too recent to be analyzed in the context of effectiveness, the 1985 Act must be reviewed in terms of reasonableness. The Illinois legislature has established certain guidelines to ensure that medical malpractice review is performed efficiently and at a minimum cost to the parties. The convention and decision of a panel must occur within a certain time period. Furthermore, the cost of the panel proceedings is to be charged to the state. However, in one significant respect, the Illinois legislature has imposed a substantial financial burden on parties to medical malpractice actions. If a party rejects a unanimous decision of the panel, continues to trial and loses at trial, that party, upon a motion brought by the prevailing opponent, bears the burden of paying the opposing party's attorney and litigation fees for both the panel review and trial. The provision does not impose a ceiling on the potential costs involved and it does not provide for judicial discretion in application. The provision ap-

126. Id.
128. ILL. REV. STAT. ch. 110, ¶ 2-1013 (1985) provides that a court must issue an order to convene a review panel no later than 90 days after the parties are at issue on the pleadings. A panel must convene within 120 days of such order unless good cause is shown for extending that date. Id. Finally, the panel must render its decision within 180 days of convening. Id.
129. Id. at ¶ 2-1019.
130. Id.
plies not only to a party who rejects a panel decision against him, but also to a party who rejects a decision in his favor because of a disagreement with the damage award. The provision does not, however, apply if both parties reject the unanimous panel decision. To determine the constitutionality of this cost-shifting provision, the reasonableness of imposing such a financial burden on medical malpractice parties should be balanced against the state interests involved.\textsuperscript{131}

Through the use of screening panels, Illinois hopes to alleviate frivolous medical malpractice claims, expedite the settlement of meritorious suits and preserve the judicial system for meritorious claims.\textsuperscript{132} The cost-shifting provision would have the effect of alleviating frivolous medical malpractice suits from the courts if the provision affected only those parties who unanimously lose on the merits at the panel proceeding. Presumably, the possibility of paying the other party’s attorney and litigation fees should effectively dissuade a plaintiff with a frivolous medical malpractice claim from going to trial. However, the provision also dissuades those parties who succeed at the panel level but reject the unanimous decision because of disagreement with the damage award.\textsuperscript{133} If such a party continues to trial and subsequently loses, he too is obligated to finance the opposing party’s attorney and litigation costs. As a result, the provision has the potential of burdening meritorious claims.

Since the potential costs of the provision are severe,\textsuperscript{134} and since meritorious claims may be burdened in the process of application, the provision is unlikely to withstand a right-to-jury challenge as written. However, the Illinois provision may be upheld as constitutional if the legislature adopts any one of three policies. First, the legislature may limit the provision’s application to only those parties rejecting a unanimous panel decision against them on the merits. Second, the legislature may place a ceiling on the amount of costs that can be shifted.\textsuperscript{135} Finally, the legislature may give

\textsuperscript{132} See Task Force, supra note 54, at 4.
\textsuperscript{133} See Ill. Rev. Stat. ch. 110, ¶ 2-1019 (1985). Note that the cost-shifting provision does not apply where both parties reject a unanimous decision in one party’s favor. Id.
\textsuperscript{134} Opening Salvos Fired in Malpractice Challenge, Chi. Daily L. Bull., Oct. 8, 1985, at 1, col. 1. In 61 medical malpractice cases tried in a two-year period, the defense costs averaged more than $55,000. Id. at col. 6. In one case, defense costs totalled $446,025. Id.
\textsuperscript{135} State acts which place additional financial burdens on medical malpractice parties have been upheld where the act places a limit on the amount of costs assessed against
courts discretion in imposing such costs on any particular party. By adopting any one of these three policies, Illinois would assure medical malpractice plaintiffs that any financial burdens incurred in the panel proceeding would be reasonable.

C. Equal Protection

Finally, screening panels are frequently challenged on equal protection grounds. Plaintiffs allege that such provisions improperly single out victims of medical negligence — as distinct from victims of other kinds of negligence — for harsh treatment by restricting the means by which they may sue. In recent years, increasing attention has been paid to judicial analysis of equal protection challenges to medical malpractice legislation. In considering the constitutionality of a statute on an equal protection basis, courts have adopted three standards of review: the strict scrutiny test, the rational basis test and the means scrutiny test.

Under the strict scrutiny approach, challenged legislation is not sustainable unless the party defending the statute shows a “compelling state interest” and the necessity of the regulation to achievement of the legislative objective. The strict scrutiny test...
is usually adopted where a suspect class or fundamental right is involved.\textsuperscript{141} Most state courts have rejected a strict scrutiny test when reviewing medical malpractice legislation because medical malpractice victims are not a suspect class and because no “fundamental” rights are infringed by the legislation.\textsuperscript{142}

State medical malpractice legislation has most frequently been tested under the second level of analysis, the rational basis standard.\textsuperscript{143} Under this test, the constitutional requirement of equal protection is violated “only if the classification rests on grounds wholly irrelevant to the achievement of the state’s objective.”\textsuperscript{144} In applying this standard, courts will accept the legislative determination of relevancy as long as it is reasonable, even though it may be disputed, debated or opposed by strong contrary arguments.\textsuperscript{145}

\textsuperscript{141} Id.
\textsuperscript{142} Id.; see, e.g., Johnson v. Saint Vincent Hosp., 273 Ind. 374, 391-92, 404 N.E.2d 585, 597 (1980).

The classification of tort claimants is based upon their status as patients and their injuries having arisen from a breach of duty owed them by a health care provider. The classification of health care provider is based upon the services they render. Neither classification involves a suspect classification such as race, wealth, lineage, alienage or illegitimacy. And a requirement such as this that a party engage in processes for improving the quality of evidence for settlement and litigation purposes does not impinge upon the exercise of a fundamental right such as voting, procreation, interstate travel, or to present a defense in a criminal action.


\textsuperscript{143} See Everett v. Goldman, 359 So. 2d 1256, 1267 (1978) (under rational basis test, pretrial screening of medical malpractice claims is not an unreasonable response to the medical malpractice crisis, nor are the provisions especially far reaching); State ex rel. Strykowski v. Wilkie, 81 Wis. 2d 491, 509-10, 261 N.W.2d 434, 443 (1978) (under rational basis test, the “public has an important interest in the quality of health care, and the legislature’s efforts to promote that interest cannot be said to be unreasonable”); Attorney Gen. v. Johnson, 282 Md. 268, 313, 385 A.2d 57, 79 (1978) (“[I]t is inappropriate for a court to preclude the legislature from attempting to resolve a problem in a particular manner simply because the intended results cannot be definitively demonstrated in advance.”); Parker v. Children’s Hosp. of Philadelphia, 483 Pa. 106, 121, 394 A.2d 932, 940 (1978) (“In reaching our conclusion today we are relying upon the legislative judgment that the procedures provided for under the Act will substantially expedite the disposition of malpractice cases in this jurisdiction.”); Carter v. Sparkman, 335 So. 2d 802, 806 (Fla. 1976) (“Even though the pre-litigation burden cast upon the claimant reaches the outer limits of constitutional tolerance, we do not deem it sufficient to void the medical malpractice law.”).

For example, in *Parker v. Children’s Hospital of Philadelphia*, the court, under a rational basis test, upheld the Pennsylvania panel review provision even though some evidence indicated that panel procedures did not provide an expeditious disposition of cases. Two years after the *Parker* decision, the Pennsylvania Supreme Court, applying a higher level of scrutiny, declared the state’s medical malpractice panel procedure unconstitutional. Due to the delays involved in processing medical malpractice claims under the prescribed procedures, the court found that the Pennsylvania act resulted in an oppressive delay and an impermissible infringement on the constitutional right to trial by jury. By initially using the rational basis test, the Pennsylvania lower court did not give the act the judicial scrutiny it deserved. As a result, the court unnecessarily denied medical malpractice litigants the right to trial by jury.

In recent years, another level of equal protection analysis has appeared: a "means scrutiny" test. To uphold a statute under this test, the court must find that the state’s interest is important and that the means adopted to serve that interest are "reasonable, but not arbitrary." While the means scrutiny test gives a legisla-

\[\text{146. 483 Pa. 106, 394 A.2d 932 (1978).} \]
\[\text{147. Id. at 121, 394 A.2d at 940. "It is an accepted principle of constitutional law that deference to a co-equal branch of government requires that we accord a reasonable period of . . . time to test the effectiveness of legislation." Id.} \]
\[\text{148. Id. Plaintiffs introduced in evidence the fact that, after two years of operation, Pennsylvania panel proceedings were causing unjustified delays in the processing of claims. Id.} \]
\[\text{149. Mattos v. Thompson, 491 Pa. 385, 421 A.2d 190 (1980).} \]
\[\text{150. Id. at 396, 421 A.2d at 196.} \]
\[\text{151. Id. at 398-99, 421 A.2d at 197 (Larsen, J., concurring). "I do not believe that deference requires sticking one’s head in the sand to avoid difficult constitutional problems when confronted with evidence of their existence and magnitude." Id.; see also Jones v. State Bd. of Medicine, 97 Idaho 859, 866, 555 P.2d 399, 406 (1976). ”It is apparent that the practical effect of the application of (the rational basis) test . . . is to substantially remove the courts from inquiry into the ends sought to be served by a legislative action.” Id.} \]
\[\text{152. Mattos v. Thompson, 491 Pa. 385, 397, 421 A.2d 190, 196 (1980) (Larsen, J., concurring). “I regret, however, that justice has been so long denied those litigants who have been bogged down in this ‘unworkable mess.’” Id. (quoting *Parker*, 483 Pa. at 132, 394 A.2d at 934 (Larsen, J., concurring) (footnote omitted)).} \]
\[\text{153. The United States Supreme Court has applied the means scrutiny test to cases involving classifications based upon gender and illegitimacy. See, e.g., *Lalli v. Lalli*, 439 U.S. 259, 265 (1979) (illegitimacy); *Reed v. Reed*, 404 U.S. 71 (1971) (gender). However, state courts interpreting state constitutions are not confined to federal constitutional standards and are free to grant individuals more rights than the federal constitution requires. *Carson v. Maurer*, 120 N.H. 925, 932, 424 A.2d 825, 831 (1980).} \]
ture more deference than the strict scrutiny approach, it requires a legislature to give greater justification for a statutory classification than is required for a rational basis analysis. In applying the means scrutiny analysis, courts must examine carefully the factual assumptions that underlie the asserted connection between the means adopted by the legislature and the goals which it seeks to achieve. Four state courts have adopted this standard of review when considering the constitutionality of state medical malpractice legislation.

For example, in *Arneson v. Olson* the means scrutiny test was applied to determine the constitutionality of a North Dakota statute which, among other things, limited damages recoverable by medical malpractice victims to $300,000. Under the means scrutiny test, the court required that a close correspondence exist between the statutory classification and the legislative goals of the act. The court found that the legislative goals included the assurance of availability of competent medical and hospital services at reasonable cost, the elimination of expenses involved in nonmer-

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156. Redish, *supra* note 1, at 772.
157. The means scrutiny test, in the context of medical malpractice legislation, was first adopted by the Idaho Supreme Court in Jones v. State Bd. of Medicine, 97 Idaho 859, 871, 555 P.2d 399, 411 (1976). Expressly rejecting the rational basis standard of review as "blind adherence and over-indulgence," the court found that the legislation deserved stricter scrutiny since it was discriminatory on its face and lacked a connection between its classification and its intended statutory purpose. *Id.; see also* Arneson v. Olson, 270 N.W.2d 125, 133 (N.D. 1978) (for equal protection purposes, North Dakota courts require a "close correspondence between statutory classifications and legislative goals"); Carson v. Maurer, 120 N.H. 925, 931, 424 A.2d 825, 831 (1980) (the test is "whether the challenged classifications are reasonable and have a fair and substantial relation to the object of the legislation"); Johnson v. Saint Vincent Hosp., Inc., 273 Ind. 374, 392, 404 N.E.2d 585, 597 (1980) (the standard is "whether the legislative classification is based upon substantial distinctions with reference to the subject matter, or is manifestly unjust or unreasonable").
158. 270 N.W.2d 125 (N.D. 1978).
159. The *Arneson* court applied the means scrutiny test because it found that the medical malpractice provisions were similar to an automobile guest statute (limiting recovery to certain tort victims) to which the court had applied a means scrutiny approach. *Id.* at 133. Other rationales for the use of means scrutiny include: (1) the belief that the rights of medical malpractice victims are sufficiently important to require that restrictions on such rights be subjected to more rigorous judicial scrutiny, see Carson v. Maurer, 120 N.H. 925, 930, 424 A.2d 825, 830 (1980); and (2) the belief that means scrutiny analysis must be applied to statutes involving invidiously discriminatory classifications. See Jones v. State Bd. of Medicine, 97 Idaho 859, 968, 555 P.2d 399, 407 (1976). At least one court has offered no rationale for application of the test to medical malpractice legislation other than its general application in equal protection analysis. See Johnson v. Saint Vincent Hosp., 273 Ind. 374, 391-92, 404 N.E.2d 585, 597 (1980).
160. *Arneson*, 270 N.W.2d at 133.
itorious malpractice claims, the provision of adequate compensation to patients with meritorious claims, and the encouragement of physicians to enter the practice of medicine in North Dakota.\textsuperscript{161}

The court next examined whether the limitation on recovery by seriously injured victims of medical negligence promoted any of these aims.\textsuperscript{162} In an independent examination of the legislative facts used in adopting the statute, the court did not find any justification for the limitations imposed on malpractice victims.\textsuperscript{163} In fact, the court found substantial evidence negating the premise that a medical malpractice insurance crisis existed in North Dakota.\textsuperscript{164} Based on this judicial analysis of the legislative facts underlying the malpractice act, the court invalidated the legislation on an equal protection basis.\textsuperscript{165}

The 1975 Illinois legislation was challenged on a mixture of equal protection and due process grounds.\textsuperscript{166} Although the Illinois Supreme Court did not expressly state, in \textit{Wright}, that equal protection questions were at issue, both the language and result of that decision indicate that a strict scrutiny analysis was used.\textsuperscript{167} As previously stated, the strict judicial scrutiny initially applied to medical malpractice legislation introduced during the 1970's is no longer applied by state courts.\textsuperscript{168} A new standard of review must be adopted by Illinois courts reviewing medical malpractice legislation. Because of the importance of the public and state interests involved and the inadequacy of the rational basis test in protecting the interests of malpractice victims, Illinois courts should adopt the means scrutiny test.

Applying the means scrutiny analysis to the Illinois legislation, the court must determine whether a close correspondence exists

\textsuperscript{161} \textit{Id.} at 135.
\textsuperscript{162} \textit{Id.} at 135-36.
\textsuperscript{163} \textit{Id.} at 136.
\textsuperscript{164} The court found, contrary to the legislature's belief that South Dakota's insurance premiums were much too high, that one of the largest insurance companies was accepting applications at rates lower than the national average. \textit{Id.} at 136. In fact, the court found, insurance premiums in North Dakota were the sixth lowest in the United States. \textit{Id.}
\textsuperscript{165} \textit{Id.}
\textsuperscript{166} \textit{See Comment, supra} note 13, at 871 (discusses the \textit{Wright} decision at length; concludes that the decision was made on a mixture of equal protection and due process grounds).
\textsuperscript{167} \textit{See Wright v. Central DuPage Hosp. Ass'n}, 63 Ill. 2d 313, 347 N.E.2d 736 (1976) (in determining constitutionality of statute, court did not discuss rationality of legislation; instead, court focused on interests of the parties affected); \textit{Comment, supra} note 13, at 873-74.
\textsuperscript{168} \textit{See supra} note 142 and accompanying text.
between the statutory classifications and the legislative goals.\textsuperscript{169} Under this approach, the court must independently examine the legislative facts used to justify the act. Through the use of screening panels, the Illinois legislature hopes to alleviate frivolous malpractice lawsuits, expedite the settlement of meritorious malpractice suits and preserve the judicial system for those cases that truly belong in the courts.\textsuperscript{170} By eliminating frivolous medical malpractice claims from the courts, the provision attempts to decrease the social and economic costs of the medical malpractice crisis in Illinois.\textsuperscript{171}

In an attempt to promote these goals, the legislature has determined that medical malpractice claimants must, prior to an adjudication of their case in court, submit their claim to a medical malpractice panel for review.\textsuperscript{172} A decision reached by the review panel is not binding on the parties and is not admissible as evidence at a subsequent trial.\textsuperscript{173} However, the act does require that if a unanimous panel decision is rejected by a disappointed claimant and that claimant subsequently loses at trial, the court, upon motion by the prevailing party, must summarily charge the claimant with the opposing party's litigation fees.\textsuperscript{174} The issue, for Illinois courts, is whether the creation of review panels with fee-shifting provisions corresponds closely enough to the Illinois legislature's goals to satisfy a means scrutiny test.\textsuperscript{175}

It is undeniable that one of the results of the review panel procedure will be the elimination of frivolous medical malpractice claims. Litigants who realize that their claims are without merit will not continue to trial and will either dismiss or settle their cases, consistent with legislative goals. The settlement or dismissal

\textsuperscript{169} Arneson v. Olson, 270 N.W.2d 125, 133 (N.D. 1978).
\textsuperscript{170} TASK FORCE, supra note 54, at 4.
\textsuperscript{171} Id.
\textsuperscript{172} ILL. REV. STAT. ch. 110, §§ 2-1013 to 2-1020 (1985).
\textsuperscript{173} Id. at ¶ 2-1018.
\textsuperscript{174} Id. at ¶ 2-1019. The provision does not apply where both parties reject a unanimous panel decision. Id.
\textsuperscript{175} Basic to the adoption of the medical malpractice review panel legislation is the presumption that a medical malpractice crisis exists in Illinois. An Illinois court recently declared the Illinois medical malpractice legislation unconstitutional, primarily because the court did not find sufficient empirical data to support a finding that a medical malpractice insurance crisis exists in Illinois. Bernier v. Burris, No. 85-6627, slip op. at 2 (Cir. Ct. Cook Cty. Ill. Dec. 19, 1985). Contrary to this decision, the author remains persuaded that a crisis exists in Illinois. It is undisputed that insurance premiums and suits are increasing and that medical malpractice companies are either leaving Illinois or limiting recoveries on their policies. TASK FORCE, supra note 54, at 4, 30. Consistent with this evidence, the article proceeds on the presumption that Illinois is undergoing a medical malpractice crisis.
of frivolous claims will decrease costs of litigation, thereby alleviating some of the problems causing the medical malpractice crisis. Since the creation of medical review panels closely corresponds to legislative goals, the panels themselves appear to be constitutional under a means scrutiny analysis.

However, it appears that the fee-shifting component will not withstand equal protection scrutiny. Although it may be argued that the fee-shifting provision will force parties to reconsider the merits of their claims and thus encourage the settlement or dismissal of frivolous claims, it is likely that many meritorious claims will be burdened by the provision as well. The provision may impose burdens on parties who have meritorious claims but reject favorable unanimous panel decisions because of a disagreement with the damage award. Additionally, the provision may burden meritorious claims simply because some parties will decide not to proceed to trial because they cannot afford to pay the opposing party's litigation costs in the event of an unfavorable verdict. Since the provision may discourage meritorious as well as frivolous claims, it does not closely correspond to legislative goals and should therefore be invalidated under a means scrutiny analysis.

IV. CONCLUSION

In 1975 Illinois, recognizing that a medical malpractice crisis existed in the state, passed legislation to alleviate some of the problems caused by the crisis. Among its several provisions, the act created medical malpractice panels to review claims prior to litigation at trial. In 1976, the Illinois Supreme Court invalidated the legislation on constitutional grounds. Ten years have passed and the legislature has once again declared that a medical malpractice crisis exists in Illinois. Once again legislation, including a provision for creation of medical malpractice review panels, has been adopted. And once again the Illinois Supreme Court must evaluate the constitutionality of the legislation.

The review panel requirement found in the 1985 Act does impose burdens on medical malpractice claimants. However, the court must determine, in light of legislative goals, whether the burdens imposed by the legislation are so unreasonable or excessive that they infringe on the constitutional rights of the claimants. The medical malpractice review panels established by the Illinois legislature do not appear to excessively burden a claimant's constitutional rights to separation of powers, trial by jury or equal protection. Therefore the review panels are a possible vehicle for the
alleviation of frivolous medical malpractice claims and the reduct-
on in costs of medical malpractice litigation in Illinois.

However, the fee-shifting provision associated with the panel re-
view unconstitutionally limits a claimant's rights to trial by jury
and equal protection. The provision burdens meritorious as well as
frivolous claims and is inconsistent with legislative goals. Since the
fee-shifting provision may be severed from the panel require-
ment,\textsuperscript{176} the balance of the provision should be upheld as constitu-
tional so that review panels can be used to further the legislature's
attempt to solve the medical malpractice crisis.

\textbf{THERESE DYNIA}

\textsuperscript{176} Even if the provision is finally declared unconstitutional at the state supreme
court level, this will not render the entire act unconstitutional. According to the sever-
ability clause of the Illinois Revised Statutes, the invalidity of one section of an act does
not render invalid other provisions or applications of the act which can be given effect
without the invalid provision or application. \textit{ILL. REV. STAT.} ch. 1, \textsection 1032 (1985).