Members Present:

Chairman Hayes
Vice Chairman Stewart
Mr. Banner
Mr. Brady
Mr. Coulter
Mr. Fielding
Mr. Horn
Mr. Malone
Mr. Polish
Mr. Prengaman
Mr. Sena

Members Absent:

None

Guests Present:

Don Ashworth	Senator
Roger Detwiller	Ex-Director of State Bar of Nevada
Fred Hillerby	Nevada Hospital Association
Mr. Johnson	District Attorney for White Pine County
Dennis Kennedy	Lawyer
Bill Swackhamer	Secretary of State
Ray Wensall	Farmers Insurance Group
Warden Wolff	Warden of Nevada State Prisons

ASSEMBLY BILL 396

Requires gift of clothing and increases amount of money which may be given to an offender upon release from prison.

Assemblyman Stewart opened the meeting by going over what the bill entailed. He felt that the bill should be amended to include that the prisoner will be given transportation to his place of residence, place of conviction, or wherever the board felt adequate. This would be by a ticket of common carrier to place of destination within the Continental United States.

Mr. Sena Motioned to Do Pass A.B. 396 as amended; Mr. Brady seconded the motion. The Committee approved the motion on the following vote:

Aye - Hayes, Stewart, Malone, Horn, Polish, Banner, Prengaman, Coulter, Fielding, Brady, Sena - Unanimous

Nay - None

Absent - None

ASSEMBLY BILL 391

Requires monthly reports to offenders of money in offenders' store fund.

Mr. Malone moved Do Pass A.B. 391; Mr. Brady seconded the motion. The Committee approved the motion on the following vote:

Aye - Hayes, Stewart, Malone, Polish, Banner, Prengaman, Fielding, Coulter, Brady, Sena - 10

Nay - None

Absent - Horn - 1

ASSEMBLY BILL 393

Provedes for establishment of procedures for allowing offenders to retain certain personal property in prison.

Don Rhodes testified on this bill. He expressed his concern for the high rate of turnover at the prison and also the problem with the prisoners' personal property. During one lockdown instance, some of their property had been improperly stored and some destroyed.

Mr. Stewart felt that there should be some set policy on personal property and that it should be adhered to. He felt that most of the prison's problems were because of the Warden. If there was a bad warden, problems would arise, if there was a good warden, things would go smoothly.

Mr. Malone was against A.B. 393, feeling that if it was passed it would open the door for the Legislature to dictate policy to all state agencies.

Mr. Horn was against A.B. 393, because he felt that the purpose of the Legislature is to establish policy, not regulations.

Mr. Stewart moved to Do Pass A.B. 393 as amended. The Committee approved the motion on the following vote:

Aye - Hayes, Stewart, Malone, Prengaman, Fielding, Coulter, Brady, Sena - 8

Nay - Horn - 1

Absent - Polish and Banner - 2

ASSEMBLY BILL 394

Requires training of certain correctional officers.

A.B. 394

Mr. Malone felt that A.B. 394 did not have much of a chance because it had a $130,000. fiscal note on it.

Don Rhodes felt that the training was much needed, not only for security measures, but also for the fact that the Correctional Officers were not very attuned to what was going on. This training would also give them more confidence in themselves.

Chairman Hayes objected to A.B. 394 because she felt that once their training was finished, they would leave the state.

Mr. Prengaman objected to A.B. 394 because many of the present Correctional Officers go months without any type of training and they do just fine.

ASSEMBLY BILL 384

Subjects department of prisons to provisions of Nevada Administrative Procedure Act for purpose of adopting regulations.

Mr. Prengaman felt that this bill must be passed because it would allow other bills to be passed regarding regulations. He felt that it was not the prison boards' job to set up rules, only to review them.

Chairman Hayes called for a recess at 7:59 a.m. and the meeting reconvened at 8:06 a.m.

SENATE BILL 105

Clarifies procedures and requirements for disclaimers of property interests.

Senator Ashworth felt that the problems arising were of individuals who disclaimed their interest which then went to the heirs and was pro-rated among the entities. This bill would provide that the interest does not go back and be pro-rated, but be put out to the heirs. It is not subject to State or Government tax. The amendments only apply to persons over 18 and competent persons, and only the individual himself can disclaim.

SENATE BILL 98

Provides for filing and enforcement of foreign judgements.

Amendments to this bill would bring the judgement into Nevada for enforcement. It also provides a method for the individual to come into the state under a foreign judgement and to proceed against the individual. The clerk then shall treat the foreign judgement in the same manner as a judgement of the district court of this state.

SENATE BILL 124

Limits incorporators to natural persons, precludes renewal of periods for reservation of corporate names, increases certain fees and removes requirement for certain publications and certificates.

Bill Swackhamer, Secretary of State, testified on this bill in regards to the amendments. At present, you can reserve a name for the corporation for 30 days by paying a $2 fee. After 30 days, you can again reserve the name. The problem was that people were abusing this privilege and reserving the name again and again. Mr. Swackhamer would like to have the bill amended from 30 days to 45 days non-renewable.

Mr. Swackhamer would also like to clear up the language in the statutes so it would be understood that the incorporator would not have to come to Nevada to have their corporate papers notarized. This is not what the statutes say, but it is what they are taken to mean because of the language used.

Mr. Swackhamer would also like to have the fees for reserving the Corporate name changed from $2 to $5 and the fees for executing any certificate not provided for in the fee schedule changed from $5 to $10.

Some problems have also been caused when people file their annual lists. At present, they must be mailed a receipt for this list and it is causing an overabundance of letters and the postage is costing about $6,000.00 per year. Mr. Swackhamer would like to have this amended so that it would not be required to mail out receipts of the lists.

ASSEMBLY BILL 546

Expands membership of medical-legal screening panels to include hospital administrators.

Fred Hillerby, Nevada Hospital Association, and Dennis Kennedy, Attorney at Law for Lionel, Sawyer & Collins, testified for A.B. 546. Mr. Hillerby feels that those providers of health care which share such a great exposure to potential malpractice litigation should be provided the opportunity to participate in pre-trial panel review of claims. Hospitals would then share the benefit of these reviews. This would help in the reduction of unnecessary claims and the increase of early amicable meritorious claims. Mr. Hillerby feels that the issues of medical malpractice claims are sufficiently complex and sensitive that when a hospital is involved the composition of the screening panel, it should reflect the perspective and expertise of hospital administration.

Dennis Kennedy testified for the Hospital Association. He feels that A.B. 546 would alter the structure of the medical-legal

A.B. 546

screening panel as it presently exists. If it was composed of 3 Attorneys and 3 Physicians, it would now consist of 2 Attorneys, 2 Physicians and 2 Hospital Administrators. The definition of a Hospital Administrator is a person who is in a managerial or administrative position in a health care facility which is licensed in the State of Nevada.

The screening panel would hear the evidence, then make a determination as to whether or not there is a reasonable probability that the injury that is claimed arose out of negligence. If the panel determines that or if there is a tie vote, then the Nevada State Medical Association is obligated to provide an expert witness for the claimant at trial. This insures that if a claim does have some merit or is arguably meritorious, that the claimant will have an expert witness and be represented fairly. If the panel does not vote in favor of the claimant, that does not preclude them from proceeding with litigation.The panel does not make findings of fact.

Ray Wensall from the Farmers Insurance Group testified on A.B. 546. His group insures the majority of hospitals. He feels that if this system was properly and equitably set up it would not remove due process of the law. He feels that the accomplishments would include:

1. Early settlement of legitiment claims.
2. An act to remove from our court system those claims without merit.
3. Reduce the cost of litigation which is at present 50¢ of each dollar that they receive.
4. Protect the public so as not to remove their right of due process.

He feels that the administrator on the panel should have an equal vote so that the hospital would have equal representation.

Mr. Roger Detwiller, Executive Director of the State Bar of Nevada, gave testimony on A.B. 546. The bar has not yet taken a position on the bill but they are opposed to some aspects of it. At this point, there is no compensation for administrative costs and hourly costs of the attorneys and physicians since their time is donated. This time would become increasingly resistant to give, at least voluntarily. Mr. Detwiller does not want to see the medical-legal panel expanded beyone it's current jurisdiction; he fears it could lead to hearings for accountants, etc. Please see Exhibit A.

Chairman Hayes called for a recess at 9:35 a.m. and the meeting reconvened at 10:44 a.m.

SENATE BILL 98

Mr. Fielding motioned Do Pass S.B. 98; Mr. Malone seconded the motion. The Committee approved the motion on the following vote:

Aye - Hayes, Stewart, Malone, Horn, Prengaman, Fielding, Coulter, Brady - 8

Nay - None

Absent - Sena, Banner, Polish - 3

SENATE BILL 105

Mr. Malone motioned Do Pass S.B. 105; Mr. Brady seconded the motion. The Committee approved the motion on the following vote:

Aye - Hayes, Stewart, Malone, Horn, Banner, Prengaman, Fielding, Coulter, Brady - 9

Nay - None

Absent - Sena, Polish - 2

ASSEMBLY BILL 338

Limits privilege of husband or wife to prevent testimony of other to testimony regarding events occuring after marriage.

This bill applies to civil and criminal proceedings. Mr. Stewart would like to see it restricted. He also feels the title of the act is misleading.

Mr. Malone and Mr. Stewart felt that there were too many conflicting points in the bill and that they should hear it at a later date when these points are resolved.

REQUEST FOR BILL

Mr. Bob Johnson, District Attorney for White Pine County testified on a Committee request for a bill. He would like to introduce a bill on an open meeting law which provides that public meetings should be open unless there is an exception to close it. The open meeting law would do away with the priviledge of communications between a client and his attorney. An example of this would be when the District Attorney serves as legal counsel for the County Commission. The District Attorney has no opportunity to sit down and privately review potential or pending litigation with the County Commissioners and this has already caused many problems.

Mr. Prengaman felt that the proposed bill had a lot of merit and should definitely be considered.

Chairman Hayes felt that there was already a bill introduced into Government Affairs of this nature, but would check on it and get back with Mr. Johnson.

At 10:15 a.m., Chairman Hayes adjourned the meeting.

Respectfully submitted,

Judy Williams

Judy Williams
Assembly Secretary

American Bar Association
Fund for Public Education
Report Concerning

LEGAL TOPICS RELATING TO MEDICAL MALPRACTICE

Submitted to the Division of Health Care Systems/OPDP
Office of the Assistant Secretary for Health
Department of Health, Education and Welfare
under Contract no. 282-76-0321 GS by
Thomas S. Chittenden, Staff Director
January, 1977

Exhibit A

Introduction

Under DHEW Letter Contract No. 282-76-0321 GS, dated January 2,1976, the Fund for Public Education of the American Bar Association retained a staff director and two assistants (hereinafter called "the staff") to conduct an analysis of legal aspects of the medical malpractice tort liability system, as recently modified by legislation in many states. This is the final report by the staff under the Contract.

The Contract requires the Fund for Public Education, through the staff, to:

1. Collect and analyze materials relating to recently-proposed or enacted changes in tort law and procedure.

2. Collect and analyze materials relating to binding arbitration and statutory pre-trial review panels.

3. Study the application of the legal standard of care to medical malpractice claims, from the perspective of health care providers.

In addition to a summary of present and proposed approaches to the malpractice problem, this report contains the staff's findings and recommendations with respect to tort law and procedure, arbitration and statutory panels. The results of the standard of care study (Task #3, above) will be submitted in a separate report, to be filed on or about March 1,1977.

The staff also provides research and other assistance to the ABA's Commission on Medical Professional Liability. Except for the recommendation relating to the locality rule (pages 23-24, infra), the staff's recommendations as to tort law and procedure (pages 18-35, infra) conform to positions taken by the Commission. The staff's recommendations relating to arbitration (pages 40-48, infra) are consistent with positions approved by the Commission's Subcommittee on Arbitration and Panels, but not yet approved by the Commission. Any opinions and conclusions contained in other sections of the final report are those of the staff only and do not necessarily reflect the views of the Commission. A statement of the Commission's views and recommendations made as of June 30,1976, is contained in the Interim Report of the Commission on Medical Professional Liability (September, 1976), published by the American Bar Association Press (hereinafter cited as "the ABA Commission Report").

EXHIBIT A

Twenty-five states and the Virgin Islands now provide by statute, and one state (New Jersey) provides by court rule, for non-binding pre-trial review of medical malpractice claims. As might be expected with the adoption of such a large number of new statutes, the mechanisms created vary considerably in scope and procedure.[81] However, some generalizations can be made about pre-trial panel procedures, keeping in mind that there will be differences in specific characteristics from one state to another.

The typical pre-trial review procedure applies to any malpractice action brought against one or more health care providers,[82] no matter how large or small the damages may be. The panel may consist of three to seven members,[83] including at least one attorney, one health care provider, and frequently one citizen member who is neither an attorney nor a physician. Panelists may be court-appointed or selected by the parties, often with the requirement that the medical member of the panel be from the same specialty or health care area as the defendant. Generally, panelists will be given unconditional immunity from civil liability for statements made or actions taken in their official capacities.

The hearing itself is almost always informal. Strict rules of evidence and procedure do not apply, and textbook evidence is admissible to prove medical issues. Most statutes authorize the panel, where necessary, to appoint a neutral expert to examine evidence, question witnesses and testify at the hearing. Within a specified period of time after the conclusion of the hearing, the panel will issue its decision, which may include a finding as to liability only, or findings as to liability and damages, depending on the particular statute. In all cases, the parties will have the choice of accepting the panel decision, reaching their own negotiated settlement, or rejecting the panel decision and proceeding with litigation. Where the latter course is taken, and the panel's decision is in favor of the patient-claimant, the

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81. For a feature by feature comparison of the statutes, see Appendix E, infra.

82. A representative definition of health care provider can be found in the Tennessee Statute: "'Health care provider' includes but is not limited to physicians, dentists, clinical psychologists, pharmacists, optometrists, podiatrists, registered nurses, physician's assistants, osteopaths, chiropractors, physical therapists, nurse anesthetists, anesthetists, emergency medical technicians, hospitals, nursing homes and extended care facilities." Tenn. P.L. 1975, ch.299, Section 2(4), effective July 1, 1975.

83. Maryland provides that if the parties agree, the case may be heard by a single panel member. Ann. Code of Maryland, Section 3-2A04 (E), effective July 1, 1976.

panel will often be required to aid the patient in obtaining expert medical testimony for trial. Conversely, a party which loses at the panel level, whether patient or provider, may face various penalty provisions for choosing to reject the panel decision and proceed to court.

Administrative expenses and panelists' fees may be defrayed in a number of ways. In some states, panel members serve without compensation, while in others, expenses and fees are paid for by the parties, or out of state funds, or from assessments on health care providers or malpractice insurers.

While the preceding summary emphasizes the similarities in the panel statutes, there are a number of significant differences which may have a marked effect on the relative success of these varying approaches:

Utilization Basis (Mandatory v. Voluntary) -- A majority of the statutes require all medical malpractice claims to go through the pre-trial panel stage before being litigated in court. A minority of the statutes make the use of panels voluntary, so that unless one of the parties (usually the patient-claimant) requests a panel hearing, the case will bypass the pre-trial review process and go immediately into the litigation system. [84]

Time of Review (Pre-Complaint v. Post-Complaint)-- A panel can be either a pre-complaint or a post-complaint procedure. The majority of panels are pre-complaint, and thus hear claims prior to the formal initiation of litigation. Post-complaint procedures are in operation in nine states. [85]

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84. Of the voluntary procedures, the panel review can be: (1) voluntarily invoked by the claimant, with the defendant being forced to go through the procedure (Arkansas, New Hampshire and Wisconsin); (2) voluntarily invoked by either party, with the non-invoking party being forced to go through the procedure (Delaware and Virginia); (3) voluntarily invoked by the claimant, but the provider must consent to the procedure before a hearing is held (New Jersey); and (4) voluntary on the part of the court, which decides whether an expert advisory opinion is needed, in which case both parties are required to go through the procedure (Alaska and Kansas).

85. Alaska, Arizona, Delaware, Illinois, Massachusetts, New York, Ohio, Rhode Island and Tennessee. In Idaho, Kansas and New Jersey, the panel can hear cases either before or after the filing of a complaint.

Health care providers, who were instrumental in the passage of pre-trial review statutes, have argued that the traditional claims and litigation mechanisms are unsatisfactory in that they are usually lengthy, time-consuming and expensive procedures which cause unnecessary antagonisms. Providers have also argued that the generality of the standard of care, coupled with inexpert decision-makers (i.e., claims administrators, attorneys and jurors), make erroneous decisions and excessive awards likely.

From the provider's point of view, a properly-constituted panel can be useful in quickly and inexpensively screening out non-meritorious claims and in promoting prompt and just settlements. Since the procedure is informal and private and since more "objective" decision-makers are involved, most providers would rather have claims resolved at the pre-trial panel stage. And to the extent withdrawal or settlement of the claim does not occur, most providers would like to make it difficult for the losing party to go to court, and to have the findings of the panel exert as much influence as possible on the final outcome.[87]

From the claimant's point of view, pre-trial panels can operate as a discovery device, and in some instances an expert is provided if the claimant prevails before the panel. However, the claimant is very sensitive to the composition of the panel and wants no strings on his access to court should he lose before the panel.

From the court administration point of view, the need is for a procedure which can dispose of as many cases as possible by settlement or withdrawal, but in a manner which is minimally fair to all parties.

Legislative activity in the past two years dealing with malpractice panels has been extraordinarily diverse and prolific. Consequently, the staff has spent a great deal of time studying the various panel review statutes and conferring with providers, attorneys and court personnel who were instrumental in the establishment of such pre-trial panels.

On the basis of its statutory analysis and discussions with knowledgeable persons,[88] the staff has concluded that,

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87. Providers are not unaware that approximately 65% of all claims are resolved in their favor, and that approximately 80% of cases tried result in a verdict for the defendant. National Association of Insurance Commissioners, Malpractice Claims Survey (no. 3) (1976), Table 20-21, at page 58.

88. Because pre-trial panels have been in existence such a short time, there is as yet no significant data on the effectiveness of these mechanisms, and therefore the staff did not have the benefit of any statistical evidence in reaching its conclusions.

properly structured, panels can be valuable devices which should aid in the reduction of unnecessary claims and increase the number of early and amicable settlements of meritorious claims. The staff's specific recomendations, which relate to the structural and procedural characteristics of pre-trial panels, are set forth below:

1. Utilization Basis

Recommendation

Where a non-binding pre-trial review panel is created by statute, all medical malpractice claims should be required to go through the pre-trial panel process.

Supporting Reasons

The pre-trial panel procedure should be mandatory. The major purposes of a panel mechanism are to mediate and settle disputes, screen out non-meritorious cases and narrow the matters actually at issue in a case. These purposes are worthy and can only be fully achieved if all malpractice cases are required to be heard by a pre-trial panel.

2. Time of Review

Recommendation

A pre-trial panel should be a pre-complaint procedure which hears claims prior to the initiation of litigation.

Supporting Reasons

All claims should be heard prior to the filing of a complaint. This will lessen the adversary nature of the proceedings because litigation has not yet been instituted. Publicity will be minimized because no papers will have been filed with a court, and the often rigid positions which parties assume in litigation will not yet have developed. These changes, coupled with an informal hearing procedure (see recommendation #7), should enhance mediation attempts and make for more satisfactory settlements.

A pre-complaint procedure also carries with it two other important benefits. The patient is benefited because he obtains an early and impartial determination of the merits of his claim which can assist him in deciding whether to file suit. And the health care provider is benefited in that those cases which are screened out by the panel procedure will never become lawsuits, thereby saving the health care provider from having to defend a non-meritorious case in court.

3. Providers Covered

Recommendation

A pre-trial panel should have jurisdiction over all health care providers. Prior to the selection of any panel members, a party should be allowed to join in the action any additional party who may be necessary for a just determination of the claim.

Supporting Reasons

While most panel statutes provide that malpractice cases against all health care providers will be heard by the review panel, a few panel procedures are restricted to specific health care providers such as physicians, or physicians and hospitals. There would seem to be little justification for limiting the scope of a statute to narrow categories of health care providers, especially when such a large percentage of medical malpractice actions are brought against multiple defendants.[89] To ensure that the pre-trial panel will be able to hear the entire case and make recommendations as to all defendants, the panel must have jurisdiction over all classes of health care providers.

In addition, a provision allowing for the late joinder of a necessary party is essential. In this way, should a party sometime after the claim is brought realize that an additional person or institution may have

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89. The National Association of Insurance Commissioners, Malpractice Claims Survey (no.3) (1976), Table 11, at page 15, indicates that at least 47% of all claims are brought against more than one defendant.

been involved in the original incident, that person can be added as a necessary party to the claim. However, it it is only fair that the joined party have some input into the selection of the panel members, and so joinder should not be allowed if the panel selections have already been completed.

4. Jurisdictional Amount

Recommendation

The pre-trial review procedure should apply to all malpractice claims, no matter what amount of damages is involved.

Supporting Reasons

There should be no jurisdictional amount that a claim must satisfy in order to qualify for the panel procedure. The reasons for reviewing all claims prior to litigation do not depend on the amount of damages claimed.

5. Panel Composition

Recommendation

Pre-trial review panels should consist of three members -- an attorney, a physician, and either a judge or a member of the general public. If possible, the physician should come from the same specialty as the health care provider against whom the claim is brought. If the claimant and respondent can agree on a single person to hear the dispute, then the panel should consist of that one person.

Supporting Reasons

The issues in medical malpractice cases are sufficiently complex and sensitive that there should routinely be more than one panel member, with the composition of the panel reflecting different backgrounds and perspectives. One panelist should be a physician whose specialty, if possible, is the same as that of the defendant. One panelist should

be an attorney, possibly with trial experience, who is capable of making procedural and evidentiary rulings at the hearing. The third panelist could be either a judge or a lay member of the general public but in any event should not be a physician, a practicing attorney or an agent or employee of an insurance company.

Where a claim is against a hospital, a hospital administrator should either be substituted for the physician member or added to the panel as a fourth member. Where a health care provider is a professional other than a physician, then someone from that profession (e.g., nurse, dentist, etc.) should likewise be represented on the review panel. The panel procedure should be flexible enough, however, to allow the parties to agree on a single panelist who would then constitute the entire panel and decide the case alone. Such a provision would also have the advantage of substantially reducing the costs of a panel in these cases.

6. Panel Selection

Recommendation

All panel members should be impartial and acceptable to all parties. The selection process should provide for a way impartial panel members can be named in the event the parties cannot agree on one or more individual panel members.

Supporting Reasons

The panel selection process should be designed to produce panelists who are objective, willing to serve and acceptable to the parties. Since the staff's recommended panel procedure is mandatory, it is important to allow the parties to participate in the selection of the panelists. However, in the event the parties cannot agree on one or more panel members, there should be a back-up procedure available for choosing impartial panel members.

taken into account in the Heintz report, and that is the added cost to the hospital of adequately informing incoming patients of the nature of the agreement they are being asked to sign. Moreover, there is a reaction on the part of many physicians and hospital administrators against discussing "legal matters", particularly the procedural or other consequences of negligently caused injuries. This understandable reluctance, the staff believes, will severely limit the spread of the arbitration option except perhaps in the group health plan context. And finally, the growth of mandatory pre-trial review panels, though not legally inconsistent in any way with arbitration, may inhibit the establishment of arbitration programs, since many providers may question the wisdom of going through a thorough pre-trial review and arbitration.

Pre-Trial Review Panels -- None of the statutory mechanisms has been in existence long enough to assess its propensities for cost reduction, or for any other legitimate objective of pre-trial review. Nor has there been any effort, to the staff's knowledge, to formulate a research design which might, in time, answer some of the questions which have been raised. However, the ABA Fund for Public Education has recently received a small grant from the American Hospital Association to undertake a preliminary assessment of statutory panel mechanisms in four states, which were selected to reflect differing approaches to pre-trial review. Since these programs are just being launched, the focus will be on describing early experience with implementation, and one of the main objectives will be to formulate sound recommendations for more systematic research. The project will be carried out by the Institute of Judicial Administration and is expected to be completed by May, 1977.

One of the expectations of the proponents of pre-trial review panels is that these mechanisms will promote prompt and "reasonable" resolution of claims, with concomitant savings in indemnity payments and expenses. A key element, from the point of view of providers, is to maximize the influence of the panel decision by making it onerous for the losing party to go to court, and by providing that the findings of the panel are available to the judge and jury if the losing party does go to court.[116]

These methods of influencing the outcome of litigation have been attacked in several states and the results have been contradictory. The Florida Supreme Court reluctantly upheld a provision allowing the introduction of panel findings into evidence at trial, concluding that the legislature had a right to limit unfettered

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116. For a fuller discussion, see pages 51-52, supra.

access to the courts in this manner due to the imminent danger of a drastic curtailment of health care services. [117]. The Court commented, however, that the pre-trial procedure places a burden on the claimant which "...reaches the outer limits of constitutional tolerance." [118]. With somewhat less anguish, the Appellate Division of the New York Supreme Court held that a similar provision admitting panel findings into evidence is constitutional. [119]. The Court noted that jurors guard their roles with a unique jealousy and characterized the provision under question as procedural, since it only provides the jury with another source of expert testimony (i.e., the panel's). A Nebraska trial court has recently upheld an admissibility provision, noting that the panel's findings merely constitute expert evidence which will be available to the jury. [120].

Another sharply contrasting view is presented by the Ohio Court of Common Pleas in striking down a pre-trial review statute which included an admissibility provision. [121]. The Court commented that the Ohio statute, which places the burden on the party losing before the panel to show that the panel was incorrect, places too heavy a burden on a person's free access to court, thus contravening the right to a jury trial. [122].

Two other cases have struck down panel statutes on grounds other than denial of the right to a jury trial. In Tennessee, the Chancery Court held that Tennessee's pre-complaint panel procedure violated the state constitutional guarantee of free access to the courts without undue delay. [123]. In Illinois, that state's post-complaint panel mechanism was struck down as granting the same decision-making authority to the lawyer and physician members of the panel as to the judge member of the panel, and as unduly burdening the claimants right to a jury trial. [124].

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

118. Id., at page 806.

119. Comiskey v. Arlen, ___App. Civ. ___, ___N.Y.Supp. ___ (Second Department, 1976). The decision resolved a direct conflict of views between two Supreme Court Justices.

120. Prendergast v. Nelson, Docket No. 303, District Court of Lancaster County (November, 1976).

121. Simon v. St. Elizabeth Medical Center, 355 N.E. 2d 903 (1976).

122. Id., at page 908.

123. Arnold v. Tennessee ex rel. Blanton (Nashville Chancery Court, Part Two, December, 1975).

124. Wright v. Central DuPage Hospital Association, 347 N.E. 2d 736 (1976).

EXHIBIT A