JUDICIARY LAW 148-a:

A HINDRANCE TO JUSTICE

By Justice Leo F. McGinity & Elliott C. Winograd

Introduction

In 1975, the New York Legislature responded, in part, to the medical malpractice insurance crisis, by way of the following measures: the reduction of the statute of limitations (CPLR 214(a)); the elimination of the ad damnum clause (CPLR 3017 (c)); the elimination of the collateral source rule (CPLR 4010); the requirement of expert testimony in actions based solely on Informed Consent; and the creation of medical malpractice mediation panels. It is this last measure, implemented by the enactment of Judiciary Law Section 148-a, which will be the focus of this article.

The system of medical malpractice panels in New York provides a pre-trial mechanism whereby a number of physicians and attorneys are empaneled and charged with reviewing a plaintiff's claim of medical malpractice. Such review may result either in a finding of liability or no liability, or, in the absence of unanimity, in no panel finding. A unanimous finding either way is admissible at trial and is treated as analogous to an expert opinion. A "no decision" finding has no substantive impact on a case. Enacted as a response to the skyrocketing premium crisis of the 1970s, it had been hoped that the system of medical malpractice panels would

furnish a means of expediting cases, of providing an impetus for the settlement of meritorious claims, of reducing the costs of litigation, and of discouraging frivolous claims. Unfortunately, this has not been the case; the medical malpractice panel is not accomplishing the purposes for which it was conceived. In fact, since at least as early as 1980, members of the bench and bar have grown increasingly dissatisfied and concerned with the effects that the panel system has had on malpractice litigation in particular, and on the administration of justice in general. It was in March of 1980 that Justice Joseph F. Gagliardi issued his comprehensive "Report of the Ad Hoc Committee on Medical Malpractice Panels," declaring the system a failure, and calling for its elimination. Although the legislature amended J.L. 148-a in 1985 to abolish the panels in Suffolk County and in the counties of the Fifth Judicial District, 1991 finds the remaining counties of the state still contending with a system that compromises and threatens the administration of justice both in reality and in the perception of the public.

A. THE MEDICAL MALPRACTICE PANELS CAUSE UNDUE DELAYS

Far from having helped to expedite malpractice cases, the panel system has, in fact, been responsible for causing great delay. In December of 1987, the New York State Office of Court Administration submitted its "Report of the Chief Administrative Judge on the Impact of Suspending the Use of Medical Malpractice

Panels in the Fifth Judicial District and the County of Suffolk." Then Chief Administrative Judge, Albert M. Rosenblatt, found that "the chief feature of the panel has been to produce extensive and unjustifiable delay, which an overburdened system can ill-afford."

The issue of delay has also been raised by courts in the context of litigation. For example, in a series of four cases which were decided together, Judge Gammerman, noting the clogged medical malpractice calendar in New York County, called attention to the fact that, while there had been at least fifty malpractice cases filed each month, panel hearings were held at the rate of only fifteen to eighteen per month. The result was an astonishing backlog of 640 cases by the end of 1981. Rosa v. Kulkarin; Bleich v. Bono; Gold v. Hershey; Wolitsky v. Cornell. 113 Misc.2d 39, 448 N.Y.S. 2d 400 (Supp. NY, 1982).

In Ferrer v. Lewenberg, NYLJ, Sept. 14, 1983, p. 12, col. 1 (Sup. N.Y., Gammerman, J.). Judge Gammerman expressed his feeling that it was highly unlikely that the panel would accomplish anything but the return of a "no finding" because of the sharp issues of fact involved. Under the circumstances, he noted, the panel procedure served no purpose other than to cause delay.

The problem of delay reached such proportions in Suffolk County, in 1984, that the Second Department issued a writ ordering a case transferred to a Queens County panel. The delay in

convening the Suffolk panel was found to be "egregious." McCabe v. DeLuca, 107 App.Div. 1097, 489 N.Y.S.2d 449 (2d Dept. 1984). It should be recalled that this occurred one year prior to the Legislature's amendment of JL 148-a abolishing the panel system in Suffolk County.

Finally, the New York State Trial Lawyers' Association has estimated that the elimination of panels would reduce the waiting time before a case is settled by a period of between eighteen months and two years.

B. THE IMPETUS FOR SETTLEMENT IS ILLUSORY

One aspect of the panel system's failure to expedite cases is its inability to provide any impetus for the settlement of claims. In truth, the utterances of medical malpractice panels have had a minimal substantive impact on cases. According to the 1987 "Report of the Chief Administrative Judge," slightly more than half (52%) of the panel hearings conducted during the study period failed to yield unanimous decisions of the panels members as to liability and, thus, did not result in admissible evidence (in Nassau County, the figure was 55%).

Of the remaining forty-eight percent of panel hearings studied, ten percent resulted in a finding of liability, and thirty-eight percent resulted in a finding of no liability. In

cases in which there was a unanimous panel finding of no liability, there was lower percentage of case dispositions by settlement, and a higher percentage of case dispositions by withdrawal, dismissal, or markings off-calendar, than in those cases in which there were findings of liability or "no decision." In addition, seventy-four percent of the verdicts following "no decision" findings were defendant's verdicts.

The conclusion is that a majority of panel hearings have no impact on cases, in terms either of assisting in settlement or of impacting on the trial. It is also apparent that those panels that do issue findings have the effect of engendering intransigence in the litigants: a finding of liability serves to inflate a plaintiff's settlement demand, while a finding of no liability merely solidifies a defendant's resolve to proceed to trial.

C. COST REDUCTION IS LIKEWISE ILLUSORY

Rather than serve to reduce costs, medical malpractice panels have become, in the words of the New York State Trial Lawyers' Association, "a time consuming, costly and burdensome administrative hurdle that plaintiffs are forced to endure as part of a malpractice legal action." The costs inherent in such a system are incurred not only by litigants, but also by the courts and the counties that administer the system.

In accordance with Section 148-a of the Judiciary Law, each county has established procedures to administer the system. The costs incurred in the administration of hundreds of cases in each of the metropolitan area counties include salaries for judge, officers, clerks and secretaries. In addition, space must be set aside in each courthouse to accommodate the Medical Malpractice Panel staff and additional room is required in order that panel hearings may be conducted. Costs are also incurred during the course of pre-panel conferences conducted for the purposes of arranging panel schedules, and discussing presentations and often lengthy contentions to be submitted to the Court.

It is the elimination, and not the continued existence, of the medical malpractice panel system, which would best serve the objective of reducing costs. Individual litigants would benefit from the eradication of this costly, burdensome "hurdle," as would the court system.

Instead of furthering the underlying purposes that the legislature had in mind when it created the medical malpractice panel system, Section 148-a of the Judiciary Law has undermined these objectives. While this would suffice as justification for its swift repeal, the arguments as will be seen, do not end here.

D. LIMITATIONS ON THE EFFECT OF PANEL

1. Cross-examination Rules.

In Bernstein v. Bodean, 53 N.Y.2d 520, 443 N.Y.S.2d 49, the Court of Appeals broadened the permissible scope of the cross-examination of trial of a physician member of the medical panel. The case suggests that the panelist may be examined concerning the following matters:

1. the recommendation itself;

2. panel procedures;

3. the data considered;

4. the opportunities for, and extent of, deliberation;

5. interim and final votes, or statements of position, by each panel member;

6. the professional and practical background of the panel recommendation; and

7. the factual and medical basis for and the processes by which, the panel, individually and collectively, arrived at tentative and final conclusions.

It should be kept in mind that the "opinion" of the panel is subject to cross-examination to the extent that the doctor or lawyer member may be called by any party as a witness. That such may be based on material not exchanged and available only to panel members dilutes this right of cross-examination and raises serious questions as to the fairness of the panel process.

2. Jury Charges PJI 2:151A and PJI 2:151A.1.

Effective September, 1982, two amendments were made to the New York Pattern Jury Instructions (NY PJI) with respect to the receipt into evidence during a jury trial, of the recommendation of the medical malpractice panel.

The charge numbered PJI 2:151A is to be given to the jury at the time that the panel's finding is first received in evidence. At the conclusion of the testimony, during the judge's main charge to the jury, charge PJI 2:15A.1 is given.

The amendments reflect a change from prior practice, which provided for a single charge concerning the panel to be given at the conclusion of the trial. The apparent intent of the amendments is to mitigate the effect on the jury of the panel's recommendation, and to ensure that it does not supplant or constrain the freedom of the jury's consideration.

E. CONSTITUTIONALITY

Until 1985, the issue of the constitutionality of the legislature's establishment of a medical malpractice panel system had not been directly confronted by the Court of Appeals. However, it had been generally accepted that J.L. Section 148-a passed constitutional muster as a result of Comiskey v. Arlen, 55 A.D.2d

304, 390 N.Y.S.2d 122 (2d Dept. 1976), aff'd on other grounds, 43 N.Y.2d 696, 401 N.Y.S. 2d 200 (1977). In that case, the Appellate Division unanimously held the statute constitutional. The Court of Appeals affirmed without reaching the constitutional issue.

In Treyball v. Clark, 65 N.Y.2d 589, 493N.Y.S. 2d 1004 (1985), the Court appeals, using reasoning similar to that found in Comiskey, upheld the constitutionality of the statute as it has been applied to a plaintiff prevented from proceeding to trial or to a delay in the convening of the panel. Additionally, the statute was held constitutional by the Second Circuit in Gronne v. Abrams, 793 F.2d 74 (2d Cir. 1986).

Despite prior similar decisions rejecting constitutional attacks on analogous statutes, the highest courts of Florida and Pennsylvania reversed their positions, and held unconstitutional medical malpractice panels. Aldana v. Holub, 381 So.2d 231 (Fla. 1980); Mottos v. Thompson, 491 Pa. 385, 421 A.2d 190 (1980).

In Aldana, the Supreme Court of Florida based its decision not upon a re-evaluation of the rational of its earlier decision upholding the statute's constitutionality, but, rather, on "the unfortunate fact that the medical mediation statute has proven unworkable and inequitable in practical operation." 381 So.2d at 237. The Supreme Court of Pennsylvania likewise concluded, upon review of a study of the Malpractice Act conducted subsequent to

its decision upholding the Act's constitutionality, that the study revealed lengthy delay and onerous conditions, restrictions and regulations. The court stated that it could not agree that the act's procedure "is reasonably designed to effectuate the desired objective of affording plaintiff a swifter adjudication of his claim at a minimal cost." 421A.2d at 195.

The statements of both of these courts could be applied with equal force to the situation confronting us in New York today.

F. IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY

The courts are in general agreement that if there exists between a panelist and a party to the action, or that party's attorney, a relationship that raises the question of an appearance of impropriety, then the panelist should be disqualified, and a new panel must be ordered. The disclosure of the relationship that raises the question of impropriety, whether actual or the appearance thereof, causes the cancellation of a scheduled panel which, unfortunately, all too often results in granting the opportunity to the litigants to present their respective medical contentions to the panel. Thus, one of the main purposes of the panel system, the expediting of cases, is thwarted to the detriment of all litigants. In this regard, it should be stated that the delay in the resolution of cases (since medical malpractice cases cannot appear upon the ready trial calendar until the case is

paneled) not only frustrates plaintiffs, but also unnecessarily deprives defendants of a swift resolution of their potential responsibility. A finding of actual impropriety - for example, a party or his attorney speaking to a panelist before the final panel determination is made - would warrant vacation of the panel finding. See Scott v. Brooklyn Hospital, 93 App. Div. 2d 577, 462 N.Y.S. 2d 272 (2d Dept. 1983); Schmitt v. Cantor, 83 App. Div. 2d 862, 442 N.Y.S. 2d 65 (2d Dept. 1981). In the case of Santolo v. Eisenberg, 96 App.Div. 2d 716, 465 N.Y.S. 2d 91 (4th Dept. 1983), a panelist had been present at a hospital meeting where the defendant had discussed the case. Although the panel finding was vacated during the trial. the court did not declare a mistrial, for, to do so, would have been to substantially benefit those parties upon whom there was a duty and a responsibility to reveal factors which were exclusively within their control. See, Virgo v. Bonavilla, 99 Misc. 2nd 238, 415 N.Y.S.2d 925 (Sup - Monroe 1979) revd. 71 App.Div. 2d 1051, 420 N.Y.S.2d 804 (4th Dept. 1979), affd. 49 N.Y.S.2d 982, 429 N.Y.S.2d 165 (1980); Seabrook v. Good Samaritan Hospital, 75 App.Div.2d 849, 427 N.Y.S.2d 850 (2nd Dept. 1980); Perea v. Medical Arts Center Hospital, 137 Misc.2d 249, 520 N.Y.S.2d 129 (Sup.NY 1987); Tirado v. Mayes, 134 Misc.2d 390, 510 N.Y.S.2d 970 (Sup-Kings 1986).

G. BROADER CONSIDERATIONS

Beyond those particular cases whose facts specifically raise

a question as to actual or apparent impropriety, there exists a broader issue which must be a focal point of concern to the legal community.

It has been asserted by critics, and reasonably so, that the medical malpractice panel system is increasingly incapable of fulfilling its quasi-judicial function of providing impartial and appropriate attorney panelists to hear cases. For example, it has become increasingly more difficult to assemble panels in situations where there are multiparty defendants involving a small number of law firms which handle the defense of a substantial part of all malpractice cases litigated in Nassau County. Most knowledgeable attorneys who specialize in the defense of medical malpractice claims are involved in actual litigation with attorneys who devote their efforts in prosecuting medical malpractice claims against physicians and hospitals, and thus, it is most difficult to select an attorney from the list of lawyers approved by the Appellate Division who would not give rise to an application to disband the panel. The recently decided case of Wasyl v. Rooney (Supreme Court, Nassau Co., March 19, 1991, Christ, J., NYLJ, April 17, 1991, p.25, col.5) clearly illustrates the pervasiveness of the problem. Confronted with a procedural question as to a party's right to object to the composition of the panel, Justice Christ noted that the seating of the attorney panelist, engaged in an adversarial process with plaintiff's counsel pending at the time of the panel hearing, impacted negatively upon the appearance of

impartiality. These applications (albeit necessary) seriously interfere with court schedules and physician panelists' very valuable time.

The court's ability to obtain from the Medical Society appropriate panelists in specific disciplines of medicine is increasingly difficult. As the field of medicine becomes more specialized, the more likely the physician panelist will be acquainted with the defendant doctor. The more enhanced the reputation of the panelist doctor, the more frequent will be the case that he or she has privileges at the defendant hospital. It has already been ruled in the case of Kletniekes v. Brookhaven Memorial Associates, Inc., 53 App.Div.2d 169, 385, N.Y.S.2d 575 (2d Dept. 1976) that a vacatur of the panel findings was not warranted simply because the physician panelist was a classmate of one of the defendants and they belonged to the same medical society where mutual concerns and common problems were discussed. Despite this holding, the questions remain as to how well they knew each other and, regardless of whether or not they knew each other, does not such a situation create, at least the appearance of a conflict of interest?

H. ELIMINATION OF THE PANEL SYSTEM WILL NOT BE DETRIMENTAL

The elimination of medical malpractice panels should not result in significant detriment either to litigants or to their

indemnifiers because, as we have seen, the panels have no substantive impact on over half of the cases (no unanimous panel finding) and no apparent substantial impact on the outcomes of cases. Furthermore, the speedier processing of medical malpractice cases would not be detrimental to the interests of litigants or their indemnifiers. It should be recalled that the data in the Report of the Chief Administrative Judge indicates that the defendants prevail at trial more often than plaintiffs where panels are suspended or where panels reach a "no decision" finding. Finally, available data shows also that settlement awards in counties where panels have been suspended are, on the average, lower than at the sites which continue to conduct the panel hearings.

I. THE JUSTIFICATION FOR THE PANEL SYSTEM NO LONGER EXISTS

The final argument in favor of eliminating the medical malpractice panel system is, quite simply, that it is no longer necessary (assuming, for argument's sake, that it ever was).

With the introduction of RJI (Request for Judicial Intervention) Statements in 1986, a means was created by which the number and types of cases in our court system could be monitored. As indicated by the Statistical Report for the Office of Management Support of the Office of Court Administration, the total number of RJI medical malpractice filings decreased from 14,224 in 1986 to 4,158 in 1989, a 71% reduction. For the first ten months of 1990,

the filings decreased to 76%. The significance of this is that there is not a medical malpractice litigation crisis.

CONCLUSION

To reiterate, the conclusion of the 1987 "Report of the Administrative Judge" is that a majority of the panel hearings hold no impact on settlement or trials. As for those panels that do issue findings, it has little effect of engendering intransigence in the litigants. Based upon the foregoing, it is time that the legislature repealed Judiciary Law Sec. 148-a.

HON. LEO F. McGINITY IS THE ADMINISTRATIVE JUDGE OF THE COURTS OF NASSAU COUNTY; ELLIOTT C. WINOGRAD IS COUNSEL TO THE FIRM OF NEWMAN SCHLAU FITCH BURNS & LANE AND IS CHAIRMAN OF THE MEDICAL-LEGAL COMMITTEE OF THE NASSAU COUNTY BAR ASSOCIATION. THE ABLE ASSISTANCE OF DAVID HUBELBANK, EDITOR-IN-CHIEF OF HOFSTRA LAW REVIEW IS ACKNOWLEDGED.