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COMMENT

THE CONSTITUTIONALITY OF MEDICAL MALPRACTICE MEDIATION PANELS: A MARYLAND PERSPECTIVE†

The recent rapid rise in medical malpractice insurance rates has engendered a proliferation of state activity designed to cope with the problem. This Comment analyzes the Constitutional challenges made to the medical malpractice mediation panels adopted by various state legislatures. The author concludes, in light of the decision in Attorney General v. Johnson upholding the somewhat unique Maryland Health Care Malpractice Claims Act, that it is likely that most such plans could withstand Constitutional attack.

I. INTRODUCTION

The medical malpractice crisis (actually a malpractice insurance crisis) produced extensive legislative reform across the country in 1975-1976.¹ This legislation was designed to counteract rapidly rising insurance rates and to ensure adequate insurance coverage for medical personnel and facilities.² One promising legislative solution is an extrajudicial dispute resolution mechanism known as "mediation." Mediation provides an inexpensive, speedy alternative to traditional litigation.

† The author gratefully acknowledges the contribution of Stephen R. Cochell, a former member of the *University of Baltimore Law Review* staff and a 1979 graduate of the School of Law, for his research and preparation of an initial draft of this Comment.

1. To date all states have enacted legislation designed to deal with some aspect of the crisis. Of the twenty-six mediation panel statutes thus far enacted, all but five took effect in 1975 or 1976. See note 3 *infra*. Some commentators have suggested that the crisis was contrived. See, e.g., Lambert, *Family Law*, 36 *ATLA JOURNAL*, 230, 255 (1976).
2. Note, *Medical Malpractice Mediation Panels: A Constitutional Analysis*, 46 *FORDHAM L. REV.* 322 (1977) [hereinafter cited as *Mediation Panels*]. Between 1960 and 1970, for example, rates for surgeons rose 950%. Non-surgical physicians faced increases of 540%, and hospital premiums rose 262%. U.S. DEP'T OF HEALTH, EDUC. & WELFARE, PUB. NO. (OS) 73-88, *MEDICAL MALPRACTICE: REPORT OF THE SECRETARY'S COMM'N ON MEDICAL MALPRACTICE* 13 (1973). The situation became even more grave during the early 1970's. In some states physicians' insurance rates rose more than 100% in a single year. Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 *TEX. L. REV.* 759, 760 n.3 (1977) [hereinafter cited as Redish]. Some doctors were faced with the possibility that malpractice coverage would be completely unavailable. New York's principal insurer withdrew malpractice coverage in July 1975, and was replaced by Argonaut Insurance Company, which increased malpractice rates by 93.5%. After announcing a further increase of 196.8% in January 1975, Argonaut withdrew from the market on July 1, 1975.

Currently, statutory mediation panels are in effect in twenty-six states.³ Although the provisions of these state statutes vary widely, all are subject to attack on the following constitutional grounds: (1) separation of powers; (2) equal protection; and (3) due process and the right to trial by jury.⁴ State courts are split on whether mediation panels are constitutional, and cannot agree on which standards are proper for testing them. The Maryland plan⁵ was recently subjected to constitutional attack in *Attorney General v. Johnson*,⁶ and was upheld by the Court of Appeals of Maryland. Because the Maryland mediation panel has the most far-reaching powers of any such panel in the country,⁷ the decision should serve as a benchmark to courts yet to determine the constitutionality of their states' mediation panels.

This Comment examines the features of mediation panels across the country, and analyzes the most important constitutional challenges to medical malpractice mediation. The Maryland plan is

Note, *Mandatory Medical Malpractice Mediation Panels — A Constitutional Examination*, 44 INS. COUNSEL J. 416, 416 n.2 (1977) [hereinafter cited as *Malpractice Mediation*] (citing STATE OF NEW YORK, REPORT OF THE SPECIAL ADVISORY PANEL ON MEDICAL MALPRACTICE 13-21 (1976)).

In 1974, Maryland's major malpractice insurance carrier announced its withdrawal from the market. The state legislature responded to the immediate crisis by creating the Medical Mutual Liability Insurance Society to fill the gap. Law of April 29, 1975, ch. 544, 1975 Md. Laws 2604 (codified at MD. ANN. CODE art. 48A, §§ 548-556 (1979)). More extensive reform, however, was needed. To that end, a special task force was created, which recommended mandatory arbitration for all claims exceeding \$5,000 as a precondition to court action. The legislature responded by passing an act concerning "Health Care Malpractice Claims." Law of May 4, 1976, ch. 235, 1976 Md. Laws 495 (codified at MD. CTS. & JUD. PROC. CODE ANN. §§ 3-2A-01 to 3-2A-09 (Supp. 1979)).

3. ALASKA STAT. §§ 09.55.535-536 (Supp. 1979); ARIZ. REV. STAT. ANN. § 12-567 (Supp. 1979); ARK. STAT. ANN. §§ 34-2602 to -2612 (Supp. 1979); DEL. CODE ANN. tit. 18 §§ 6803-6814 (Supp. 1978); FLA. STAT. ANN. § 768.44 (West Supp. 1979); HAWAII REV. STAT. § 671-11 (Supp. 1978); IDAHO CODE §§ 6-1001 to -1013 (1979); IND. CODE ANN. §§ 16-9.5-9-1 to .5-9-10 (Burns Supp. 1979); KAN. STAT. ANN. §§ 65-4901 to -4908 (Supp. 1978); LA. REV. STAT. ANN. § 40:1299.47 (West 1977); ME. REV. STAT. ANN. tit. 24 §§ 2801-2809 (Supp. 1978); MD. CTS. & JUD. PROC. CODE ANN. §§ 3-2A-01 to 3-2A-09 (Supp. 1979); MASS. ANN. LAWS ch. 231, § 60B (Michie/Law. Co-op Supp. 1978); MO. ANN. STAT. §§ 538.010 to .080 (Vernon Supp. 1979); MONT. REV. CODES ANN. §§ 17-1301 to -1315 (Supp. 1977); NEB. REV. STAT. §§ 44-2840 to -2847 (1978); NEV. REV. STAT. § 41A (1975); N.H. REV. STAT. ANN. §§ 519-A:1 to -A:10 (1974); N.M. STAT. ANN. §§ 41-5-1 to -5-28 (1978); N.Y. JUD. LAW § 148-a (McKinney Supp. 1978); N.D. CENT. CODE §§ 32-29.1-01 to .1-10 (Supp. 1979); PA. STAT. ANN. tit. 40, §§ 1301.301 to -.306 (Purdon Supp. 1979); R.I. GEN. LAWS §§ 10-19-1 to -19-10 (Supp. 1978); TENN. CODE ANN. §§ 23-3401 to -3421 (Supp. 1978); VA. CODE §§ 8.01-581.1 to -581.12:2 (1977 & Supp. 1979); WIS. STAT. ANN. §§ 655.02 to .21 (West Spec. Pamphlet 1979).
4. See Annot., 80 A.L.R.3d 583 (1977).
5. MD. CTS. & JUD. PROC. CODE ANN. §§ 3-2A-01 to 3-2A-09 (Supp. 1979).
6. 282 Md. 274, 385 A.2d 57, *appeal dismissed*, 437 U.S. 117 (1978).
7. No statute other than Maryland's cloaks a panel's findings with a presumption of correctness at the trial de novo. Compare Massachusetts, which is the only state that requires a plaintiff to post a bond before proceeding to trial. MASS. ANN. LAWS ch. 231, § 60B (Michie/Law. Co-op Supp. 1978). *But see Eastin v. Broomfield*, 116 Ariz. 576, 587, 570 P.2d 744, 754 (1977) (bond requirement held unconstitutional as a burden on access to courts).

emphasized because of its uniqueness in the field of extra-judicial dispute resolution.

II. BACKGROUND

A state has two broad solutions available when faced with rapidly rising malpractice insurance rates. First, the total amount paid out in settlements can be lowered⁸ either by reducing the number of plaintiffs entitled to bring claims⁹ or by limiting the amount recoverable on those claims.¹⁰ This should reduce strain on insurance carriers, resulting in more readily available malpractice insurance and lower premiums. Second, a state can reform the dispute resolution mechanism¹¹ in an attempt to provide faster, less expensive methods of deciding medical malpractice claims. This, too, should lessen the burden on insurance companies, with a concomitant drop in malpractice insurance premiums.¹²

The first alternative, manipulation of the remedy, indiscriminately affects meritorious as well as frivolous claims.¹³ Because

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8. These solutions are characterized by one commentator as tort law modifications. For a discussion of these modifications and others beyond the scope of this comment see Abraham, *Medical Malpractice Reform: A Preliminary Analysis*, 36 MD. L. REV. 489 (1977) [hereinafter cited as Abraham].
 9. For example, the statute of limitations can be shortened so that fewer claims are filed. The longer the relevant statute of limitations, the longer the period of risk for the insurance company. Insurance companies refer to this period of risk as the "long tail." A related doctrine, the discovery rule, provides that the statute does not begin to run until the victim discovers or should have discovered his injury. This rule lengthens the period of liability for both the health care provider and his insurance carrier. Some states have modified the discovery rule. See, e.g., IOWA CODE ANN. § 614.1(9) (West Supp. 1979) (six year limit with exception for foreign objects left in patient's body). Another doctrine, establishing a special disability period for minors, tolls the statute of limitations until a minor reaches the age of majority. Until this time he is considered unable to protect his interests. Young children in some states can retain viable claims for periods greatly in excess of the traditional period. Concern for the "long tail" has led some states to modify or reject this doctrine. E.g., IND. CODE ANN. § 16-9.5-3-1 (Burns Supp. 1979) (minors under six excepted). See generally Redish, *supra* note 2, at 765-66.
 10. For example, under the Indiana plan, a plaintiff's total recovery in a malpractice case may not exceed \$500,000. IND. CODE ANN. §§ 16-9.5-1-1 to .5-9-10 (Burns Supp. 1979). Another possibility is to abrogate or eliminate the collateral source rule, which precludes the jury from considering the compensation received by a plaintiff from outside health insurance policies when it assesses the damages to be paid by defendant. See generally Redish, *supra* note 2, at 764.
 11. See text accompanying note 14 *infra*.
 12. Malpractice cases, because of their complexity and the possibility of extremely high awards, are expensive to defend. It must also be recognized that because of the great expense of trying lawsuits, some plaintiffs file nuisance suits hoping to reach quick settlement, realizing that insurance companies are often willing to settle rather than go through the expense of trial. See Documentary Supplement, *Medical-Legal Screening Panels As An Alternative Approach to Medical Malpractice Claims*, 13 WM. & MARY L. REV. 695, 709 (1972).
 13. For example, a legitimate claim for \$1,000,000 would be limited to a recovery of \$500,000 in Indiana. See note 10 *supra*.

medical malpractice may result in serious injury, this approach is not recommended. A more sophisticated solution is the second possibility, which treats all claims equally but seeks early disposal of cases that are not well based in fact and law. Medical review boards,¹⁴ screening panels, and arbitration have been explored as alternatives to often cumbersome judicial trials.

The terms "screening panels" and "arbitration" are often confused. The distinction between the two, however, is important. Arbitration boards provide final, binding determinations and are an actual substitute for trial.¹⁵ Screening panel determinations are purely advisory and intended to educate the parties as to the merits of a case.¹⁶ Such decisions are not intended to be binding or admissible as evidence in further proceedings. Although Maryland describes its system as an "Arbitration Panel,"¹⁷ the service provided by the panel is not arbitration. Decisions of the panel are neither final nor binding,¹⁸ the earmarks of true arbitration. Nor is the Maryland plan best described as a screening panel. The Maryland plan, which clothes the decision of the panel with a presumption of correctness,¹⁹ is a hybrid that incorporates features of both screening panels and arbitration. The procedure is relatively inexpensive, informal, and provides a speedy decision. Proceedings take place in private, allowing for minimal damage to the physician's career. At the same time, the merits of the case are considered by a panel that has some expertise in the field. The recommendations of that panel, while not binding, provide strong incentive for settlement before trial because of the parties' awareness that the panel's finding will be considered by the jury. Several commentators suggest that this type of system be called "mediation,"²⁰ and it shall be referred to herein as such.

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14. Medical review boards are advisory panels designed to give peer group review of medical performance. The findings of these boards are not useful for litigation purposes, except to provide the doctor with some idea of the merits of the claim against him. Because they are not adversary proceedings, review boards are outside the scope of this Comment.
 15. For purposes of this Comment, "arbitration" means a non-judicial mechanism that renders binding decisions. Many states provide for voluntary arbitration plans either as the sole alternative to court action or in conjunction with other non-judicial dispute resolution mechanisms. *E.g.*, MD. CTS. & JUD. PROC. CODE ANN. §§ 3-201 to -234 (1974). At least thirty-five states have adopted arbitration statutes of some form. D. DOBBS, REMEDIES 937-38 (1973).
 16. Screening panels are similar to review boards, except that they are adversary proceedings. Screening panels allow both parties to present evidence, and render an opinion based upon the legal merits of the case. Their purpose is to discourage parties from bringing frivolous or non-meritorious claims to court, not to provide evidence for trial.
 17. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-01(b) (Supp. 1979).
 18. A party may reject an award for any reason by serving notice on the other party and filing an action to nullify the award. *Id.* § 3-2A-06(a) (Supp. 1979).
 19. *Id.* § 3-2A-06(d) (Supp. 1979).
 20. *See, e.g., Mediation Panels supra note 2; Malpractice Mediation, supra note 2.*

Certain characteristics are common to most mediation panel systems. The majority, including the Maryland plan, require mediation as a prerequisite to trial.²¹ Several states require that panels be used only upon the exercise of the discretion of the trial judge.²² A few systems are voluntary and provide decisions that equal in effect those of screening panels.²³

In some states the panels make decisions only as to liability;²⁴ other states allow panels to make a finding of damages as well.²⁵ The weakness in the policy of the former states is that a major feature of the case, damages, is left undecided.²⁶ Those panels providing only liability findings do not supply the parties with a sufficient basis for deciding whether to settle or proceed to trial. The problem with settling many malpractice cases is not determining liability, but arriving at a mutually acceptable measure of damages. Because the avowed purpose of mediation panels is to encourage settlement, they must provide the parties with an accurate and complete opinion of the merits of a claim.

The composition of mediation panels varies from state to state. Typically, as in Maryland, a physician, an attorney, and a layperson serve on each panel. The physician provides medical expertise on the merits of the claim, the attorney evaluates the legal consequences, and the layman serves as the "conscience" of the panel.²⁷ In essence, the panel can be likened to a smaller, more sophisticated jury.²⁸ Questions have been raised as to the propriety of including physicians on panels.²⁹ To date, however, the need for expert opinion

21. See, e.g., MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-04 (Supp. 1979). Some states require mediation as a prerequisite to the filing of the complaint. In Maryland, for example, the complaint is filed directly with the Director of the Health Claims Arbitration Office. *Id.* Other states permit the complaint to be filed in court, but require mediation before the commencement of trial. See, e.g., R.I. GEN. LAWS § 10-19-2 (Supp. 1978).

22. E.g., KAN. STAT. ANN. § 65-4901 (Supp. 1978).

23. See, e.g., ARK. STAT. ANN. §§ 34-2602 to -2612 (Supp. 1979); ME. REV. STAT. tit. 24 §§ 2801-2809 (Supp. 1978).

24. See, e.g., ARIZ. REV. STAT. § 12-567G (Supp. 1979).

25. See, e.g., MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-05(d) (Supp. 1979). In some states, panels are permitted to assess punitive damages. See, e.g., PA. STAT. ANN. tit. 40, § 1301.603 (Purdon Supp. 1979). Defense lawyers criticize panels that do not provide a finding of damages. They claim "they are forced to disclose their defense with no guarantee that the claim will be dropped if the panel finds in their favor, and if the plaintiff wins at the panel stage he can hold out for a larger settlement." Roth, *The Medical Malpractice Insurance Crisis: Its Causes, The Effects, And Proposed Solutions*, 44 INS. COUNSEL J. 469, 497 (1977).

26. Abraham, *supra* note 8, at 514.

27. *Id.*

28. *Mediation Panels*, *supra* note 2, at 326.

29. Ninety per cent of Maryland's doctors are insured by the same carrier, the Medical Mutual Liability Insurance Society of Maryland. The fear is that doctors will oppose damage awards because of the possible effect on their own insurance rates.

and reliance on physicians' professional integrity have overcome opposition.³⁰

The impact of the panels' decisions varies widely. A majority of states allow the decision of the panel into evidence at subsequent court proceedings.³¹ Nearly all of these states allow the jury to determine the weight to be attached to the finding of the panel.³² The sole exception is Maryland, which provides that the panel decision is presumptively correct.³³ Statutes that do not provide for admissibility of the panel's decision³⁴ vitiate the entire process. Far from being encouraged to settle, the parties may go through mediation unprepared and uncaring, knowing that the result means little or nothing. Inadmissible panel findings are merely advisory and can be readily ignored by either party.

The Maryland plan derives a higher margin of utility from the deliberation of its panels. The parties are prodded into maximizing their efforts before the mediation panel by the knowledge that the panel's decision carries enough weight to direct a verdict at the trial *de novo*.³⁵ The Maryland plan, with its presumption, encroaches further on the constitutional rights of the parties than the plan of any other state. The Court of Appeals of Maryland, by upholding the Maryland plan and the presumption, paved the way for more powerful mediation panels across the country.

III. SEPARATION OF POWERS

The doctrine of separation of powers parcels out and separates the authority of state government among the executive, legislative and judicial branches.³⁶ Each department within its own sphere is independent of the others, and each performs duties that are not subject to the control of the others. No department may exercise the

30. Every plan in effect today includes doctors or other health care providers in the decision making process.

31. Some states admit the liability finding only. *See, e.g.*, N.Y. JUD. LAW § 148-a(8) (McKinney Supp. 1978). Other plans, including Maryland's, allow the finding as to damages to be admitted as well. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-05(d) (Supp. 1979). Mandatory plans that allow damage awards to be admitted into evidence are relatively rare. *See, e.g.*, WIS. STAT. ANN. § 655.19(1) (West Spec. Pamphlet 1979) (damage findings admissible at court's discretion).

32. *See, e.g.*, ARIZ. REV. STAT. § 12-567M (Supp. 1979). Juries probably consider panel findings as equivalent to expert testimony. A few states require jury instructions to that effect. *E.g.*, ALASKA STAT. § 09.55.536(e) (Supp. 1979) (requiring jury instruction that the panel report be considered and evaluated in the same manner as any other expert testimony).

33. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(d) (Supp. 1979). *See text accompanying notes 113-20 infra.*

34. *See, e.g.*, MO. ANN. STAT. § 538.050 (Vernon Supp. 1979) (no mention of, or reference to, any recommendation of the review board may be made at trial); MONT. REV. CODES ANN. § 17-1312(4) (Supp. 1977) (report of panel not admissible in any subsequent action).

35. *See text accompanying notes 116-19 infra.*

36. *Hyson v. Montgomery County Council*, 242 Md. 55, 62, 217 A.2d 578, 582 (1966).

powers properly belonging to the other departments. In the context of mediation panel legislation the issue is whether the panels usurp judicial power in violation of separation of power principles.

In Maryland, the Health Claims Arbitration Office is expressly recognized as a unit of the executive branch.³⁷ This poses questions that do not arise in other jurisdictions. In Massachusetts, for example, mediation panels are considered to be part of the judicial branch.³⁸ In such a case no separation of powers problem exists, because judicial power is clearly retained within its proper department. In jurisdictions such as Maryland, where the mediation function is not part of the judicial branch, the panels are subject to challenge on the basis that judicial power has been improperly delegated to a coordinate branch of the government.

The important question is whether the power exercised by mediation panels is judicial. If so, the mediation plans violate state constitutional provisions vesting judicial power exclusively in the courts.³⁹ If the power exercised by the panels is not judicial power, the constitutional prohibitions do not apply.⁴⁰ What, then, is the

37. MD. CTS. & JUD. PROC. CODE ANN. §3-2A-03(a) (Supp. 1979).

38. *Paro v. Longwood Hosp.*, 369 N.E.2d 985, 992 (Mass. 1977). The vast majority of jurisdictions place the panels under the judicial branch. Most states place administration of the mediation process under a judicial officer or clerk of the court. See, e.g., N.Y. JUD. LAW. §148-a(1) (McKinney Supp. 1978).

39. MD. CONST. art. 4, §1 provides as follows:

The Judicial power of this State shall be vested in a Court of Appeals, and such intermediate courts of appeal, as shall be provided by law by the General Assembly, Circuit Courts, Orphan's Courts, such Courts for the City of Baltimore, as are hereinafter provided for, and a District Court; all said Courts shall be Courts of Record, and each shall have a seal to be used in the authentication of all process issuing therefrom.

40. MD. CONST., DECL. OF RIGHTS art. 8 provides "[t]hat the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other." This provision gave rise to the contention that the Act vests judicial power in an administrative agency, allowing an arm of the executive branch to discharge the duties of the judiciary. The court of appeals in *Attorney General v. Johnson*, 282 Md. 274, 385 A.2d 57, *appeal dismissed*, 437 U.S. 117 (1978), went to some length to determine that the body exercising power — the arbitration panel — is not an administrative agency. *Id.* at 285-86, 385 A.2d at 63-64. The administrative agency created by the Act is a "unit in the Executive Department" called the Health Claims Arbitration Office. MD. CTS. & JUD. PROC. CODE ANN. §3-2A-03 (Supp. 1979). The court distinguished the panels from the Arbitration Office, finding the nexus between the office and the panels insufficient to place the panels within the function of the office, and thus within the executive branch. 282 Md. at 286, 385 A.2d at 64.

The court did not explain where the unmoored arbitration panels belong in the scheme of Maryland government, but it was emphatic in removing them from the executive. Because the panels have no executive function, they may exercise judicial power with impunity so far as article eight of the Declaration of Rights is concerned. That article merely prohibits one body from exercising the functions of two branches.

This analysis is strained and unsupported by authority. To separate the panels, which make the awards, from the Arbitration Office, which provides all

essence of judicial power? The Court of Appeals of Maryland provides the most complete answer of any court yet to consider the question in this context.

The court began its analysis in *Attorney General v. Johnson*⁴¹ by avoiding "the erroneous notion that all adjudication is judicial."⁴² "Adjudication" is the process of fact-finding and the application of legal principles to those facts — a process characterized as quasi-judicial.⁴³ It has long been recognized in Maryland that the proper exercise of quasi-judicial power by an administrative agency is constitutionally permissible.⁴⁴

logistical support, makes too nice a distinction. Furthermore, the argument is merely a makeweight, because the court went on to find that the power delegated is not judicial. The identity of the body to which judicial power is not granted is of no consequence. If the panels do not exercise judicial power, the court's analysis isolating them from the executive branch in order to avoid the separation of powers provisions of article eight of the Declaration of Rights was unnecessary.

41. 282 Md. 274, 385 A.2d 57, *appeal dismissed*, 437 U.S. 117 (1978).
42. *Id.* at 284, 385 A.2d at 63 (citing *Mulhearn v. Federal Shipbuilding & Dry Dock Co.*, 2 N.J. 356, 364, 66 A.2d 726, 730 (1949)).
43. *Dal Maso v. County Comm'rs*, 182 Md. 200, 205, 34 A.2d 464, 466 (1943). The term "quasi-judicial" is imprecise; "adjudicatory" function is recommended. Justice Jackson noted his views on administrative agencies and their labels:

They [administrative bodies] have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking.

Courts have differed in assigning a place to these seemingly necessary bodies in our constitutional system. Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution. The mere retreat to the qualifying "quasi" is implicit with confession that all recognized classifications have broken down, and "quasi" is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed.

- FTC v. *Ruberoid Co.*, 343 U.S. 470, 487-88 (1952) (Jackson, J., dissenting).
44. *County Council v. Investors Funding Corp.*, 270 Md. 403, 429-32, 312 A.2d 225, 239-41 (1973) (upholding Montgomery County Commission on Landlord Tenant Affairs). The case tied the exercise of adjudicatory power to the proper exercise of regulatory powers, stating, "[T]he Commissions function is not primarily to decide questions of legal rights between private parties, but [that function] is merely incidental, although reasonably necessary, to its regulatory powers." 270 Md. at 441, 312 A.2d at 245-46.

For an explanation of the relationship between regulatory and adjudicatory powers, see Tomlinson, *Constitutional Limits on the Decisional Powers of Courts and Administrative Agencies in Maryland*, 35 MD. L. REV. 414, 449-55 (1976); *Maryland Racing Comm'n v. McGee*, 212 Md. 69, 80, 128 A.2d 419, 425 (1957) (validating Maryland Racing Commission's power to suspend a trainer's license when the trainer violates a Commission rule); *Heaps v. Cobb*, 185 Md. 372, 278-79, 45 A.2d 73, 76 (1945) (upholding the authority of retirement boards to make decisions on pension rights); *Dal Maso v. County Comm'rs*, 182 Md. 200, 205, 34 A.2d 464, 466 (1943) (upholding the authority of zoning boards to make zoning determinations); *Solvuca v. Ryan & Reilly Co.*, 131 Md. 265, 284, 101 A. 710, 716 (1917) (Maryland's Workmen's Compensation Act held constitutional).

Having noted that the determination of facts and the application of legal principles to those facts do not necessarily constitute an exercise of judicial power, the court went on to ascertain the qualities that "imbue such determinations with judicial power."⁴⁵ The court held that implicit in Maryland's case law is the principle that "the essence of judicial power is the final authority to render and enforce a judgment."⁴⁶ The court noted with approval the rule articulated in an earlier Maryland case: "It is not enough to make a function judicial that it requires discretion, deliberation, thought and judgment. It must be the exercise of discretion and judgment within the subdivision of the sovereign power which belongs to the judiciary"⁴⁷ The court of appeals interpreted this rule to mean that a decision constitutes an exercise of judicial power only when it is binding and enforceable by the entity that rendered it.⁴⁸

The decisions of mediation panels are neither binding on the parties nor enforceable by the panels. In Maryland, either party may reject the panel's decision for any reason or for no reason at all.⁴⁹ Even if the decision is not rejected, the panel must look to the courts to enforce the award.⁵⁰ Thus, because mediation panels lack the essential power to render binding enforceable decisions, their function is merely adjudicatory and does not involve an exercise of judicial power.

Other courts considering the separation of powers issue have reached the same conclusion. In Nebraska, the function of the panel is characterized as a pretrial settlement conference that in no way encroaches on the powers of the court.⁵¹ The Arizona Supreme Court noted that Arizona's mediation panels are not empowered to render a judgment against either party, and the court characterized panel actions as merely "advisory."⁵² Wisconsin's panel was upheld as exercising quasi-judicial power only, with the reviewing court afforded full opportunity to test the panel's conclusions.⁵³ Thus, the

45. 282 Md. at 286, 385 A.2d at 64.

46. *Id.* The court cited authority from other states for this proposition. Cedar Rapids Human Rights Comm'n v. Cedar Rapids Community School Dist., 222 N.W.2d 391, 396 (Iowa 1974); Underwood v. McDuffee, 15 Mich. 361, 368 (1867); Breimhorst v. Beckman, 227 Minn. 409, 433, 35 N.W.2d 719, 733 (1949). *See also* Walters v. Blackledge, 220 Miss. 485, 505, 71 So. 2d 433, 439 (1954), in which the Mississippi Supreme Court rejected the separation of powers argument in a challenge to that state's workmen's compensation act, stating that "administrative agencies, although exercising quasi judicial powers . . . do not have the final authority to decide and to render enforceable judgments."

47. Shell Oil Co. v. Supervisor, 276 Md. 36, 45-46, 343 A.2d 521, 526 (1975) (quoting Solvuc v. Ryan & Reilly Co., 131 Md. 265, 282, 101 A. 710, 715 (1917)).

48. 282 Md. at 287, 385 A.2d at 65.

49. Md. CTS. & JUD. PROC. CODE ANN. §3-2A-06(a) (Supp. 1979).

50. *Id.* §3-2A-05(h).

51. Prendergast v. Nelson, 199 Neb. 97, 110, 256 N.W.2d 657, 667 (1977).

52. Eastin v. Broomfield, 116 Ariz. 576, 582, 570 P.2d 744, 750 (1977).

53. State *ex rel.* Strykowski v. Wilkie, 81 Wis. 2d 491, 522, 261 N.W.2d 434, 448-49 (1978).

highest courts of Nebraska, Arizona, and Wisconsin concur with the Court of Appeals of Maryland that the court system, which retains the authority to render final decisions, remains the repository of judicial power.

Only one jurisdiction, Illinois, is in disagreement.⁵⁴ The reason for the difference lies in the Illinois definition of judicial power. The Supreme Court of Illinois relied on a 1931 criminal case⁵⁵ for the proposition that "the application of principles of law is inherently a judicial function."⁵⁶ Although the statement was lifted out of context from a discussion of whether the judge or the jury should determine questions of law, the Illinois court expanded the thought to declare that the process of adjudication is an exercise of judicial power. Such precedent is of dubious value in the separation of powers context. To date, no state has accepted the Illinois definition of judicial power, and Maryland has expressly rejected it.⁵⁷

IV. EQUAL PROTECTION

Mediation panel statutes require only medical malpractice claimants to submit their claims to pretrial review. This distinction between medical malpractice plaintiffs and other tort plaintiffs raises the question of whether such a classification violates the equal protection clauses of state and federal constitutions.⁵⁸ Although Maryland, like most states, classifies the tort action itself⁵⁹ rather than the category of plaintiffs, application of the statute results in a de facto classification of malpractice plaintiffs.⁶⁰ The mere existence of a legislatively created classification, however, does not automatically violate equal protection rights.⁶¹ Equal protection clauses only prohibit such a classification when it is shown to be

54. *Wright v. Central DuPage Hosp. Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976).

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

56. 63 Ill. 2d at 322, 347 N.E.2d at 739.

57. The court of appeals found the argument "singularly unpersuasive." 282 Md. at 290, 385 A.2d at 67. Other courts have distinguished *Wright, e.g.*, *Eastin v. Broomfield*, 116 Ariz. 576, 582, 570 P.2d 744, 750 (1970), but only Maryland has expressly repudiated the Illinois court's reasoning.

58. See U.S. CONST. amend. XIV, § 1, which states in relevant part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Although article 23 of the Maryland Declaration of Rights does not expressly provide for equal protection of the laws, that article has been recognized as embodying the concept of equal protection. *Governor of Maryland v. Exxon Corp.*, 279 Md. 410, 438 n.8, 370 A.2d 1102, 1118 n.8 (1977), *aff'd*, 437 U.S. 117 (1978).

59. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-02 (Supp. 1979) ("All claims, suits and actions . . . against a health care provider").

60. See Note, *The Massachusetts Medical Malpractice Statute: A Constitutional Perspective*, 11 SUFFOLK L. REV. 1289, 1296 (1977).

61. See *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

completely arbitrary,⁶² or when the classification unduly impairs another constitutional right.⁶³

Traditionally, courts have used a "two-tiered" analysis in reviewing statutes challenged on equal protection grounds.⁶⁴ The first tier, involving a fundamental right⁶⁵ or suspect classification⁶⁶ requires that a compelling government interest justify the discriminatory classification. This is the "strict scrutiny" standard that, according to one commentator, "has been 'strict' in theory and fatal in fact."⁶⁷ The Court of Appeals of Maryland found no occasion to apply strict scrutiny to the Maryland mediation plan inasmuch as it found that the sole fundamental right involved in the case, the right to a jury trial,⁶⁸ is not abridged.⁶⁹ No court has yet applied strict scrutiny in a similar case.⁷⁰

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62. See *Lindsley v. National Carbonic Acid Gas Co.*, 220 U.S. 61, 78-79 (1911).
63. *Shapiro v. Thompson*, 394 U.S. 618, 630-31 (1969). See generally *Malpractice Mediation*, *supra* note 2, at 423-26.
64. Compare *Graham v. Richardson*, 403 U.S. 365, 374-75 (1971) (suspect classification required state to justify action with compelling interest) with *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 44 (1973) (strict scrutiny not required; rational basis test applied).
65. According to Justice Black the term "fundamental right" includes most of the specific guarantees of the first eight amendments to the United States Constitution. Cord, *Neo-Incorporation: The Burger Court and the Due Process Clause of the Fourteenth Amendment*, 44 *FORDHAM L. REV.* 215, 224-26 (1975). Additionally, the category includes such rights as are "explicitly or implicitly guaranteed by the Constitution." *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973). This latter definition includes the right of privacy, *Roe v. Wade*, 410 U.S. 113 (1973), and the right to travel, *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972).
66. Traditional suspect classifications involve "immutable personal characteristics or historical patterns of discrimination and political powerlessness." See *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 507, 261 N.W.2d 434, 442 (1978) (citing *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973)). Aside from such inherently suspect distinctions as race, national origin, or alienage, four Justices of the Supreme Court have held that discrimination based on sex is within the ambit of suspect classifications. *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion).
67. Gunther, *The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 *HARV. L. REV.* 1, 8 (1972) [hereinafter cited as Gunther]. Historically, statutes found to involve a fundamental interest or suspect classification almost invariably have been found to lack "compelling" justification. "A rare exception is *Korematsu v. United States*, 323 U.S. 214 (1944), upholding the forced evacuation of Japanese-Americans from the West Coast." P. FREUND, *CONSTITUTIONAL LAW CASES AND OTHER PROBLEMS* 914-15 (4th ed. 1977) [hereinafter cited as FREUND].
68. It may be argued on the strength of *Boddie v. Connecticut*, 401 U.S. 371, 374-77 (1971) (holding that access to courts in divorce action is fundamental) that access to the courts is a fundamental right. The Supreme Court has, however, on at least two occasions since *Boddie* rejected such an argument. *United States v. Kras*, 409 U.S. 434 (1973) (identifying the marital relationship, not right of access, as the basis for the decision in *Boddie*); *Ortwein v. Schwab*, 410 U.S. 656 (1973) (*Boddie* did not invalidate filing fee requirement for review of administrative denial of welfare benefits).
69. 282 Md. at 309-10, 385 A.2d at 77-78. See text accompanying notes 91-149 *infra*.
70. Courts which have considered the equal protection implications of mediation statutes are in agreement that the rational basis test is a proper one in this

The alternate tier of equal protection analysis involves minimal judicial scrutiny. If neither a fundamental right nor a suspect classification is involved in the case, the state need only show that the classification reasonably relates to the objective of the legislation.⁷¹ Under this "rational basis" test, courts are extremely reluctant to set aside a legislative classification "if any state of facts may reasonably be conceived to justify it."⁷²

The ultimate goal of mediation panels is to ameliorate the malpractice insurance crisis — a legitimate public policy objective.⁷³ The hope is that an alternative to expensive litigation will reduce the costs of defending malpractice suits, allowing a corresponding drop in insurance rates.⁷⁴ Under the rational basis test, classifying malpractice plaintiffs in a separate category from other tort plaintiffs is permissible because it is reasonably related to the legislative goal of remedying the specific problems of medical malpractice insurance.⁷⁵

An intermediate level of equal protection scrutiny, the means-focused test⁷⁶ was considered, but rejected by the Court of Appeals of Maryland. Under this test, the question is whether the classification

context. The New York Supreme Court, Appellate Division, did not analyze the question, rather it merely noted in a single sentence that the classification has a rational basis and must be sustained. *Comiskey v. Arlen*, 55 A.D.2d 304, 315, 390 N.Y.S.2d 122, 128 (1976). Other courts have gone to some length to supply the rational basis themselves. *See, e.g.,* *Paro v. Longwood Hosp.*, 369 N.E.2d 985, 989 (Mass. 1977). The Florida Supreme Court faced the problem that while plaintiffs were required to mediate, defendants were permitted the choice of participating in the hearing or not participating. The Florida court found that this arrangement violated equal protection, but resorted to statutory construction to save the statute. *Carter v. Sparkman*, 335 So. 2d 802, 805-06 (Fla. 1976), *cert. denied*, 429 U.S. 1041 (1977).

71. *See note 64 supra.*

72. *McGowan v. Maryland*, 366 U.S. 420, 426 (1961). Historically, statutes subjected to the rational basis test almost invariably have been sustained. P. FREUND, *supra* note 67, at 915.

73. Health care is a matter of public interest, and it is within the police power of the state to attempt to control health care costs. *Cf. Blue Cross v. Franklin Square Hosp.*, 277 Md. 93, 352 A.2d 798 (1976) (upholding the power of the Maryland Health Services Cost Review Commission to regulate hospital rates).

74. The announced purpose of the Maryland Act is to reduce the cost of malpractice claims, which would reduce the cost of liability insurance and help to stabilize the insurance market. The *Johnson* trial court concluded that "This alone justifies the Legislature's separate treatment of medical malpractice claims from other tort liability claims." *Johnson v. Attorney General*, Daily Record, June 20, 1977 at 2, col. 7 (Baltimore City Ct., No. 111/197816-099191, filed June 6, 1977).

The settlement of malpractice cases serves at least three functions related to the malpractice insurance problem. First, defense costs are saved. Secondly, large verdicts rendered by sympathetic juries are forestalled. Finally, rapid resolution of claims helps to eliminate the "long tail" problem faced by insurance carriers. *Malpractice Mediation. supra* note 2, at 419 n.27.

75. *Attorney General v. Johnson*, 282 Md. at 312, 385 A.2d at 79.

76. *See generally* Gunther, *supra* note 67. The *Johnson* court noted that Maryland has not differentiated between the rational basis test and the "means-focused" test. 282 Md. at 311, 385 A.2d at 78. The court observed that the "reasonable

substantially furthers the legislative ends.⁷⁷ The court inquires whether a crisis does exist and whether the legislation in question substantially alleviates that crisis.⁷⁸ This test was used in Idaho to evaluate a statutory provision limiting recovery in malpractice actions. The Idaho court remanded the case in order for the trial court to determine as a matter of fact whether a medical malpractice crisis existed.⁷⁹

The Court of Common Pleas of Ohio in *Graley v. Satayatham*,⁸⁰ used the means-focused test, without naming it, to strike down a statute abrogating Ohio's collateral source rule.⁸¹ In *Graley* the Ohio court, in an attempt to state the rational basis test, attributed the

basis" test is actually two tests. The legislative classification must bear some rational relationship to its end or have some fair and substantial relationship to that end. The first test is the traditional rational basis test, and is the test used by the court in upholding the Maryland mediation plan. The court applied the second test in dictum, treating it as an intermediate-scrutiny test. That test is satisfied "where the available evidence suggests the soundness of the theory." 282 Md. at 313, 385 A.2d at 79. The *Johnson* court has reawakened a controversy that seemed to have ended in Maryland with Governor of Maryland v. Exxon Corp., 279 Md. 410, 370 A.2d 1102 (1977), *aff'd*, 437 U.S. 117 (1978). That case ignored the "real and substantial relation" formulation in favor of a "reasonableness" test. Rees, *State Constitutional Law for Maryland Lawyers: Individual Civil Rights*, 7 U. BALT. L. REV. 299, 313 n.113 (1978) [hereinafter cited as Rees]. See *Detroit Automotive Purchasing Servs. v. Lee*, 463 F. Supp. 954, 969-70 (D. Md. 1978).

This confusing search for a middle level of review is unnecessary. Thus far, intermediate scrutiny has been confined to classifications based on gender and illegitimacy. See S. NOWAK, R. ROTUNDA & T. YOUNG, *CONSTITUTIONAL LAW* 525 (1978) [hereinafter cited as NOWAK & ROTUNDA]. Maryland's adoption of the Equal Rights Amendment absolutely prohibits gender based classifications. See MD. CONST., DECL. OF RIGHTS art. 46. Thus, except for possible application in the narrow area of classifications based upon illegitimacy, intermediate scrutiny is a dead letter in Maryland.

77. See Gunther, *supra* note 67, at 20.

78. For a thorough discussion of the means-focused standard and its relationship to legislation in the area of medical malpractice, see Redish, *supra* note 2, at 774-84.

79. The Idaho court stated that,

While we are as aware as any other member of the public of assertions of growing problems in the medical malpractice insurance field, the record here presents no factual basis for understanding the nature and scope of the alleged medical malpractice crisis nationally or in Idaho. It is thus impossible for this Court to assess the necessity for this legislation and whether or not the limitations on medical malpractice recovery set forth in the Act bear a fair and substantial relationship to the asserted purpose of the Act.

Jones v. State Bd. of Medicine, 97 Idaho 859, 873-74, 555 P.2d 399, 413-14 (1976), *cert. denied*, 431 U.S. 914 (1977). See also *Arneson v. Olson*, 270 N.W.2d 125, 136 (N.D. 1978) (striking down North Dakota's limitation of damages statute on equal protection grounds because the court found that no malpractice crisis existed in North Dakota).

80. 74 Ohio Op. 2d 316, 343 N.E.2d 832 (1976).

81. Under the collateral source rule, the tort-feasor is not permitted to introduce evidence at trial that plaintiff enjoys alternative sources of recompense for his injury. The purpose of the rule is to allocate full liability for damages to the party at fault. See Comment, *Recent Medical Malpractice Legislation — A First Checkup*, 50 TUL. L. REV. 655, 669 (1976).

following rule to *McGowan v. Maryland*:⁸² “[A] statutory classification cannot be tolerated unless a legitimate legislative objective is furthered by the classification.”⁸³ That is not an accurate statement of the rule in *McGowan*,⁸⁴ but rather a fair approximation of the means-focused test. The court applied the test, and finally concluded that “this legislation may be counterproductive.”⁸⁵

The Court of Common Pleas compounded its error in *Simon v. Saint Elizabeth Medical Center*.⁸⁶ In that case, relying exclusively on *Graley*, the court struck down Ohio’s mediation plan on equal protection grounds. The *Simon* court observed that it could “add nothing of importance to the equal protection analysis of the *Graley* opinion,”⁸⁷ and invalidated malpractice mediation because the process grants benefits to malpractice defendants unavailable to defendants in other tort cases.⁸⁸ This reasoning prohibits the use of different procedures for different tort actions — an impractical solution to a complex problem. Long accepted variations in tort actions, such as immunities for certain defendants and pleading and proving special damages in certain libel cases would be discriminatory under such an approach.

Another objection to the means-focused test is that it requires the judiciary to review the wisdom of legislative action. Courts have constantly rejected the role of a “super legislature.”⁸⁹ Yet, in applying the test, a court is required to determine first, whether the legislative action was necessary at all, and if it was, whether the chosen action was the proper one.

The Court of Appeals of Maryland refused to indulge in judicial second-guessing, stating “it 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.”⁹⁰ This approach is in keeping with the proper function of the judiciary in its role as reviewer of legislative enactments.

82. 366 U.S. 420 (1961).

83. 74 Ohio Op. 2d at 319, 343 N.E.2d at 836.

84. See text accompanying note 72 *supra*.

85. 74 Ohio Op. 2d at 320, 343 N.E.2d at 838.

86. 3 Ohio Op. 3d 164, 355 N.E.2d 903 (1976).

87. *Id.* at 167, 355 N.E.2d at 906.

88. *Id.*

89. See, e.g., *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976), wherein the Supreme Court of the United States stated that “[t]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.”

90. 282 Md. at 313, 385 A.2d 57 at 79. The court stated, in dicta, however, that even if the means-scrutiny test were applied, the result would be no different because there is no evidence to show that the chosen means are unlikely to accomplish the legislative goal. *Id.* at 312-13, 385 A.2d at 79-80.

V. RIGHT TO JURY TRIAL

The seventh amendment to the United States Constitution, which guarantees the right to jury trial in civil cases, has not been held applicable to the states through the fourteenth amendment.⁹¹ Nearly all state constitutions, however, provide that a jury trial is guaranteed in civil cases.⁹² Because medical malpractice is a tort,⁹³ the plaintiff has a right to a trial by jury.⁹⁴ Mandatory mediation of malpractice cases has been challenged as infringing upon two aspects of this right: (1) the right to present the case before a jury, *viz.* the due process right of access, and (2) the right to have the jury determine the facts in controversy.

A. *Right of Access*

The first attack is grounded upon the theory that mediation of claims involves such substantial expense and delay that a plaintiff's right of access to the courts is abridged.⁹⁵ The right of access is guaranteed in Maryland by article nineteen of the Declaration of Rights.⁹⁶ The "law of the land" provision in article nineteen

91. *Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974); *Colgrove v. Battin*, 413 U.S. 149, 169 n.4 (1973); *cf.* *Minneapolis & St. L.R.R. v. Bombolis*, 241 U.S. 211 (1916) (prior to adoption of the 14th amendment incorporation doctrine).

92. The only exceptions are Louisiana and Colorado.

93. *See* PROSSER, *LAW OF TORTS* 162-66 (4th ed. 1971).

94. The question of whether a party is entitled to a jury trial has often been resolved by use of a historical test: if a jury trial was available to a similar claimant at the time that the Constitution was adopted, the jury trial right is secured as "inviolable," and the parties must be afforded a trial by jury. *E.g.*, *Houston v. Lloyd's Consumer Acceptance Corp.*, 241 Md. 10, 20, 215 A.2d 192, 198 (1965). *Knee v. Baltimore City Passenger Ry.*, 87 Md. 623, 624, 40 A. 890, 891 (1898). The historical test does not require that the state refrain from adding qualifications to the right, but has been specifically limited to an evaluation of the *availability* of a jury trial. *See Walker v. New Mexico & So. Pac. R.R.*, 165 U.S. 593, 596 (1897). It is important to note, however, that in the federal court system the jury trial question is no longer resolved by simple application of the historical test. *See Ross v. Bernhardt*, 396 U.S. 531 (1970); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959).

95. Justice England of the Florida Supreme Court, while concurring in the validation of Florida's mediation plan, was troubled "that persons who seek to bring malpractice lawsuits must be put to the expense of two full trials of their claim." *Carter v. Sparkman*, 335 So. 2d 802, 807 (Fla. 1976), *cert. denied*, 429 U.S. 1041 (1977). Justice England noted further, however, that "[a] disparity of resources has always been an imbalance in litigation which the courts are relatively powerless to adjust." *Id.* at 808.

96. Article 19 provides as follows:

That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the land.

guarantees the same due process of law as the fourteenth amendment to the Federal Constitution.⁹⁷

The threshold question in due process analysis is whether state action has deprived any person of life, liberty, or property. In the context of mediation panels, the plaintiff must establish a liberty or property interest in right of access to the courts and a deprivation of that interest. In Maryland, a plaintiff is guaranteed "remedy by the course of the [l]aw of the land."⁹⁸ That law is not a solidified body of law. "Rather it is a 'system' where sometimes evolutionary, sometimes revolutionary changes are made to meet changing conditions and circumstances."⁹⁹ A plaintiff may have a liberty or property interest in the system as a whole, but not in any particular rule. The rules may be changed at the will, or even at the whim, of the legislature.¹⁰⁰ Thus, although a plaintiff may demand that his rights be determined by the "law of the land," he may not block changes in that law by claiming an "interest" in the status quo.

Because a plaintiff has no liberty or property interest in the right of access to the courts, the protections of article nineteen of the Maryland Declaration of Rights are not triggered. Nonetheless, in dictum, the Court of Appeals of Maryland in *Attorney General v. Johnson*¹⁰¹ applied substantive due process analysis to the facts. Substantive due process requires that the laws passed by the state legislature bear a reasonable relationship to a legitimate objective.¹⁰² This "ends-means" test is satisfied by the same rational basis test required by equal protection analysis.¹⁰³ Thus, even if a plaintiff can establish deprivation of a vested liberty or property interest, so long as a court finds that the additional expense and delay is not unreasonable in relation to a legitimate legislative goal, substantive due process is satisfied.¹⁰⁴ Other jurisdictions that have considered

97. *In re Easton*, 214 Md. 176, 187, 133 A.2d 441, 447 (1957). In construing article 19, the Court of Appeals of Maryland has held that the decisions of the Supreme Court are practically direct authorities. *Sanner v. Trustees of Sheppard and Enoch Pratt Hosp.*, 278 F. Supp. 138, 142 (D. Md.), *cert. denied*, 393 U.S. 982 (1968); *Governor of Maryland v. E Exxon Corp.*, 279 Md. 410, 370 A.2d 1102 (1977), *aff'd*, 437 U.S. 117 (1978).

98. MD. CONST., DECL. OF RIGHTS art. 19.

99. *Sanner v. Trustees of Sheppard and Enoch Pratt Hosp.*, 278 F. Supp. 138, 142 (D. Md.), *cert. denied*, 393 U.S. 982 (1968).

100. *Munn v. Illinois*, 94 U.S. 113, 134 (1877).

101. 282 Md. 274, 385 A.2d 57, *appeal dismissed*, 437 U.S. 117 (1978).

102. NOWAK & ROTUNDA, *supra* note 76, at 410. If a fundamental right is involved, however, the state must show a compelling government interest. *Id.* In essence, the two-tiered test associated with equal protection analysis has been transplanted into the area of due process. See *Roe v. Wade*, 410 U.S. 113, 173 (1973) (Rhenquist, J., dissenting). For a thorough treatment of substantive due process, see Preston & Mehlman, *The Due Process Clause As A Limitation On The Reach Of State Legislation: An Historical And Analytical Examination Of Substantive Due Process*, 8 U. BALT. L. REV. 1 (1978). For a discussion of the due process test in Maryland, see Rees, *supra* note 76, at 313 n.114.

103. NOWAK & ROTUNDA, *supra* note 76, at 410.

104. See 282 Md. at 299, 385 A.2d at 71.

the right of access question agree with Maryland that the restriction is reasonable in light of the legitimate goal of reducing the cost of medical malpractice insurance.¹⁰⁵

It is sometimes argued that mediation panel statutes abolish a common law right without providing a reasonable substitute for that right thereby violating due process.¹⁰⁶ The idea that due process requires a reasonable substitute or quid pro quo apparently originated from dictum in *New York Central Railroad v. White*.¹⁰⁷ The Court of Appeals of New York has indicated, however, that it seriously questions whether the quid pro quo test is any test at all.¹⁰⁸

Despite doubts about the validity of quid pro quo as applied to whether mediation panels unconstitutionally abridge a litigant's access to courts, several courts have accepted the argument that legislation limiting the amount of recoverable *damages* in malpractice actions violates due process. These courts reason that such legislation fails to provide a substitute for the right to recover damages above a specified limit.¹⁰⁹ In considering the right of access question, the trial court in *Johnson* relied partly on the quid pro quo test.¹¹⁰ The court of appeals, however, ignored the test completely, which indicates that quid pro quo is probably of little importance in Maryland. Other courts have held that malpractice mediation does not eliminate any substantive rights, but merely alters the procedure

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105. *Carter v. Sparkman*, 335 So. 2d 802, 805-06 (Fla. 1976), *cert. denied*, 429 U.S. 1041 (1977); *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 261 N.W.2d 434, 444 (1978). The latest jurisdiction to consider the right of access question disagrees with Maryland, however. The Supreme Court of Missouri declared that state's mediation plan unconstitutional on the grounds that it violated a litigant's right to seek *immediate* redress in the courts. *State ex rel. Cardinal Glennon Memorial Hosp. v. Gaertner*, 583 S.W.2d 107, 110 (Mo. 1979). Chief Justice Morgan, however, in a strong dissent, noted that the procedure does not interfere with the ultimate jury determination of the issues. The Chief Justice concluded that "the condition is minimal and reasonable in light of the legislation's purpose of minimizing the medical [mal]practice crisis." *Id.* at 115.
 106. *See, e.g., Jones v. State Bd. of Medicine*, 97 Idaho 859, 868-69, 555 P.2d 399, 408-09 (1976).
 107. 243 U.S. 188 (1917). "[I]t perhaps may be doubted whether the State could abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead." *Id.* at 201.
 108. *Montgomery v. Daniels*, 38 N.Y.2d 41, 56, 340 N.E.2d 444, 453, 378 N.Y.S.2d 1, 14 (1975).
 109. *Wright v. Central DuPage Hosp. Ass'n*, 63 Ill. 2d 313, 328, 347 N.E.2d 736, 742 (1976); *Simon v. Saint Elizabeth Medical Center*, 3 Ohio Op. 3d 164, 170, 355 N.E.2d 903, 910 (1976).
 110. The trial court compared the Maryland plan to workmen's compensation law. Workmen's compensation abrogated the common law concept of fault for employees' injuries but provided a substitute remedy allowing recovery according to a statutory schedule. At least one court has identified this act of substitution as the justification for upholding workmen's compensation. *Department of Natural Resources v. Linchester Sand and Gravel Corp.*, 274 Md. 211, 227, 334 A.2d 514, 524-25 (1975). The *Johnson* trial court noted that "no such quid pro quo is found in the Act, and this factor is not without significance." *Johnson v. Attorney General*, Daily Record, June 20, 1977, at 2, col. 5 (Baltimore City Ct., No. 111/197816-099191, filed June 6, 1977).

for enforcing those rights.¹¹¹ One court found the requisite quid pro quo in lowered costs to the plaintiff as a consumer of medical services.¹¹² In summary, the quid pro quo test is of little analytical value as a measure of medical mediation's satisfaction of due process standards, either because it is not a test at all, or because the requirements of the test are satisfied. No court has used quid pro quo to invalidate mediation legislation, and because of lack of certainty about the test, it is not likely that any court will do so.

B. *The Jury as Fact Finder*

In several states, mediation panels have been challenged on the ground that admissibility of the panel's decision at a later trial de novo deprives the jury of its protected function as finder of fact. The gravamen of the argument is that the jury will be so influenced by the finding of the mediation panel that it will not render its own verdict. An early trial court decision accepted this reasoning and held that Ohio's mediation panel statute unconstitutionally abridged the right to jury trial.¹¹³ The court reasoned that admission of the panel decision "substantially reduces a party's ability to prove his case, because that party must persuade a jury that the decision of the arbitrators was incorrect, a task not easily accomplished in view of the added weight which juries have traditionally accorded the testimony of experts."¹¹⁴ The court further insisted that the statute put "strings" on the jury trial right, "making it a far less effective right than would otherwise be the case."¹¹⁵

A New York trial court, however, took an equally firm stand in support of the constitutionality of admitting the panel's finding.¹¹⁶ The court praised the jury system for its ability to remain objective: "Historically, jurors for the most part have proven their independence. They guard their roles with unique jealousy. They accept with obvious pride the admonitions of the trial court that they are the 'sole judges of the facts.'"¹¹⁷ As appellate courts began to consider the question, the two trial court decisions inevitably came into conflict. Without exception, the reasoning of the New York court, extolling the independence of jury decisions, has prevailed.¹¹⁸

111. See, e.g., *Paro v. Longwood Hosp.*, 369 N.E.2d 985, 991 (Mass. 1977).

112. *Id.* But see *Simon v. Saint Elizabeth Medical Center*, 3 Ohio Op. 3d 164, 170, 355 N.E.2d 903, 910 (1976) (rejecting the societal quid pro quo argument that some must give up their rights so that all may receive cheaper medical care).

113. *Simon v. Saint Elizabeth Medical Center*, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (1976).

114. *Id.* at 168, 355 N.E.2d at 908.

115. *Id.*

116. *Halpern v. Gozan*, 85 Misc. 2d 753, 381 N.Y.S.2d 744 (1976).

117. *Id.* at 759, 381 N.Y.S.2d at 748.

118. See, e.g., *Eastin v. Broomfield*, 116 Ariz. 576, 581, 570 P.2d 744, 749 (1977) ("Moreover, we believe, as did the court in *Halpern v. Gozan* . . . that if the trial court properly instructs the jury they will perform their role as the exclusive finder of fact.").

The conflict and resulting trend are particularly noteworthy in regard to Maryland, because Maryland is the only state that cloaks the finding of the mediation panel with a presumption of correctness.¹¹⁹ Thus, the panel's finding carries more weight in Maryland and seems to intrude further into the province of the jury than in any other state. In upholding similar statutes, other courts have relied on the fact that the panel finding is accorded no particular weight. The Maryland statute, however, must be supported on other grounds.

The court of appeals in *Attorney General v. Johnson*,¹²⁰ found that the General Assembly of Maryland had merely established a rebuttable presumption. "It cuts off no defense, interposes no obstacles to a full contestation of all the issues, and takes no question of fact from either court or jury."¹²¹ In most states the Maryland style presumption would rest lightly on the shoulders of the party against whom it weighs. If neither party presents evidence at the trial de novo, a directed verdict should issue for the party in whose favor the presumption lies.¹²² If, however, his opponent can muster sufficient evidence to avoid a directed verdict, the presumption is rebutted. Thus, in most jurisdictions, either party's burden to rebut is subsumed under his far greater burden to prove his case in chief. No additional burden would be imposed by the presumption of correctness. Although the presumption is sufficient to sustain the burden of proof, it is defeated by the introduction of rebutting testimony. This is the "bursting bubble" theory of presumptions accepted by nearly all jurisdictions.¹²³

In Maryland, however, "the cases indicate a presumption-by-presumption approach with an emphasis on according presumptions a greater procedural potency than the bursting bubble theory."¹²⁴ The Maryland courts have concluded that some presumptions are supported by underlying values that should not be banished upon the appearance of slight evidence.¹²⁵ In some cases, Maryland courts require that the presumption be rebutted by a preponderance of the

119. See note 19 *supra*.

120. 282 Md. 274, 385 A.2d 57, *appeal dismissed*, 439 U.S. 805 (1978).

121. 282 Md. 274, 294-95, 385 A.2d 57, 69 (quoting *Meeker v. Lehigh Valley R.R.*, 236 U.S. 412, 430 (1915)). In *Meeker*, the court held that a provision permitting the introduction of the prior findings and order of the Interstate Commerce Commission as prima facie evidence of the facts contained therein did not violate the right to trial by jury. See also *Ex parte Peterson*, 253 U.S. 300 (1920) (admission of auditor's report as prima facie evidence does not violate right to jury trial).

122. See C. McCORMICK, *LAW OF EVIDENCE* 821 (2d ed. 1972) [hereinafter cited as McCORMICK].

123. Annot., 5 A.L.R.3d 19 (1966).

124. Comment, *Presumptions in Civil Cases: Procedural Effects Under Maryland Law In State and Federal Forums*, 5 U. BALT. L. REV. 301, 312 (1976) [hereinafter cited as *Presumptions*].

125. *Id.* at 315.

evidence.¹²⁶ In other cases, rebuttal of the presumption may require less than a preponderance.¹²⁷ In order to determine the weight to be accorded a presumption, the court examines the underlying policy for the presumption. The more important the reason for the presumption, the more likely that a preponderance of the evidence will be required to overturn it.¹²⁸

In *Grier v. Rosenberg*,¹²⁹ the case that fashioned the current Maryland rule, the presumption was based both upon substantial public policy¹³⁰ and upon the inferential probative value of the

126. See, e.g., *Phillips v. Cook*, 239 Md. 215, 222, 210 A.2d 743, 748 (1965).

127. See *Presumptions*, *supra* note 124, at 314, for a discussion of the now-abolished presumption of death that arose from an unexplained absence of seven years. The author suggests that the presumption of death was rebuttable by less than a preponderance of the evidence.

128. See *Presumptions*, *supra* note 124, at 308-15.

129. 213 Md. 248, 131 A.2d 737 (1957). Plaintiff Grier alleged personal injury caused by the sudden stop of a Baltimore City transit bus on which she was a passenger. The bus had stopped quickly to avoid a collision with a car owned by defendant Rosenberg. The car did not stop after the near collision, but its license number was noted by the bus driver. Rosenberg conceded that in cases of this kind proof of ownership of the car gives rise to a rebuttable presumption that the car was, in fact, operated by the owner or his agent, servant, or employee. Rosenberg contended, however, that the presumption was rebutted by his testimony that he could not recall any activity that would have taken him near the scene of the injury. Rosenberg stated that someone from his office might have driven his car on the day of the injury, but that inquiries among his employees had not produced anyone who remembered the incident. The court of appeals held that although Rosenberg had given sufficient evidence to present a jury question, and thus avoid a directed verdict, the presumption did not disappear from the case. 213 Md. at 255, 131 A.2d at 740. In most jurisdictions the bubble would have burst, and the presumption would not have gone to the jury. In Maryland, however, a different rule is followed:

In cases of this nature, after the plaintiff has offered proof of the ownership of the automobile in the defendant, if the defendant does not offer any evidence on the issue of agency, the Court should instruct the jury that if they find that as a fact that the defendant owned the car, they must find he is responsible for the negligence (if any) of the driver. If the defendant does present evidence to show that the alleged driver was engaged on business or a purpose of his own, it may be so slight that the Court will rule it is insufficient to be considered by the jury in rebuttal of the presumption, in which case the Court should grant the same instruction it would have granted if the defendant had offered no evidence on the issue. The evidence may be so conclusive that it shifts the burden or duty of going forward with evidence back to the plaintiff, in which event the defendant would be entitled to a directed verdict, if the plaintiff does not produce evidence in reply, unless there is already evidence in the case tending to contradict defendant's evidence The evidence, however, may fall between the two categories mentioned above, in which event the issue of agency should be submitted to the jury.

213 Md. at 254-55, 131 A.2d at 740.

130. The presumption rests on defendant's superior access to the evidence and on the social policy of widening the responsibility for owners of motor vehicles. *McCORMICK*, *supra* note 122, at 822.

underlying set of facts.¹³¹ Therefore, the *Grier* court determined that a preponderance of the evidence was required to rebut that presumption. The mediation panel presumption, on the other hand, is based upon a desire to save time and money. There is no vital public policy requiring that the presumption be accorded exceptional significance. Therefore, it is possible that in applying the presumption the judge need only determine whether credible evidence has been introduced in rebuttal sufficient to support a finding contrary to the presumed fact.

It is more probable, however, that rebuttal of the presumption of correctness requires more than mere credible evidence. The Maryland court noted that the presumption is precisely the same as that found in Maryland's Workmen's Compensation Act.¹³² Under Maryland law, the finding of the Workmen's Compensation Commission is "prima facie correct."¹³³ That provision puts the burden of proof on the party taking the appeal, whether he be plaintiff or defendant.¹³⁴ If the plaintiff is the party appealing he must prove by a preponderance of the evidence that the decision of the Commission was incorrect. When the defendant loses before the Commission and appeals, the burden of proof shifts to the defendant.¹³⁵ Under workmen's compensation law, the provision placing the burden of proof on the appellant means only that he must prove in the trial court what he asserts.¹³⁶ The presumption of correctness, because it has the same effect as the workmen's compensation provision just discussed, requires the plaintiff at the trial de novo to persuade the court or jury by a preponderance of the evidence that the decision of the mediation panel was incorrect. Only if the mind of the trier of fact is in equipoise on the evidence in the record will the presumption be sufficient to tip the scales in favor of the party who prevailed at the mediation hearing.¹³⁷

No matter what the effect of the presumption at the trial de novo, the jury remains the final arbiter of the issues raised, and its decision, based upon consideration of all the evidence, prevails. The New York trial court in *Halpern v. Gozan*,¹³⁸ and every appellate court to consider the question since then have expressed confidence in the jury's ability to remain unaffected by "suggestion, device, or

131. See *Presumptions*, *supra* note 124, at 314.

132. 282 Md. at 293, 385 A.2d at 68.

133. MD. ANN. CODE art. 101, § 56(c) (1979).

134. *Stewart & Co. v. Howell*, 136 Md. 423, 434, 110 A. 899, 902 (1920).

135. *Id.*

136. *Williams Constr. Co. v. Bohlen*, 189 Md. 576, 580, 56 A.2d 694, 696 (1948). The party appealing may rely on the same evidence presented before the Commission, but must convince the trier of fact that the Commission incorrectly decided the facts, drew improper inferences from the facts, or misconstrued the law applicable to the facts. *Id.*

137. 282 Md. at 293, 385 A.2d at 68.

138. 85 Misc. 2d 753, 381 N.Y.S.2d 744 (1976).

artifice."¹³⁹ Careful jury instruction should prevent any intrusion on the parties' right to have the jury make an independent determination of the facts.¹⁴⁰

While the regulation of access to the courts under the mediation plan may not amount to deprivation of due process, that regulation does affect the right to a jury trial guaranteed by article five of the Declaration of Rights.¹⁴¹ That the jury trial right may be subject to regulation has been long established in Maryland.¹⁴² The essential requirement is that a jury trial be allowed before the final decision.¹⁴³ Only if the legislature made the findings of the mediation panel final and binding would the jury trial right be directly abridged.¹⁴⁴

A closer question is whether the mediation requirement constitutes an onerous condition, restriction, or regulation that makes the jury trial right "practically unavailable."¹⁴⁵ The Florida Supreme Court responded that while mandatory compliance with the malpractice mediation procedure is at the "outer limits of constitu-

139. *Id.* at 759, 381 N.Y.S.2d at 748.

140. For a discussion of jury instructions on presumptions that deviate from the bursting bubble approach, see MCCORMICK, *supra* note 122, at 824-26.

141. The Maryland Declaration of Rights provides in pertinent part for the right to a jury trial as follows:

That the Inhabitants of Maryland are entitled to the Common law of England, and the trial by Jury, according to the course of that Law, and to the benefit of such of the English statutes as existed on the Fourth day of July, seventeen hundred and seventy-six; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law or Equity; and also of all Acts of Assembly in force on the first day of June, eighteen hundred and sixty-seven; except such as may have since expired, or may be inconsistent with the provisions of this Constitution; subject, nevertheless, to the revision of, and amendment or repeal by, the Legislature of this State.

MD. CONST., DECL. OF RIGHTS, art. 5.

142. *Steuart v. Baltimore*, 7 Md. 500, 512 (1855).

143. *Knee v. Baltimore City Passenger Ry.*, 87 Md. 623, 625, 40 A. 890, 891 (1898).

144. *See Attorney General v. Johnson*, 282 Md. 274, 289-90, 385 A.2d 57, 66, *appeal dismissed*, 439 U.S. 805 (1978).

145. *Id.* at 303, 385 A.2d at 74. The "practically unavailable" standard originated in *In re Smith*, 381 Pa. 223, 112 A.2d 625, *appeal dismissed sub nom. Smith v. Wissler*, 350 U.S. 858 (1955). The Pennsylvania Supreme Court noted that the right to jury trial is lost only when the statute closes the courts to litigants and makes the decision of the arbitrators the final determination of the parties' dispute. Therefore, there is no denial of the right of trial by jury if the statute preserves that right to each of the parties by the allowance of an appeal from the decision of the arbitrators or other tribunal. "The only purpose of the constitutional provision is to secure the right of trial by jury before rights of person or property are *finally* determined. [emphasis in original]. All that is required is that the right of appeal for the purpose of presenting the issue to a jury must not be burdened by the imposition of onerous conditions, restrictions or regulations which would make the right *practically unavailable*." *Id.* at 231, 112 A.2d at 629 (emphasis added).

tional tolerance,"¹⁴⁶ it is not such a burden, and the Florida plan was held constitutional. Although the Maryland court's statement that "the court proceeding with its jury trial is subjected to no regulation or burden of any kind as a precondition to its utilization"¹⁴⁷ is somewhat questionable, the point is that burdens and regulations may be affixed to the right of trial by jury¹⁴⁸ so long as the right is not made practically unavailable. In light of the fact that the right to jury trial may be delayed or made more expensive,¹⁴⁹ it must be recognized that the "practically unavailable" standard requires a heavier burden than malpractice mediation imposes.

VI. CONCLUSION

A sharp rise in malpractice insurance premiums briefly highlighted the area of medical malpractice. Although developments in that area will likely continue, the volume of legislative activity has diminished considerably. The dozens of plans, programs, and solutions to the malpractice insurance problem have come under constitutional examination. Nearly all have survived judicial scrutiny. The basic reason lies in the tradition of judicial deference to legislative wisdom.

Of the entire range of extra-judicial dispute resolution mechanisms, mediation panels hold the most promise. The rights of both parties are preserved for trial, if need be, but a mediation plan provides a powerful incentive to settlement.

Considering the onslaught of increasingly complex litigation overburdening the court system, further legislative action is almost a certainty. If mediation panels prove to be effective in the area of medical malpractice law, it is possible that state legislatures will apply such solutions to other areas of the law as well, perhaps beginning with various personal injury torts. Mediation can be both effective and impervious to constitutional attack if the legislature follows certain simple rules in drafting. The most important consideration concerns the decision of the mediation panel itself. The object is to derive maximum impact from the decision, while leaving unabridged the right to jury trial and observing the doctrine of separation of powers. To this end, any statute must guarantee a trial de novo following mediation.

*Attorney General v. Johnson*¹⁵⁰ upholds the admissibility of the panel's decision as evidence at trial and permits the decision to be

146. *Carter v. Sparkman*, 335 So. 2d 802, 806 (Fla. 1976).

147. 282 Md. at 303, 385 A.2d at 74.

148. *Knee v. Baltimore City Passenger Ry.*, 87 Md. 623, 625, 40 A. 890, 891 (1898).

149. *Id.*

150. 282 Md. 274, 385 A.2d 57, *appeal dismissed*, 439 U.S. 805 (1978).

cloaked with a presumption of correctness. Given the advantages of these provisions, there is little doubt that mediation could be made an effective alternative to formal courtroom proceedings.¹⁵¹ Whether mediation plans will prove adequate in the face of the burdens of administrative practicality, however, awaits the test of time.¹⁵²

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151. Under the doctrine laid down in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the United States District Court for the District of Maryland has held that suits arising under diversity jurisdiction that are otherwise covered by the Act must be mediated prior to the filing of a complaint in the District Court. *Davison v. Sinai Hosp. of Baltimore, Inc.*, 462 F. Supp. 778, 779-80 (D. Md. 1978); *accord Edelson v. Soricelli*, 610 F.2d 131 (3d Cir. 1979) (applying Pennsylvania law); *Woods v. Holy Cross Hosp.*, 591 F.2d 1164, 1168 (5th Cir. 1979) (applying Florida law). Thus, the Maryland presumption of the correctness of the mediation panel decision will likely be applied in the federal courts as "a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision." FED. R. EVID. 302. *See generally Maryland v. Baltimore Transit Co.*, 329 F.2d 738 (4th Cir.), *cert. denied*, 379 U.S. 842 (1964).
152. Not all plans have proved a resounding success in handling the practicalities of administration. Indeed, the Pennsylvania plan has been attacked unsuccessfully on such grounds, prompting the Third Circuit to observe:
Appellants forcefully argue that plaintiffs who have been injured because of medical malpractice have effectively been denied an opportunity to present their cases to a judge and jury. A record that discloses only nine arbitration hearings out of 2,466 claims does not describe a state arbitration system that works exceptionally well, moderately well, or even modestly well. Rather, it describes a system that, though theoretically sound, is actually a resounding flop.
Edelson v. Soricelli, 610 F.2d 131, 136 (3d Cir. 1979).