Who Should Decide the Fate of Medical Malpractice Cases?

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Introduction

As human beings, doctors are bound to make mistakes which can result in severe injury or the death of their patient. In such unfortunate situations, the person who was injured or died, or the deceased's beneficiary may be entitled to recover compensatory and other monetary damages by filing a medical malpractice lawsuit against the medical professional in question. Medical malpractice litigation "is a process to determine the existence or absence of liability in a dispute between a patient and healthcare provider (doctor, hospital, nurse etc.)."[1] As this definition suggests, when a patient suffers unintended injuries or death at the hands of a medical professional, any claim of liability against that professional will initially be addressed through negotiations and, if not informally resolved, by a judge or jury presiding over a medical malpractice lawsuit.

Ninety-three percent of medical malpractice claims are resolved before trial; the remaining seven percent ended in a trial.[2] The procedures followed in medical malpractice cases are dependent on individual state laws, and rules of evidence and civil procedure. For example, Florida

[1] Steven E. Pegalis & Harvey F. Wachsman, *American Law of Medical Malpractice, Preface* iii, THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY, Vol. 1 (1980).

[2] Thomas H. Cohen & Kristen A. Hughes, *Medical Malpractice Insurance Claims in Seven States,* Bureau of Justice Statistics (March 2007), https://www.bjs.gov/content/pub/pdf/mmicss04.pdf.

statutes mandate a three-week settlement conference before trial. Alternatively, seventeen states[3] have requirements which prevent medical malpractice cases from reaching the trial stage without prior review by a screening panel.[4]

Screening panels, also known as the review panel procedure, are extrajudicial panels that decide whether a claimant has sufficient grounds to pursue a medical malpractice claim against a medical provider. These panels are used prior to the filing of a lawsuit but, more commonly, are used during the pendency of a medical malpractice lawsuit before it reaches the trial stage. The panels are comprised of doctors, attorneys, and judges.[5] In some respects, these panels are looked upon as a form of alternative dispute resolution with attributes from arbitration proceedings as well as pre-trial mediation. Similar to arbitration, the panels review the evidence presented by the parties and make decisions regarding whether or not the claim should proceed to the trial stage (or, in a pre-suit scenario,

[3] Those states are: Alaska, Delaware, Hawaii, Idaho, Indiana, Kansas, Louisiana, Maine, Massachusetts, Montana, Nebraska, New Hampshire, New Mexico, Utah, Virginia, the Virgin Islands and Wyoming.

[4] Heather Morton, *Medical Liability/ Malpractice ADR and Screening Panels Statutes,* NAT'L CONF. of ST. LEGIS. (NCSL) (May 20, 2014), https://www.ncsl.org/research/financial-services-and-commerce/medical-liability-malpractice-adr-and-screening-panels-statutes.aspx

[5] Vincent C. Alexander, State Medical Malpractice Screening Panels in Federal Diversity Action, ST. JOHN'S UNIVERSITY SCHOOL OF LAW (1980), https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1004&=&context=faculty_publications&=&sei-redir=1&referer=https%253A%252F%252Fscholar.google.com%252Fscholar%253Fhl%253Den%2526as_sdt%253D0%25252C10%2526q%253Dmedical%252Bmalpractice%252Bscreening%252Bpanels%252B%2526btnG%253D#search=%22medical%20malpractice%20screening%20panels%22

whether the injured party has a valid malpractice claim).[6] The panels also resemble mediation because of the high probability that the claim will be settled prior to the trial stage with panels taking an active role in promoting pre-trial settlement. Upon review by the panel, there is a possibility that the claim will be permitted to proceed to trial, but panels have been empowered to dismiss lawsuits altogether.[7] The role of screening panels acting as quasi-judicial bodies adjudicating the validity of medical malpractice claims, have been the subject of constitutional challenges. As a result, the existence of screening panels presents complicated and contentious issues for judges, lawyers' claimants, and the general public.

This article will examine the existence and effectiveness of the mandatory screening panel procedure (also known as the mandatory review panel procedure) in medical malpractice cases as implemented in seventeen states.

History

The legal medical malpractice field is one of the oldest fields of law. According to the AMA Journal of Ethics, the concept of medical malpractice can be traced back to the Code of Hammurabi (2030 BCE), an ancient Babylonian code of law.[8] For example, one of the clauses stated that if a nobleman died under the care of a surgeon, said surgeon

[6] Dennis J. Rasor, *Mandatory Medical Malpractice Screening Panels: A Need to Re-Evaluate,* Ohio State Journal on Dispute Resolution*, Vol. 9:1* (1993), at 115, https://kb.osu.edu/bitstream/handle/1811/79864/OSJDR_V9N1_115.pdf?sequence=1.
[7] Alexander, *supra* note 5 at 2.
[8] Joseph J. Kass & Rachel B. Rose, Medical Malpractice Reform: Historical Approaches Alternative Models, and Communications and Resolution Programs, AMA JOURNAL OF ETHICS (Mar. 2016), https://journalofethics.ama-assn.org/article/medical-malpractice-reform-historical-approaches-alternative-models-and-communication-and-resolution/2016-03.

would be punished by cutting his hands.[9] Centuries later, medical malpractice litigation would still be recognized in courts around the world, including Roman courts and later on England's courts in 1200 CE. It was not long after America's independence from England that medical malpractice came to its shores.

According to an article published in the Clinical Orthopedics and Related Research Journal, the United States did not see its first field-related malpractice case until the early 18th century.[10] The earliest record of a medical malpractice case in the United States occurred in the 1796 Connecticut case of *Cross v. Guthrie*.[11] In this case, the plaintiff, widower/husband to the deceased patient, argued that his wife died because of the aggressive and unskilled manner in which a surgeon conducted the surgical procedure.[12] The plaintiff prevailed against the surgeon and was awarded monetary compensation.[13] Following this seminal case, twenty-seven medical malpractice cases arose from 1794-1861, the majority of which involved orthopedic malpractice (fractures, amputations and dislocations).[14] As a result of this increase in medical

[9] T. Halwani, M. Takrouri. *Medical laws and Ethics of Babylon as read in Hammurabi's code*, The Internet Journal of Law, Healthcare and Ethics (2006) Vol. 4: 2, http://ispub.com/IJLHE/4/2/10352.
[10] B. Sony Bal, MD, MBA, *An Introduction to Medical Malpractice in the United States*, Clinical Orthopedics and Related Research (Nov. 26, 2008), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2628513/.
[11] Robert J. Flemma, M.D., *Medical Malpractice: A Dilemma in Search for Justice*, Marquette Law Review, Vol. 68 (Winter 1985), https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1948&context=mur
[12] Kant Patel & Mark E. Rushefsky, Healthcare Politics & Policies in America 2nd Ed., M.E. Sharp Inc.(1999) at 199.
[13] Flemma, *supra* note 11.
[14] Id.

malpractice claims, medical professionals within the United States experienced a significant shift in professional liability exposure.

The introduction of anesthesia in 1846 expanded the surgical field and the number of surgical procedures. However, with the increase of surgical procedures, it is not surprising that the number and types of medical malpractice claims also increased, including dental and pharmaceutical malpractice claims. Some medical practitioners halted their surgical practice because of the rising threat of medical malpractice claims.[15] By the 1970s, the rise of medical malpractice cases led physicians, medical practitioners, and medical facilities to increase the price of their services in order to pay for increased malpractice insurance coverage.[16] The increase of malpractice coverage for medical providers is said to have caused an increase in insurance premiums for the general public.[17] State legislators, medical professionals, and special interest groups took notice.

In the U.S., seventeen states attempted to alleviate the surge in medical malpractice claims being filed in their court systems by codifying rules creating the screening panel procedure.[18] These seventeen states were Alaska, Delaware, Hawaii, Idaho, Indiana, Kansas, Louisiana, Maine, Massachusetts, Montana, Nebraska, New Hampshire, New Mexico, Utah, Virginia, the Virgin Islands and Wyoming, all of which have the review boards active to date.[19] The states that implemented the review panels sought to reduce the costs of medical provider's malpractice insurance and subsequently, the insurance premiums of the general

[15] Id.
[16] Alexander, *supra* note 5 at 1.
[17] Id.
[18] Id.
[19] Id.

public.[20] Are the states which implemented the review panels seeing fruit as a result of their implementation?

Analysis

Following the enactment of laws creating screening panels, and their subsequent involvement with courts in the seventeen states, malpractice insurance premiums for health care providers decreased. The purpose of the screening panels was to decrease the cases through a filtering process, which should in turn decrease the malpractice insurance premiums for health care providers due to a reduction in legal costs. In 1989, the insurance premiums decreased from 5.6% to 4.8%.[21] For example, Maine's insurance premiums fell by 32% and malpractice premiums in Kansas dropped by 25%.[22] And from 1991 onward, insurance premiums for health care providers saw decreases in premiums by five to thirty five percent.[23] One example of this can be gleaned from statistics regarding St. Paul Fire and Marine Insurance Company, the largest provider of malpractice insurance for physicians and hospitals in the United States.[24] Through the early 1990's, St. Paul Fire and Marine Insurance Company, decreased its malpractice insurance premiums by six to twenty-five percent.[25] In 1993, the insurance company "announced that it would not

[20] Stephen Zuckerman, Information on Malpractice: A Review of Empirical Research on Major Policy Issues,
Law & Contemporary Problems, DUKE LAW, (Spring 1985),
https://scholarship.law.duke.edu/lcp/vol49/iss2/5/.
[21] Dennis J. Rasor, *supra* note 6 at 115.
[22] Robert Pear, Insurers Reducing Malpractice Fees for Doctors in U.S., N.Y. TIMES (Sep. 23, 1990),
https://www.nytimes.com/1990/09/23/us/insurers-reducing-malpractice-fees-for-doctors-in-us.html
[23] Id.
[24] Id.
[25] Id.

raise malpractice premiums."[26] Thus, it appears that the implementation of screening review panels resulted in a reduction of medical malpractice insurance premiums. While this was good news for physicians who were leaving the practice or paying high medical malpractice insurance premiums, the same was not true for the general public.

As the premiums for medical malpractice insurance continued to decrease for physicians, it was projected that health care provider charges and health premiums for the general public would also decrease. That projection was wrong. By 1990, the cost for a consumer to see a physician was fifty percent more than the consumer price index.[27] Furthermore, the cost of health care insurance for the general public had "skyrocketed."[28] According to the Health System Tracker, the total health expenditures had increased nationwide from $443 in 1985 to $788 in 1991, per person on an annual basis.[29] Healthcare spending totaled $74.6 billion in 1970, and by the late 1990's, the amount spent on healthcare reached $1.4 trillion.[30] Despite the fact that malpractice insurance premiums continued to decrease, the amount paid by Americans for healthcare continued to increase. From an economic standpoint, the implementation of screening

[26] Id.
[27] Id.
[28] Jacqueline Ross, Will States Protect Us, Equally, from Damage Caps, in Medical Malpractice Legislation?
IND. L. REV., Vol. 30:575 (Spring 2004),
file:///C:/Users/user/AppData/Local/Temp/3237-Article%20Text-8634-1-10-20120928.pdf
[29] *How has U.S. spring on healthcare changed over time?,* Health System Tracker Peterson- KFF (Dec. 20, 2019), https://www.healthsystemtracker.org/chart-collection/u-s-spending-healthcare-changed-time/#item-nhe-trends_year-over-year-growth-in-health-services-spending-by-quarter-2010-2019.
[30] Id.

panels seemed only to benefit the medical profession, and not the general public.

Despite the reduction in medical malpractice premiums and the corresponding increase in health insurance premiums, screening panels are still used in the seventeen states where they were originally implemented. Additionally, other states have tried to enact legislation to create the review panel process. One state in particular created legislation to implement a review panel process and its constitutionality was promptly challenged. In 2017, The Kentucky legislature enacted the Medical Review Panels Act.[31] This act established a three-person panel to review details of medical malpractice cases and decide whether the case could proceed in a trial court. The problem was that the panels had up to ninety days to issue their opinion and only after that 90-day period could a claimant proceed with filing a lawsuit.[32] According to records produced pursuant to a Kentucky Open Records Act request, only 11 of 531 malpractice claims had been assigned to medical review panels, revealing a severe backlog in filed claims.[33] Despite the backlog, the screening panels continued until early 2018, when the case of Ezra Claycomb came before the Kentucky Supreme Court.

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[31] Stephanie Sundier, *Kentucky Supreme Court Rules Medical Review Panels Unconstitutional*, Jurist (Nov. 16, 2018), https://www.jurist.org/news/2018/11/kentucky-supreme-court-rules-medical-review-panels-unconstitutional/

[32] Christopher J. Robinette & Dani Wachtel, Kentucky Medical Malpractice Review Panels Rules Unconstitutional, Insurance Journal (Feb. 4, 2019), https://www.insurancejournal.com/magazines/mag-features/2019/02/04/516221.htm

[33] *Kentucky Medical Malpractice Panel Backlogged by Hundreds of* Claims, INSURANCE JOURNAL (Aug. 9, 2018) https://www.insurancejournal.com/news/southeast/2018/08/09/497563.htm.

Ezra Claycomb, a minor, brought a lawsuit through his parent, Tonya Claycomb, against the Commonwealth of Kentucky challenging the constitutionality of the Medical Malpractice Review Panel Act. Ezra suffered from severe brain damage and cerebral palsy allegedly caused by medical malpractice.[34] Before the Act, Ezra could immediately file a medical-malpractice suit in circuit court. According to the Act, the medical screening panel could take up to nine months before rendering an opinion as to whether Ezra could proceed with a malpractice claim. His attorneys filed an action in court challenging the constitutionality of the Act under the Kentucky Constitution. More specifically, whether the Act denied Ezra equal protection and due process access to open courts, and whether the implementation of the review panels was a violation of separation of powers.[35] The trial court found violations of *inter alia,* equal protection rights, separation of powers doctrine, and guaranty to the open-courts and jural rights. The trial court found the entirety of the Act unconstitutional and permanently enjoined the Commonwealth from enforcing any of its provisions.

The Commonwealth then requested emergency relief from the Court of Appeals and suspension of the enforcement of the permanent injunction entered by the trial court, which the Court of Appeals granted. The Kentucky Supreme Court then accepted transfer to decide the merits of the case. Upon review the Kentucky Supreme Court found that the Act "unconstitutionally delays a claimant's access to the courts for the adjudication of their common- law personal injury claims".[36] Further, the Court observed that the state legislature, through the Act, "created a mandatory delay affecting the ability of all medical-malpractice

[34] Id.
[35] Robinette, supra 32.
[36] *Commonwealth of Kentucky v. Claycomb,* 566 S.W. 202 (Ky. 2018), https://casetext.com/case/commonwealth-v-claycomb

claimants to seek *any* redress, unless all parties either "validly agree...to a binding arbitration procedure" or agree to bypass the medical review panel process."[37] In other words, the review panels deny claimants the right to open access to the courts and a speedy trial. The Kentucky Supreme Court struck down the Medical Review Panels Act. The fact that there is a constitutional question about medical review panels is why only seventeen states have implemented this policy, while the other thirty-three states have not.

Outside of the court system, screening panels promote the practice of "defensive medicine" by physicians. According to the U.S. Department of Health, Education and Welfare Commission on Medical Malpractice, defensive medicine is defined as "the alteration of modes of medical practice, induced by the threat of liability for the principal purpose of forestalling the possibility of lawsuits by patients as well as providing a good and legal defense in the event such lawsuits are instituted."[38] Defensive medicine is a common practice used by physicians to justify the prescription of medical procedures that are not necessary for the patient to undergo. Today, eight out of ten physicians practice defensive medicine as a way to legally protect themselves from medical malpractice claims.[39] Some have argued that practicing defensive medicine goes against a doctor's professional code of ethics. Chapter Two of the American Medical Association's Code of Medical Ethics, Consent, Communication and Decision Making, provides that medical providers must help patients make "well considered decisions about their

[37] Id.
[38] Steven E. Pengalis & Harvey F. Wachsman, *American Law of Medical Malpractice,* 2d § 2:9 at 56, The Lawyers Co-Operative Publishing Company, (1992).
[39] Dennis J. Rasor, *supra* note 6 at 115.

care and treatment."[40] Further, the Code's Chapter 11, which addresses the delivery and financing of health care, provides that physicians should advocate for fair and informed decision making about basic health care. In addition, fair services should be included in a minimum package for all.[41] By its very nature, the use of defensive medical practices by doctors begs the question: Is the patient aware that at the time consent is requested, that the procedure he or she is about to undergo is solely for the benefit of the physician?[42] Defensive medicine seems contrary to AMA's Code and flies in the face of these ethical provisions. Because of the mandatory nature of the Medical Review Panel, the long wait while the patient suffers, and because the needs of the patient are seen as secondary to the effort to reduce costs for physicians, one might qualify the use of such protocols as defensive medicine.

Throughout the United States, attorneys have attempted to eliminate malpractice review panels. Attorneys have claimed that these panels "[1] Cause unnecessary delay in final disposition of a claim; [2] is biased because there are two physicians, an attorney and two lay persons on a formal panel; [3] produces findings which have a "chilling effect" on any circuit court trial; and [4] protects repeat offender physicians about whom nothing is done".[43] Despite efforts to ban the screening panels throughout the seventeen states that have a mandatory implementation of the panels, only recently has the validity of these panels been examined at length. States such as Kentucky, Louisiana and Indiana have brought these issues to court. However, only Kentucky has reversed the Act and abolished the

[40] *Code of Medical Ethics: consent, communication & decision making,* AMA, Ethics, https://www.ama-assn.org/delivering-care/ethics/code-medical-ethics-consent-communication-decision-making.
[41] Id.
[42] Code of Medical Ethics Code Overview, AMA, https://www.ama-assn.org/delivering-care/ethics/code-medical-ethics-overview.
[43] Flemma, *supra* note 11.

but has done nothing to reduce healthcare costs to the public at large.[45] It also encourages defensive medical practices by physicians, which raises questions as to the adequacy of care and possible violations of the ethical standards such as the AMA Code of Medical Ethics. The extensive amount of time claimants must wait for decisions to be made by panels denies them access to the courts while costs for medical care may be mounting. Moreover, screening panels raise constitutional questions around a claimant's right to equal protection and access to open courts. The Claycomb case cited above is but one example of good intentions resulting in a bad outcome. While the state sought to reduce frivolous litigation and lower the cost of liability premiums for medical providers, the legislature crossed the boundaries of separation of powers.[46] Although legislative enactment of medical malpractice review boards may be grounded in good intentions, it has been poorly executed and resulted in unintended consequences. State lawmakers must find ways to ensure that medical malpractice review boards are an efficient, effective and fair means of alternative dispute resolution that benefits more than doctors and insurance companies. To be successful, enactment of mandatory review panels must also result in lower health care costs for the general public and a swift resolution to malpractice disputes.

[45] Anjelica Capellino, How are Medical Malpractice Review Panels Impacting The Legal Process,
EXPERT INST. (Aug. 30, 2018),
https://www.expertinstitute.com/resources/insights/are-medical-malpractice-review-panels-helping-or-hindering-the-legal-process/.

[46] Commonwealth of Kentucky v. Claycomb, *supra* note 36.

Review Panels. Indiana and Louisiana still have mandatory review or screening panels, even after the issues were addressed in court cases.

Conclusion

Perspective might be an appropriate term to use when weighing the benefits and detriments of medical review panels. Statistics show that only seven percent of medical malpractice cases go to trial. The other 93% of malpractice disputes are settled before trial or before a case is filed. The small number of cases that go to trial appears to be a miniscule figure, but in most circumstances, a medical malpractice case can take years to reach a trial date. Therefore, who should decide the fate of medical malpractice cases — medical review panels or our judicial system?

Health care professionals argue that medical malpractice cases should be decided by a review panel because they are the quickest in reviewing cases to determine whether they have enough grounds to be settled or proceed to the trial stage. For example, according to the Bureau of Justice Statistics' website, "64% of larger [medical malpractice] claims are disposed of in less than one year,"[44] though the backlog of claims in Kentucky illustrates that claims can be delayed before even reaching panels in the first place. On paper, medical review panels may seem efficient, but in the real world, they are far less practical or, perhaps, constitutional.

As shown above, the use of screening panels might only alleviate one aspect of the situation — the cost of medical malpractice premiums —

[44] Steven K. Smith, Carol J. DeFrances & Patrick A. Langan, *Tort Cases in Large Counties,* Bureau of Justice Statistics Special Report, Civil Justice Survey of State Courts (April 1995), https://bjs.gov/content/pub/pdf/TCILC.PDF.