THE MEDICAL MALPRACTICE PANEL:  
ITS CREATION AND EFFECT

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The medical malpractice furor of a few years ago acted as a compelling force for legislative change. As a result, the New York State Legislature enacted Chapter 109 of the Laws of 1975 and Chapter 955 of the Laws of 1976, which are applicable to malpractice actions against physicians and podiatrists, and Chapter 95 of the Law of 1978, extending jurisdiction to such cases against hospitals.

One of the most controversial statutory provisions enacted was the creation of the Medical Malpractice Panel. The statute establishing this panel is Section 148-a of the Judiciary Law. In essence, subdivision 2 of said section provides for a hearing before a panel consisting of a Supreme Court Justice, a physician and an attorney. (See S 684.4[b] of the Rules of the Appellate Division, Second Department, to cases involving multiple physician defendants.) Prior to the hearing any party may object to the physician or attorney who has been designated. Such objection shall be decided by the justice presiding as a member of the panel. (Judiciary Law, S 148-a, sub. 2, par.d.) The hearing itself is informal and without a stenographic record. Except as otherwise provided, no statement or expression of opinion made in the course of the hearing is admissible either as an admission or otherwise in any trial of the action (Judiciary Law, S 148-a, sub.4).

If an action is commenced against a psychiatrist in the State of New York, upon conclusion of all preliminary proceedings, when the case is placed on the calendar of the court, the case is then referred to the Medical Malpractice Part for a hearing. The panel has the authority to render a recommendation of liability or no liability which, when unanimous, may be offered into evidence during the trial of the lawsuit. The portion of section 148-a which refers to the unanimous recommendation of the panel is subdivision 8, which provides:

If the three members of the panel concur as to the question of liability, a formal written recommendation concerning such question of liability shall be signed by the panel members and forwarded to all parties. In such event, the recommendation shall be admissible in evidence at any subsequent trial upon the request of any party to the action. The recommendation shall not be binding upon the jury or, in a case tried without a jury, upon the trial court, but shall be accorded such weight as the jury or the trial court chooses to ascribe to it.
If the recommendation is read to the jury or by the trial court, the doctor member of the attorney member of the panel, or both of them, may be called as a witness by any party with reference to the recommendation of the panel only. The party calling such witness or witnesses shall pay their reasonable fees and expenses.

The constitutionality of the statute has not as yet been ruled upon by the Court of Appeals, but three of the four Appellate Divisions have held the statute to be constitutional (Comiskey v. Arlen, 55 A D 2d 304 [2d Dept.], 390 N Y S 2d 122; affd. on other grds. 43 N Y 2d 696 Kimball v. Scors, 59 A D 2d 984 [3rd Dept.]; Dundon v. Presbyterian Hospital, 58 A D 2d 746 [1st Dept.], affd. 44 N Y 2d 674).

In Comiskey v. Arlen, the Appellate Division, Second Department unanimously held the statute constitutional on the theory that the introduction of a unanimous panel recommendation is, in effect, an expert opinion, which is to be evaluated by the jury in the same manner as it would evaluate any other expert opinion. The court held that section 148-a, subdivision 8 of the Judiciary Law constitutes another legislative exception to the hearsay rule. Moreover, the court held that the Legislature acted within its power by merely amending the rules of evidence and therefore no constitutional infirmity was involved, since the jury still retained the final say in determining the facts and what weight ought to be given to the evidence.

The Appellate Division, Second Department, has recently decided two important cases dealing with the operation of the statute. The cases are Kletnieks v. Brookhaven Memorial Hospital, 53 A D 2d 169 and Curtis v. Brookdale Hospital, 62 A D 2d 749.

In Kletnieks, the defendant moved to vacate the panel's unanimous recommendation of liability, on the ground that the panel's finding of departure, without a concomitant finding of "proximate cause," was insufficient to support a recommendation of liability as that term is used within the meaning of section 148-a(8) of the Judiciary Law. The Appellate Division determined that a recommendation of liability within the meaning of the statute requires both a finding of (1) a deviation and departure from the accepted medical practice in the community and (2) that said deviation and departure was the proximate cause of the injury or injuries alleged to have been sustained. In this regard, the Appellate Division in the First Department concurs. (See, Marrico v. Misericordia Hospital, 59 A D 2d 680.)

In the Curtis case, the court addressed the ambiguity of the statute concerning the scope of examination and testimony of the medical and attorney panelists who may be called as witnesses. The statute, section 148-a(8) provides in part:

If the recommendation is read to the jury or to the trial court, the doctor member or the attorney member of the panel, or both of them, may be called as a witness by any party with reference to the recommendation of the panel only. (Emphasis supplied.)

Prior to Curtis, there was a dispute at the trial level as to the meaning of "with references to the recommendation of the panel only." As a result, some justices permitted only a restricted examination of the panelists, while others permitted a more liberal examination.