CAN LAYPEOPLE REASONABLY ASSESS MEDICAL MALPRACTICE DAMAGES?

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I. INTRODUCTION

“Can you imagine seeing your newborn baby girl laying lifeless after watching her first smile just seven hours prior?” The plaintiffs’ lawyer begins his opening with that question as he addresses the jury, looking directly into a man named James Shipley’s eyes. Mr. Shipley is among seven others chosen to be jurors in a medical malpractice case. The plaintiffs allege that their three-week-old newborn died due to the negligence of the emergency room doctor. The doctor claims that the injury was unavoidable and that he did everything possible to save the child’s life. Mr. Shipley is a forty-nine-year-old Caucasian male with three kids. His oldest daughter recently birthed a healthy baby girl two weeks before this case. Mr. Shipley is currently the manager of the manufacturing and production department at Swisher Sweets Cigar Factory, a company that has employed him for over thirty years. Mr. Shipley dropped out of high school and started working on the cigar product line at the age of sixteen to support his pregnant girlfriend, now wife, and worked his way up to his managerial position. Mr. Shipley reads at an eighth-grade level, and his only experience in the medical world has been standing in the waiting room during the birth of his three children and his granddaughter. Is Mr. Shipley in the best position to determine whether the actions of the doctor, who has devoted his life to medicine and who has saved countless lives, were up to the proper standard of care?

A layperson is “a person who is not a member of a given profession, [such] as law or medicine.” A person is eligible for jury

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duty in Florida if the person is a United States citizen, a legal resident of Florida, a legal resident of the county where the trial is located, eighteen years of age, and has a valid identification card or driver’s license.² States select jurors randomly per state law.³ Because medical malpractice claims are typically civil actions, the same process applies to jury selection in medical malpractice cases.⁴ Therefore, laypersons are often summoned and selected for jury duty.⁵

American parents with young children have an average reading level between seventh and eighth grade.⁶ Twenty percent of people, more than 2.6 million, sixteen or older that are living in Florida, do not have “the most basic reading skills, according to estimates . . . by the National Center for Education Statistics (“NCES”).”⁷ Consequently, in Florida, one in five adults lack simple literacy skills.⁸ Any of these adults, if they meet the low threshold for jury selection in Florida, can serve as a juror in a medical malpractice lawsuit.⁹ The court tasks the jury with determining whether a defendant deviates from the complex standard of care required by a healthcare provider in that field and whether the breach of duty caused the injury.¹⁰ Laypersons are not in the best position to analyze complex testimony and render a decision based merely on hearing medical testimony and seeing evidence of the

² FLA. STAT. §§ 40.01, 40.011(2) (2014); see also Were You Called?, FLORIDAJURYDUTY.COM, http://www.floridajuryduty.com/were-you-called-questions.php (last visited Feb. 13, 2015).
³ See Were You Called?, supra note 2.
⁴ James D. Clark, Jury Selection, in FLORIDA MEDICAL MALPRACTICE HANDBOOK 11-3 (2d ed. 2009).
⁵ See generally FLA. STAT. § 69.071 (2014) (stating that a juror being “qualified” is “sufficient”); § 40.01 (stating the minimum requirements that a juror needs to qualify for selection, which does not include any specialized knowledge); Were You Called?, supra note 2 (discussing eligibility for “any person” who meets the criteria).
⁸ Id. (“Florida, with its large immigrant population, has the third lowest adult literacy level of all the states, behind California and New York.”).
⁹ See sources cited supra note 5.
alleged malpractice. For this reason, Florida needs to implement a new system that eradicates layperson juries in medical malpractice cases.

Part II of this Article provides an overview of historical modifications made to medical malpractice in Florida and the elements necessary to try a medical malpractice case. Specifically, Part II explains the duty that healthcare providers owe to patients, the burden of proof necessary, and jury instructions. Part III of this Article describes the idea of health courts, specialized juries, or bench trials instead of the layperson juror system presently implemented. Next, Part IV of this Article explains the criticism and critiques, positive and negative, of implementing a new system. Finally, the Article concludes with a proposal for jury reform in Florida medical malpractice cases.

II. HISTORY OF MEDICAL PRACTICE AND HOW IT IS PRESENTLY TRIED IN FLORIDA

Florida has accomplished important leaps in medical malpractice, making Florida a foundation for medical malpractice reformation. Before 1985, victims would seek an attorney and the attorney would file a complaint, commencing litigation. After the 1985 reform, Florida implemented a presuit process. Since 1985, a patient’s attorney must hold an investigation to confirm that there is a

11 See id. (“Generally, expert testimony is required to establish the standard of care prevalent in a particular medical field.”); see also Edward L. Holloran, III, Medical Malpractice Litigation in Florida: Discussion of Problems and Recommendations, 26 NOVA L. REV. 331, 342 (2001).
12 See supra note 11 and accompanying text.
13 See infra Part II.
14 See infra Part II.
15 See infra Part III.
16 See infra Part IV.
17 See infra Part V.
18 See infra notes 19-34 and accompanying text.
20 See FLA. STAT. § 766.106 (2014); Weissman, supra note 19.
reasonable chance that the healthcare provider was negligent and that the negligence caused the injury.\textsuperscript{21} The patient’s attorney must review medical records from the healthcare provider, send the records to a medical expert to review, and the expert must provide written verification that there are reasonable justifications to claim that a defendant was negligent in the treatment and care of the claimant and that the negligence resulted in an injury to the claimant.\textsuperscript{22} Next, along with copies of any medical records that the expert relied upon in signing the affidavit, the attorney must send a “Notice of Intent to Initiate Litigation for Medical Negligence” to each defendant, to which each defendant has ninety days to reply.\textsuperscript{23} After the presuit process, a complaint may be filed, discovery begins, and if the parties do not settle or are dismissed on a motion or pleading then the case advances to trial.\textsuperscript{24}

In 1988, the Florida Birth-Related Neurological Injury Compensation Association (“NICA”) created and began to manage the Florida Birth-Related Neurological Injury Compensation Plan (“Compensation Plan”).\textsuperscript{25} NICA uses the Compensation Plan to pay for the care of infants born with preapproved neurological injuries under the program without the litigation process or the commencing of a medical malpractice lawsuit.\textsuperscript{26} The Compensation Plan’s purpose is to provide monetary funds to ensure the child has the “necessary and reasonable care, services, drugs, equipment, facilities, and travel, excluding expenses that can be compensated by state or federal governments, or by private insurers.”\textsuperscript{27} The monetary award does not exceed $100,000 to the parents or guardian of the baby with the preapproved neurological injury.\textsuperscript{28} The parent or guardian receives

\begin{itemize}
\item \textsuperscript{21} See §§ 766.106(2)(a), 766.203(2).
\item \textsuperscript{22} See § 766.203(2).
\item \textsuperscript{23} See § 766.106(2)–(4); see also Robert W. Kelley & Kimberly L. Wald, Presuit, FLA. HEALTHCARE L. BLOG, http://floridahealthcarelaw.com/the-complexity-of-florida-medical-malpractice-law/presuit/ (last visited Jan. 21, 2015).
\item \textsuperscript{24} See § 766.106; Kelley & Wald, supra note 23.
\item \textsuperscript{26} See id.
\item \textsuperscript{27} Id.
\item \textsuperscript{28} Id.
\end{itemize}
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$10,000 as a death benefit.\textsuperscript{29} The Compensation Plan may also pay for attorney’s fees and other reasonable expenses connected to filing the claim.\textsuperscript{36} The Compensation Plan is allowed to distinguish birth-related neurological injuries from medical malpractice cases based on the legitimate state interests of providing care, providing rehabilitation to birth-related neurological injuries, and providing help to reduce the high cost of malpractice insurance that obstetricians pay.\textsuperscript{31} The administrative law judges under NICA have exclusive jurisdiction to determine whether a parent or guardian is eligible to benefit from the Compensation Plan.\textsuperscript{32}

The Compensation Plan and other systems have sparked the idea for reform of medical malpractice litigation, which is discussed later in this Article.\textsuperscript{33} The presuit process serves as an example of successful reformation that has occurred in Florida medical malpractice law.\textsuperscript{34} The next area in need of reformation is the elimination of layperson juries.\textsuperscript{35} Comprehending the need to eradicate lay juries derives from an understanding that juries are responsible for evaluating medical malpractice cases.\textsuperscript{36}

A. The Duty Healthcare Providers Owe to Patients

In order to prove negligence in civil actions there must be a showing of duty, breach, causation, and damages.\textsuperscript{37} In medical malpractice, “[n]egligence is a breach of [a healthcare provider’s] duty resulting in harm to the patient.”\textsuperscript{38} In medical malpractice actions, similar to ordinary negligence actions, the patient must establish a duty

\textsuperscript{29} \textit{Id.}
\textsuperscript{30} \textit{Id.}
\textsuperscript{32} § 766.304.
\textsuperscript{33} \textit{See infra} Part IV.
\textsuperscript{34} \textit{See supra} notes 20-24 and accompanying text.
\textsuperscript{35} \textit{See infra} Part III.A.
\textsuperscript{36} \textit{See infra} Part III.A.
\textsuperscript{38} \textsc{1 Med. Malprac. Chklsts. & Disc.} § 2:3 (2014).
owed to the patient by the healthcare provider.\textsuperscript{39} The healthcare provider must have breached that duty "by allowing conduct to fall below the applicable standard of care."\textsuperscript{40} Furthermore, the patient must show that the healthcare provider proximately caused the injury because of the breach of duty.\textsuperscript{41} The finder-of-fact, which is most often a jury, is responsible for evaluating whether the healthcare provider fell below the applicable standard of care based on evidence and testimony presented by both parties.\textsuperscript{42}

A physician develops a legal duty of care to a patient as soon as the physician accepts the person as a patient.\textsuperscript{43} This means that the duty is "explicitly relational" and is instantaneously owed to the patient.\textsuperscript{44} This duty of care must conform to the accepted standard of medical practice.\textsuperscript{45} A healthcare provider's error in judgment does not automatically constitute malpractice.\textsuperscript{46} A patient's physical injury by a healthcare provider, by itself, is not sufficient proof to determine whether the healthcare provider complied with the commonly recognized standard of care.\textsuperscript{47}

The standard of care for malpractice actions is a physician's or surgeon’s duty to exercise the "skill, diligence, and knowledge" reasonably exercised and pertinent in similar conditions in the profession’s practice.\textsuperscript{48} Because there are many ways to practice

\textsuperscript{40} Torres, 961 So. 2d at 344.
\textsuperscript{41} See id.
\textsuperscript{42} See Moisan, 531 So. 2d at 400 (holding that the trial court erred by entering judgment because the jury may have determined that the surgical procedure fell below the applicable standard of care based on the evidence).
\textsuperscript{43} 1 MED. MALPRAC. CHKLSTS. & DISC., supra note 38.
\textsuperscript{44} Torres, 961 So. 2d at 344 (citing \textit{Restatement (Third) of Torts: Liab. for Physical & Emotional Harm} § 41 cmt. h (2012)).
\textsuperscript{45} See id.
\textsuperscript{46} 1 MED. MALPRAC. CHKLSTS. & DISC., supra note 38.
\textsuperscript{47} Id.
\textsuperscript{48} See \textit{Fla. Stat.} § 766.102(1) (2014) ("The prevailing professional standard of care for a given health care provider shall be that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers."); see also Beavis v.
medicine and many ways that local customs develop, some professionals argue that there are multiple standards of care that can potentially apply to one situation.\textsuperscript{49} With all the possible discrepancies critics question which standard is the proper legal standard.\textsuperscript{50} Some individuals speculate that medical malpractice cases use "a special standard of care because the fact-finder, whether judge or jury, generally does not have the common knowledge necessary to determine whether a doctor’s actions were ‘reasonable,’ thus conforming to the ‘reasonable person’ standard of care."\textsuperscript{51}

\textbf{B. Burden of Proof}

In civil cases, the standard of proof requires a "proof of probability," which means "more likely than not."\textsuperscript{52} This standard means that the plaintiff's evidence must "more closely resemble the truth" than the evidence put forth by the defendant.\textsuperscript{53} Medical malpractice retains the same standard.\textsuperscript{54} The general rule is that the plaintiff has the burden to establish the healthcare provider's negligence in a medical malpractice claim.\textsuperscript{55} This standard respects whatever circumstances the healthcare provider was in at the time of the incident.\textsuperscript{56} To prove a breach in the standard of care, the plaintiff must show that the injury was not a foreseeable result and that the injury would not have occurred but for the deviation from the professional standard of care.\textsuperscript{57} The jury decides whether the defendant failed to

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\textsuperscript{50} Id.

\textsuperscript{51} Id. at 98.

\textsuperscript{52} 1 MED. MALPRAC. CHKLSTS. & DISC., \textit{supra} note 38, § 2:5. "A mere tilting of the scale towards one side versus the other, a 50.1% versus the 49.9%, is enough to establish proof in the eyes of the law." \textit{Id.}


\textsuperscript{54} \textit{Id.}


\textsuperscript{56} See FLA. STAT. § 766.102(1) (2014).

\textsuperscript{57} \textit{Id.}
provide the care and skill of an average healthcare provider through evidence and expert testimony of what constitutes the appropriate and applicable standard of care.\textsuperscript{58} One study shows that 97\% of medical malpractice lawsuits require medical experts to explain the material in the case to the jury.\textsuperscript{59}

\section*{C. Jury Instructions in Medical Malpractice}

Judges give jury instructions about the pertinent law to help jurors during their deliberations.\textsuperscript{60} Typically, judges issue predrafted instructions in civil matters, including medical malpractice cases.\textsuperscript{61} Attorneys may draft jury instructions to supplement the judge’s instructions, usually based on the facts of the case.\textsuperscript{62} After discussing generalities and procedural instructions, the judge offers instructions on the physician’s standard of care.\textsuperscript{63} Jury instructions are very important to medical malpractice cases.\textsuperscript{64} Failure to give proper instructions may constitute reversible error, requiring a new trial.\textsuperscript{65} The trial court has a duty to correctly instruct the jury on the law governing the case and explain the issues of the case.\textsuperscript{66} The instructions should also include information about the evidence presented during the case.\textsuperscript{67} The jury receives instructions on the standard of care that the healthcare provider owed to the patient, and the fact-finder has the task of determining whether the healthcare provider fell below that standard of care.\textsuperscript{68} Depending on the facts of the case, the time, place, manner, and

\begin{itemize}
\item \textsuperscript{58} See 1 MED. MALPRAC. CHKLSTS. & DISC., supra note 38, § 2:5.
\item \textsuperscript{59} Holloran, supra note 11, at 334-35.
\item \textsuperscript{61} See 1 MED. MALPRAC. CHKLSTS. & DISC., supra note 38 § 13:10.
\item \textsuperscript{62} See id.
\item \textsuperscript{63} See, e.g., id. § 13:11 (providing sample jury instructions on the physician’s standard of care).
\item \textsuperscript{64} See, e.g., Miller v. Court, 510 So. 2d 926, 927 (Fla. Dist. Ct. App. 1987) (holding that the trial court’s failure to give a jury instruction on the plaintiff’s pre-existing medical condition, which was supported by evidence, was reversible error).
\item \textsuperscript{65} See id. at 928.
\item \textsuperscript{66} 70 C.J.S. Physicians and Surgeons § 157 (2014).
\item \textsuperscript{67} Id.
\item \textsuperscript{68} See id.
physician-patient relationship may be relevant and needs to be included in the jury instruction.  

III. THE IDEA OF A NEW COURT

A. The Problem

It is difficult for a layperson to determine whether professional liability has been established. Professional liability is derived from the elements of causation and the standard of medical care owed to the plaintiff, as discussed above. Because neither the judge nor the jury know the standard of care owed to the patient or the elements of causation, the parties and the jury must rely on expert testimony to determine which standard of care the healthcare provider owed to the patient. Is a jury composed of laypersons qualified to decide which expert is correct in a case where there is conflicting expert testimony from two certified doctors about the applicable standard of care? Certainly, a person, like Mr. Shipley, with no medical knowledge, would not know how to decipher conflicting testimony on what the commonly accepted standard is if he heard it from an expert in court. Nor would Mr. Shipley have the resources to determine the correct standard on his own. What is Mr. Shipley basing his decision on regarding the appropriate standard of care? Hypothetically, Mr. Shipley would evaluate the body language of the expert, the conviction in the expert’s voice, how well the expert explained the standard, and perhaps even how apathetic the emergency room doctor looked, or whether the plaintiffs are merely seeking money or are truly mourning the loss of their child. Would Mr. Shipley’s analysis change if the defense

69 Id.
71 See id.; supra Part II.A.
72 Drapp, supra note 49, at 97-98.
73 See Holloran, supra note 11, at 345.
74 See Drapp, supra note 49, at 98.
75 See Holloran, supra note 11, at 345 (“[S]tudies have shown that these jurors focused more on the appearances of witnesses, the credentials of the expert witnesses,
presented evidence that the parents wanted to give the child up for adoption and did not even want the baby when the baby died? No, it would not. However, that may be a factor in how a person like Mr. Shipley would determine damages.

The point is, all of these subjective points have nothing to do with whether the doctor performed in accordance with the standard of care. An expert with good body language and the ability to explain complex medical issues should not be the deciding factor of a healthcare provider's professional liability. The actual causation and standard of care should be an objective analysis from people previously exposed to the medical field in a way that can aid their determination. The theatrics and tactics of good lawyers are tools that can easily sway lay juries into making a particular conclusion. When a jury is forced to look at an injury on display, like a person in a wheelchair or other evidence that invokes an emotional reaction, the jury may make its determination based on the severity of the injury rather than the degree of the healthcare provider's negligence.

Jury instructions are supposed to be a tool to help educate the jury on the law and their tasks as individual jurors. Jury instructions are helpful, but for someone who does not know anything about medicine or the law, understanding these instructions can be difficult. The instructions are usually read at the end of the parties' case presentations and, at times, are full of legal jargon that can be difficult for a layperson to understand. This situation is the equivalent of sitting in a law school Remedies or Criminal Procedure class and having the professor read her outline aloud only once to the class, with the professor expecting the class to retain the information and to score and the demeanor of the attorneys trying the cases.

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76 See, e.g., How Did it Ever Come to This?, MED. ECON, Oct. 19, 1998, available at 1998 WLNR 7839587 (explaining that a jury may be more likely to believe a well-spoken expert witness over one that is more knowledgeable).
77 See, e.g., Drapp, supra note 49, at 107.
78 See How Did it Ever Come to This?, supra note 76.
79 See id.
80 See supra Part II.C.
81 See Holloran, supra note 11, at 352.
82 Id.
well on the final exam. That is a lot of information to digest. If the students have never been exposed to the information then even if the professor gave the students an outline to study, without truly being taught or being able to ask questions the complexity of the material would cause a problem. The same theory applies to lay juries. The court is administering medical and legal jury instructions to laypersons with an eighth grade reading level, which greatly limits the jurors' capacity to understand the instructions and the case. Additionally, jury instructions "lack the simplicity and comprehensibility needed by lay jurors" and are usually preformatted. These problems and concerns led to the creation of alternative medical malpractice litigation systems.

B. Health Courts

Health courts are often characterized as an administrative system, such as the tax or workers compensation tribunal. In 2002, Philip K. Howard, the founder and chair of the organization Common Good, developed the idea of specialized health courts. In 2006, health policy experts at the Harvard School of Public Health and Common Good collaborated to make the commonly referred to model of health

83 See supra notes 6-8 and accompanying text (explaining that the average reading age of parents with young children in America is between seventh and eighth grade, and that one in five adults in Florida lack basic literacy skills).
84 Holloran, supra note 11, at 352.
85 See infra Parts IV-V.
Another advocate of health courts is the Progressive Policy Institute run by Marshall Wittman, who was formerly on the Bush administration staff.89

The prototype for health courts, which can vary from state to state,90 was developed from New Zealand and the Scandinavian countries' systems as well as Florida's and Virginia's administrative programs for birth-related neurological injuries.91 The purpose of creating a new system to adjudicate medical malpractice claims was to lower the high cost of medical malpractice insurance and medical care.92 Heath courts were also created to be a "fairer adjudication of

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88 See Santo, supra note 87.
89 Sileo, supra note 86, at 85.
91 Daul, supra note 86.

In New Zealand, the Accident Compensation Corporation (ACC), which was established in the 1970s, covers all injuries caused by medical treatment. Compensation covers lost earnings and rehabilitation costs, as well as a one-time payment to claimants for miscellaneous expenses. This system has helped to maintain total administrative costs to about 10 percent. The ACC processes approximately 3,000 claims annually, which suggests that even in a system with easy reporting, not all injured patients are filing claims.

Howard & Maine, supra note 86. "In the U.S., Florida and Virginia have developed administrative systems to address claims for birth trauma. Although both programs have limitations, they have demonstrated that non-tort based compensation plans for medical injuries are feasible and can decrease the cost for physicians in high-risk specialties like obstetrics." Id. "The Scandinavian countries—including Sweden, Denmark, Finland, Norway, and Iceland—use the concept of 'avoidability' in their health courts. Avoidability—an idea that Sweden pioneered in 1975—means asking whether an injury would have occurred had proper care been provided (rather than the American negligence standard)." Janice Simmons, Foreign Health Courts Could Serve as Model for U.S., HEALTH LEADERS MEDIA (Mar. 9, 2010), http://www.healthleadersmedia.com/content/PHY-247704/Foreign-Health-Courts-Could-Serve-as-Model-for-US.html.
92 Farrow, supra note 90, at 188-89.
medical malpractice cases."93

There are no juries in health courts.94 Medical experts or specialized judges, accompanied by a panel of experts, are the primary fact-finders.95 Panels of experts are composed of neutral expert witnesses providing testimony and opinions on the standard of care and negligence.96 The threshold that plaintiffs must meet is "avoidability," not negligence caused by the healthcare provider.97 The Progressive Policy Institute states that compensation is granted if the mistake that lead to the injury could have been avoided.98 The Common Good Draft Proposal characterizes "avoidability" as compensable if the injury could have been avoided according to the "best practice."99 Best practice is different from negligence because it does not focus on whether the caregiver "fell below customary practice."100 The creation of this standard promotes medical provider cooperation with the health court and slowly eradicates the stigma created by fault-based negligence.101

Neutral experts replace party-hired experts who were previously needed for medical malpractice claims.102 The judges author binding judgments concerning "standards of care, injury, causation, and compensation."103 These decisions are written and serve as precedent for future determinations.104 Participation in the tribunals is mandatory and compensation is determined by a "strictly defined schedule."105

93 Id.
94 Daul, supra note 86.
95 Id.
96 Farrow, supra note 90, at 193.
97 Daul, supra note 86.
99 Id.
100 Id.
101 See id. at 23-24.
102 Id. at 20; see also Fixing Medical Justice, COMMON GOOD (Oct. 21, 2013), http://www.commongood.org/blog/entry/hartford-business-journal-interviews-philip-howard.
103 Farrow, supra note 90, at 194.
104 Howard & Maine, supra note 86.
105 Sileo, supra note 86, at 85.
“defined schedule” is a fancy way of stating that there is a damage cap.\textsuperscript{106} However, the injured patient receives no guarantee of a medical malpractice award but still loses his or her right to bring an action in court.\textsuperscript{107}

\section{C. Juries or Bench Trials}

Specialized juries require jurors who are college-educated for complicated medical malpractice claims.\textsuperscript{108} Attorneys are known for attempting to screen people with higher educations from trials for strategic reasons, including screening for the ability to seek weak spots in cases and screening for individuals who are independent-minded.\textsuperscript{109} Because these medical concepts are complex, critics argue that medical malpractice lawsuits should require jurors with a higher education level than the average adult.\textsuperscript{110} Complex litigation arises when there is “multiple party litigation, complex issues and case facts, cases involving ‘highly technical evidence,’ and difficulties associated with providing the proper remedy.”\textsuperscript{111} An increase in technology and medical advances make medical malpractice cases complex.\textsuperscript{112} Medical or scientific testimony and evidence are complex issues, and case facts involving high technical evidence, at times, may lead to difficulty deciding the remedy.\textsuperscript{113} Therefore, medical malpractice cases need jurors with above-average education levels.\textsuperscript{114} These “special juries” do not allow the exclusion of people due to race or gender because discrimination is unlawful.\textsuperscript{115} However, exclusion based on educational level or expertise is lawful because it is not specifically reprimanded in the language of the Jury Selection and Services Act of 1968.\textsuperscript{116}

\begin{thebibliography}{99}
\bibitem{106} See id. at 85-86.
\bibitem{107} Id. at 86.
\bibitem{108} See Holloran, \textit{supra} note 11, at 362.
\bibitem{109} See id. at 347.
\bibitem{110} See id. at 345-46.
\bibitem{111} Id. at 336.
\bibitem{112} Id. at 335.
\bibitem{113} See id. at 335-36, 338.
\bibitem{114} See id. at 344-45.
\bibitem{115} Id. at 362.
\bibitem{116} Id.
\end{thebibliography}
Supporters of reform contend that specialized trial judges should be the sole decision makers in medical malpractice cases.\textsuperscript{117} Because specialized judges are experienced and more educated than the average lay juror, judges are in the best position to apply the law and make reasonable decisions.\textsuperscript{118} Specialized bench trials eliminate some of the costs of litigation and save time.\textsuperscript{119}

For critics that insist on having lay juries, supporters push for the improvement of layperson jury proficiency.\textsuperscript{120} Jurors should have the ability to ask the previously screened expert written questions for clarification and judges should encourage note taking among jurors.\textsuperscript{121} Others suggest the need to provide clearer jury instructions at the outset of the case so that a jury fully understands its role in the court as well its role before deliberation.\textsuperscript{122} In addition, the court should provide juries with a written transcript of the expert testimony to offer a better understanding and to prevent the expert from swaying the jury with subjective actions.\textsuperscript{123} Lastly, critics propose that courts should eliminate the exclusion of professionals and other people with higher education levels from the jury selection process.\textsuperscript{124}

IV. CRITICS

A. Disadvantages and Issues with Reform

Federal and state constitutional issues halt the implementation of health courts.\textsuperscript{125} Critics predict five main constitutional challenges.\textsuperscript{126} The challenges include issues dealing with equal protection, due

\textsuperscript{117} Id. at 362-63.
\textsuperscript{119} Id.
\textsuperscript{120} See id. at 292.
\textsuperscript{121} Id. at 293.
\textsuperscript{122} Id.
\textsuperscript{123} See id.
\textsuperscript{124} See id.
\textsuperscript{126} See id. at 66.
127 The fact that medical malpractice cases are out of the courtroom and personal injury cases are inside of the courtroom presents an equal protection issue. 128 Both cases deal with injuries to a person caused by another. 129 However, the main equal protection argument focuses on the unfairness of damages caps and noneconomic damages in medical malpractice cases. 130 Previous opposition to flat dollar damage caps in medical malpractice damages combats the health court’s interest in bringing down the cost of medical malpractice awards to a discernable average with a damage schedule. 131 A damage schedule limits medical malpractice damages more than other torts, such as personal injury. 132 Lastly, if health courts plan to treat similar medical malpractice claims differently based on specific claims, then an equal protection claim may be raised in court. 133

The following due process issues will arise if the healthcare proposal is implemented: lack of a jury trial, the possibility of not having a hearing, the right to select one’s own medical expert versus having the court provide experts to the parties, and the availability of a de novo appeal. 134 After the administrative law process, plaintiffs will “be directed either to appellate courts or to trial courts after going through an administrative process. In both cases, the controlling legislation would specify that the standard of review on appeal would be deferential, akin to the ‘arbitrary and capricious’ standard common in review under federal administrative law.” 135

The separation of powers argument focuses on the health court’s use of state-appointed experts. 136 Legal experts contend that the legislature “usurped two traditional judicial functions—the qualification

127 Id. at 66-67. 128 See id. at 67. 129 See supra notes 37-38 and accompanying text. 130 See Mello et al., supra note 125, at 67. 131 See id. at 67-68. 132 See id. 133 See id. at 68. 134 See id. at 69. 135 Id. 136 See id. at 70.
of experts and the admission of evidence.  

Lastly, Florida’s Constitution has an “access to the court” provision allowing people to redress their injuries in the court. All of these issues arise because peoples’ constitutional rights are being infringed upon in the pursuit of lowering medical malpractice insurance while also limiting each plaintiff’s recovery.

Aside from constitutional challenges there are practical issues with the health court system. Healthcare providers, like many other professions, want to protect the integrity of their profession. The judges presiding over these health courts are trained on medical terms and standards, similar to persons within the medical industry. People within the medical industry have an interest in protecting themselves and colleagues from medical malpractice liability. The fear among critics is that these judges will be biased toward patients in an attempt to protect defendants and their colleagues in the medical field.

Critics argue that health courts allow hospitals and insurers to force settlements for lesser amounts and, because of the damage schedule, the jury will grossly undercompensate the plaintiffs in comparison to a jury trial. Critics disagree with changing the standard from “negligence” to “avoidability.” Because injuries are treated like “system errors rather than personal provider negligence,” this reduces the pertinent stigma and fear in the medical field of committing medical malpractice. Even in the grossest form of negligence the healthcare provider is not held personally liable for his

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137 Id.
138 Fla. Const. art. I, § 21. “The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.” Id.
139 See Mello et al., supra note 125.
140 See infra notes 141-54 and accompanying text.
141 See Farrow, supra note 90, at 190.
142 See id.
143 Id.
144 See id.
145 Id. at 204.
146 See id. at 205-06.
147 Id.
or her negligent actions.\textsuperscript{148}

The American Bar Association ("ABA") does not support the idea of health courts.\textsuperscript{149} The ABA believes that one of the health courts' goals is to impose a damage cap on medical malpractice lawsuits.\textsuperscript{150} The ABA does not support limits on pain and suffering tort damages.\textsuperscript{151} Comparing this system to a workers' compensation system does not strengthen the argument with the ABA, as the ABA believes it is "inappropriate" to compare a workers' compensation system to that of a health court.\textsuperscript{152} Although the ABA supports alternative dispute resolution, the ABA only supports alternative dispute resolution when the parties voluntarily agree to participate.\textsuperscript{153} Forcing the parties to comply with a completely new system, solely benefiting the defendant, is not what the ABA wants to support.\textsuperscript{154}

\textbf{B. Advantages and Support for Reform}

Organizations such as the American Medical Association support the move for medical malpractice specialized court reform.\textsuperscript{155} According to studies, patients who bring medical malpractice lawsuits state that they are suing to prevent the mistake from happening to another innocent family.\textsuperscript{156} Litigation does not always promote this interest because litigation is inherently a closed, protected, and private process.\textsuperscript{157} Health courts promote "a culture of safety" that supports the sharing of information about injuries to encourage self-evaluation and foster knowledge.\textsuperscript{158} Compensation is quicker, efficient, and more

\textsuperscript{148} See id. at 206.
\textsuperscript{149} See Sileo, supra note 86.
\textsuperscript{150} See id.
\textsuperscript{151} Id.
\textsuperscript{152} Id.
\textsuperscript{153} Id.
\textsuperscript{154} See id.
\textsuperscript{155} Farrow, supra note 90, at 189.
\textsuperscript{157} See id.
\textsuperscript{158} Id.
reliable in health courts because the decision-making mechanism prevents large payouts in average cases.\textsuperscript{159}

Because a specialized judge presides over the issues, the cost of litigation decreases as the cost of having and educating juries is eliminated.\textsuperscript{160} The cost of litigation also decreases from court-provided experts who are neutral, replacing the need for personalized party experts.\textsuperscript{161} Because the standard changes from negligence to avoidability, it is easier for patients to file medical malpractice claims.\textsuperscript{162} The damages are distributed using damage schedules, making the distribution more fair and consistent.\textsuperscript{163}

The Common Good believes that health courts decrease the problem of “defensive medicine.”\textsuperscript{164} Practitioners will be affected by the database created in health courts because it provides practitioners with guidelines of what is proper medical care.\textsuperscript{165} The database lessens the stress of liability fears and promotes legal precedent that is easily followed.\textsuperscript{166} Proponents explain that the database is searchable, Internet accessible, and positively affects how healthcare providers treat patients.\textsuperscript{167} Although critics fear that the database may undermine a plaintiff’s individual claim, the Progressive Policy Institute assures that health courts consider the specific medical care guidelines in each case pursuant to the individual facts of the case.\textsuperscript{168}

\textsuperscript{159} Id.
\textsuperscript{160} See Farrow, supra note 90, at 189; see also “Health Courts” and Accountability for Patient Safety, supra note 156.
\textsuperscript{161} See Farrow, supra note 90, at 189.
\textsuperscript{162} See id.
\textsuperscript{163} Id.
\textsuperscript{164} Santo, supra note 87 (“Proponents assert that the current tort system, specifically lack of a uniform standard of care, has led to the practice of defensive medicine—which is defined as ‘a deviation from sound medical practice that is induced primarily by a threat of liability.’”).
\textsuperscript{165} See id.
\textsuperscript{166} See id.
\textsuperscript{167} See id.
\textsuperscript{168} See id.
V. THE PROPOSAL

In order to eradicate the need for lay juries, the proposal must serve the plaintiffs and make sure that they have a fair system to adjudicate their claims. For this reason, this proposal is composed of two methods. Specifically, the proposal consists of a courtroom process and an alternative administrative law health court ("Health Court") process available for patients to choose. Each process offers specialized services, benefits, advantages, and disadvantages. By placing the choice in the plaintiff's hands, many of the constitutional arguments weaken. The main difference between this proposal and the original health court proposal is that the presuit process is mandatory in medical malpractice cases in Florida and strongly recommended for other states considering the implementation of this proposal. The implementation of the proposed system should be on a smaller scale to supplement the current legal procedure until it is fully tested and developed. Then the system will eventually overtake the current procedure. Implementing this proposal will not be done overnight. A successful execution of this process will take a lot of time, refinement, and open minds. However, because Florida has made previous progress with medical malpractice reform, like the Compensation Plan and presuit process, the idea of a Health Court system is feasible.

Florida's encouragement to settle through the presuit process is an opportunity that cannot be overlooked in this proposal. Therefore, like now, a patient must notify each defendant of the intent to litigate with the proper paperwork and service of process. The plaintiff does not allege the course that he or she intends on using until the plaintiff formally files his or her complaint to either tribunal. Because the proposal consists of two systems in place, one where litigation-type damages may be awarded and the other closer to a damage schedule, the parties' settlement bargaining power is not limited during the presuit process.169

This proposal mandates an additional step to the presuit process. The plaintiff will be required to meet with a representative, aside from the attorney hired, who works for the Health Court system. This

A representative would be paid a salary and has no stake in the matter. This representative’s job will be to listen to a plaintiff’s claim, provide additional coaching on which process the representative thinks that the plaintiff should choose, and thoroughly explain the advantages and disadvantages of both processes. The meeting will contain information and discussion on settlement as well. The representative will give the plaintiff a handout that explains the two processes and a copy of his or her evaluation of the meeting. The evaluation will provide the plaintiff with a helpful tool for discussion with his or her attorney as well as afford the plaintiff with a neutral opinion on his or her case.

After the presuit screening is complete, the party files a formal complaint to the proper tribunal to commence litigation. The two processes, the courtroom experience and the Health Court experience, differ from here on out. The courtroom process consists of two sub options. One is a bench trial held by a specialized judge and the other is a jury trial.

Presently, there is a flood of lawyers in the market in need of jobs and a flood of medical malpractice cases in the courtroom. This proposal attempts to remedy both issues. The judge will be trained to specialize in medical law and preside over jury trials, bench trials, and Health Courts. This position is a new job opportunity for people who have past medical experience and still want to pursue a career in law, or for people who have specialized in that area while attending law school. This position gives law students another area to practice and opens new job opportunities. The idea is to create a new profession that benefits the community while opening new jobs and getting the Health Courts running effectively.

To create effective specialized judges a new curriculum will be developed for these new-aged judges. Law schools would require

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170 See Mark Koba, Courtroom Drama: Too Many Lawyers, Too Few Jobs, CNBC (Mar. 21, 2013, 12:01 PM), http://www.cnbc.com/id/100569350. “Because of the recession of 2007-2009 and a still-struggling economy, the legal profession is under severe stress.” Id. Aspects, such as an overall increase in population in the United States, the healthcare growth population, the achievement of modern medicine, and the rise in litigation have led to a rise in medical malpractice suits in Florida. See Holloran, supra note 11, at 332.

171 See generally Holloran, supra note 11, at 351 (arguing that judges are not given
applicants to take medical courses offered in medical schools throughout Florida. Modifications, such as online, undergraduate, and graduate classes offering similar courses would be offered for law schools that are not located near medical schools. Because of the specialized quality of becoming a medical Health Court judge, their legal education should surpass three years. Tentatively, the specialized training for Health Court judges could extend four years or more. In addition to their medical education, these students will be required to intern with an acting specialized judge and intern with hospital residents observing the many fields of medicine for a semester or more. Because it is a new system, the first class of judges would not have anyone to intern for them. Therefore, students would watch medical malpractice suits in preparation for their jobs. After two classes graduate into the system the interning portion of the proposal would begin.

In the bench trial option, the specialized judge would preside over the case like a usual bench trial. The patient would retain the option to select neutral experts provided by the court or to bring his or her own expert at his or her own expense. This decision must be made by the mid-discovery phase of litigation. A specific time period, such as ninety days, would be decided upon approval by the legislature. In order to protect the patient from biased doctors, and to protect camaraderie within the medical field, the court shall seek doctors, retired professionals, medical professors, et cetera, who live out of the immediate county or out of state, to serve as neutral experts for the cases. After each party presents his or her case and cross-examines the experts and witnesses the judge renders a written decision. This decision is appealable to the court of appeals using the regularly applied standard in administrative tribunals.

The jury trial option is similar to the traditional procedures in use today; the new proposal would require a specialized judge, an

specific training to understand difficult medical concepts and terminology in medical malpractice claims).

172 See generally id. at 368 (advocating for courts to appoint natural expert witness); 12 Fla. Jur. 2D Costs § 88 (2014) (stating that compensation for witnesses must be paid by the person who summons the witness at an amount agreed upon by the parties).

option for the plaintiff to have the judge choose an expert witness, and the jury to be comprised of college-educated students, either undergraduate, graduate, first-year law students, or second-year medical students. Pursuant to the Florida Constitution, a jury cannot have less than six jurors.\textsuperscript{174} Therefore, the goal is for two students from every form of education listed above to be on the jury at once. The goal is to implement first-year students of professional schools because they still hold a sense of "innocence" to the profession. From experience, a first-year law student is exposed to how to think like a lawyer and may have already started to develop a new way of analysis, which shows that a first-year law student retains his or her reasonableness as a layperson but could handle a complex claim. First-year and second-year medical students are still learning the medical jargon and have not yet assimilated into the community aspect of the medical field.\textsuperscript{175} Because they are still students and not considered doctors, serving as a juror will not harm the students against a potential colleague in their future profession. Comparatively, higher educated citizens in undergraduate and graduate school have a higher ability to understand some of the complicated information involved in medical malpractice cases.\textsuperscript{176}

Not everyone who sues for medical malpractice is in pursuit of money.\textsuperscript{177} Historically, there have been several reasons why patients sued healthcare providers, such as not wanting the same negligence to happen to anyone else.\textsuperscript{178} Other reasons for litigation included the need for an explanation, wanting doctors to understand what they did wrong,

\begin{itemize}
\item \textsuperscript{174} \textit{FLA. CONST.} art. 1, § 22.
\item \textsuperscript{175} \textit{See} Karen Hamilton, \textit{Getting Ready: Medical School Years 1-3}, AM. MED. ASS'N, http://www.ama-assn.org//ama/pub/about-ama/our-people/member-groups-sections/minority-affairs-section/transitioning-residency/getting-ready-medical-school-years-1.page (last visited Feb. 14, 2015). "Most medical schools have two years of basic science courses, but there are some exceptions." \textit{Id.} Those exceptions include schools limiting the science courses to a year or a year-and-a-half. \textit{Id.} Either way, for the most part, medical students will just be learning theoretical information and a medical malpractice suit may prove to be a good teaching tool.
\item \textsuperscript{176} \textit{See} Holloran, \textit{supra} note 11, at 344.
\item \textsuperscript{178} \textit{See} \textit{id.}
\end{itemize}
or wanting an admission of negligence. In more recent years, there is evidence that plaintiffs' motivations are not always financial. Investigating the incident and discovering how the doctor or hospital plans to prevent future mistakes is still a common motivation. A lack of respect toward patients may also cause them to decide to sue. Because some plaintiffs do seek compensation and other disciplinary action the court option is open. However, the proposed Health Court is created for those seeking closure in a tribunal less focused on money.

The Health Court proposal focuses on the emotional aspect that patients seek, not merely compensation. Although the administrative health court system is different from the court system, the presuit step is mandatory to promote settlement. Unlike other proposals for health courts, under the proposal in this Article the plaintiff must prove negligence, not avoidability. Many patients want the healthcare provider to understand that the healthcare provider did something wrong or made a mistake that caused harm. Using the term "avoidable" does not carry the same disciplinary feeling as negligence. The parties must appear in front of a panel and present their cases to the panel. The panel consists of three to six specialized judges, as described before. The parties should still obtain legal counsel. The parties may bring their own expert to explain to the panel, but the normal protocol is for an expert to be assigned to the case. Neutral experts receive the case in advance and prepare for cross and direct examination by both parties under oath. Both parties are encouraged to speak to outside experts in order to prepare for the examination of the neutral, court-assigned expert.

After both sides have ended with a closing statement, the panel would have a couple of days, typically two to four, to issue a written verdict. A written decision by the head judge would be mailed to the parties, and the parties would have twenty days to review and appeal. If

179 Id.
181 See id.
182 See id.
183 See id.
184 See Lowry, supra note 177.
the panel finds that the injury was caused by negligence, compensation would be decided based on the panel’s choosing. The panel would use a table tracking precedent similar to a damage schedule. This schedule would be a compilation of all the precedent damages amounts and typical settlement agreements based on the facts. These settlement agreements would include presuit settlements as well as settlements that occur before the panel issues its decision. The panel would not be required to adhere to the chart, but the chart is a source of reliance for the panel. The patient’s requests for compensatory damages and what the defendant finds excessive is taken into account as well. In addition to compensation, the defendant would have to issue a formal apology, approved by the health court, to the party within thirty days after receiving the written decision. This apology must admit negligence to the family and show how the defendant plans to prevent this from happening again. Failure to comply with the order may lead to civil damages and contempt.

Because this proposal offers an in-court option and jury option, constitutional jury trials and access to court claims should lessen, if not cease. The plaintiffs are expressly forfeiting their right to a jury trial and access to the court if they choose the Health Court option. Additionally, the plaintiffs are also forfeiting their right to select their expert aids in lessening those due process claims. The patient’s separation of powers argument based on the court’s use of state-appointed experts also lessens because the patient would legally waive that right in written form by consenting to the state appointed expert, if they so choose.

The Florida Legislature is no stranger to medical malpractice reform that places a particular area of medical malpractice outside of the court system. The NICA damage cap system has been in effect

185 See Farrow, supra note 90, at 204. Notice, this is ten days after the appeal period is up. If the defendant loses and appeals, the apology is tolled until the issue is resolved. If the defendant loses on appeal the defendant has ten days to get the apology to the opposing party.

186 See Mello et. al., supra note 125, at 92.

187 See id.

188 See id.

189 See, e.g., supra notes 25-32 and accompanying text.
for more than two decades with some level of success. The proposed damage schedule is not a damage cap; it is a precedent organizer open to variation because the cases are determined on a case-by-case basis. Presuit settlement sums are included in the damage schedule. Constitutional claims against the schedule may follow, however, the nonconclusiveness of the schedule may provide a stronger argument than the "flat-dollar caps" that some health court proposals suggest.

Critics of health courts believe that the courts allow hospitals and insurers to force settlements for lesser amounts due to the damage schedule, which causes plaintiffs to be grossly underpaid in comparison to jury trial payouts. This proposal should not foster the same fear. Because the first chance to settle occurs during the presuit process, the plaintiff is getting the same opportunity and price of settlement generally available. There would be two different ways to settle the claim, through the Health Court system or through the regular court system. When someone elects Health Court, he or she is expecting to get a reduced amount already. The settlement should be along the lines of the damage schedule, which will save costs and fees and provide incentive to settle in a fair way that is not grossly inaccurate. If the patient decides to use the Health Court system, he or she is subject to the same rights as in a tort claim. The only difference is that those parties will be trying their case in front a judge who knows the material or to a jury, if requested, with a higher ability to understand the complexity of the case, which is constitutional.

VI. CONCLUSION

The common criticism of the current medical malpractice system stems from the jury. The majority of juries are composed of laypersons. Lay jurors are receiving jury instructions that they do not

190 See NICA-Florida's Innovative Alternative to Costly Litigation, supra note 25.
191 See Mello et. al., supra note 125, at 67-68.
192 See Farrow, supra note 90, at 204.
193 See Howard & Maine, supra note 86.
194 See supra notes 117-18 and accompanying text.
195 See supra Part III.A.
196 See supra notes 1-5 and accompanying text.
always understand because the instructions are very complex. These laypersons, due to lack of understanding of the complex issues, are basing their decisions on subjective elements and lawyering tactics created to lure the jury into siding with either party. The severity of the injury and other factors are being used to determine the liability of the healthcare provider, which is not the correct standard. Medical malpractice suits have turned into a battle of the experts, instead of figuring out which standard of care the healthcare provider owes to the patient. Therefore, the government needs to impose an alternative system in adjudicating claims that does not include laypersons determining medical malpractice cases.

Although reform will not be easy it is a necessary step in the evolution of medical development. The idea of heath courts, as proposed in the past, was a brilliant step in the right direction to design a system that can analyze complex information and prescribe a fair decision. Many of the initially proposed aspects of health courts target key issues within the medical malpractice decision-making process and attempt to resolve them. This proposal attempts to target issues with the previous health court and remedy those issues. As long as the reader is persuaded that the current system needs to change, the reform has begun.

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197 See supra notes 80-85 and accompanying text.
198 See supra notes 70-79 and accompanying text.
199 See supra note 79 and accompanying text.
200 See supra Part III.A.
201 Cf. supra Part III.A.
202 See supra Part III.A.
203 See supra Part III.B.
204 See supra Part III.B.
205 See supra Part V.