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CIVIL PROCEDURE—CONSTITUTIONAL LAW—Access to the Courts and the Medical Malpractice Act: *Jiron v. Mahlab*

I. INTRODUCTION

The New Mexico Medical Malpractice Act (the "Act"),[1] was enacted in 1976 as an attempt by the Legislature to ensure the availability of health care at a reasonable cost for the people of New Mexico. The Legislature sought to achieve this goal by making professional liability insurance for health care providers easier to obtain.[2] One of the provisions of the Act requires a plaintiff wishing to bring a medical malpractice action to seek review of his claim by the Medical Review Commission prior to filing an action with any court.[3] In *Jiron v. Mahlab*,[4] the New Mexico Supreme Court found this requirement unconstitutional as applied to plaintiffs who purportedly would lose personal jurisdiction over a defendant because of the delay involved in going to the Commission.[5] The court ruled that the statute violated the plaintiffs' due process right of access to the courts.[6]

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1. N.M. Stat. Ann. §§ 41-5-1 to -28 (Repl. Pamp. 1982).

The Act possesses several reform-oriented provisions. It authorizes the creation of a Medical Review Commission composed of health care providers and attorneys. *Id.* § 41-5-14. All claims for alleged acts of malpractice must be evaluated and adjudged by the Commission before any action is filed with the district court. *Id.* § 41-5-15. The Commission's decision is advisory and does not bind the parties in any way. *Id.* § 41-5-20. The three-year statute of limitations applicable to medical malpractice actions, *id.* § 41-5-13, is tolled from the time of submission of the case to the Commission until thirty days after the Commission's decision is entered. *Id.* § 41-5-22. The Act limits a claimant's maximum recovery for one occurrence to $500,000, excluding punitive damages and medical costs. *Id.* § 41-5-6(A).

The Act does not cover all health care providers in the state; the system is voluntary. To qualify for coverage under the Act, a health care provider must either show proof of malpractice liability insurance or post a bond. All covered providers must also pay an additional state surcharge. *Id.* § 41-5-5.

The case of Jiron v. Mahlab, 99 N.M. 425, 659 P.2d 311 (1983), deals exclusively with the provision mandating that the claim be submitted to the Medical Review Commission prior to filing any court action, N.M. Stat. Ann. § 41-5-15(A) (Repl. Pamp. 1982).

2. The Legislature acted in response to a statewide medical malpractice crisis. Medical costs were rapidly escalating, and health care providers were finding it increasingly difficult to obtain malpractice insurance. *See generally* Kovnat, *Medical Malpractice Legislation in New Mexico*, 7 N.M.L. Rev. 5, 7-10 (1976-77).

3. N.M. Stat. Ann. § 41-5-15(A) (Repl. Pamp. 1982) provides: "No malpractice action may be filed in any court against a qualifying health care provider before application is made to the medical review commission and its decision is rendered."

4. 99 N.M. 425, 659 P.2d 311 (1983).

5. *Id.* at 427, 659 P.2d at 313.

6. *Id.* at 428, 659 P.2d at 314.

This Note criticizes the *Jiron* court's holding that the statute violated the plaintiffs' right to due process. It proposes a simpler resolution of the problem of loss of personal jurisdiction over the defendant: the court should have considered the alternatives to personal service of process prescribed by the New Mexico long-arm statute[7] and Rule 4 of the New Mexico Rules of Civil Procedure.[8]

II. STATEMENT OF THE CASE

In May, 1982, the plaintiffs, Anna Jiron and her husband, Alfred, sought to bring a medical malpractice action against the defendant-physician, Dr. Benjamin Mahlab, and his employer, Medical Emergency Services, Inc.[9] The plaintiffs alleged that Dr. Mahlab's treatment had caused permanent injury to Mrs. Jiron's esophagus and vocal cords.[10] During the preliminary preparation of the case, the plaintiffs discovered that the defendant-physician was planning an extended tour of Southeast Asia and would be difficult to contact during his absence.[11] The plaintiffs, anticipating that this defendant would soon be unavailable for service of process, filed suit in the Valencia County District Court and immediately served the defendant with process.[12] In doing so, the plaintiffs failed to abide by the requirement of the Medical Malpractice Act which provides: "No malpractice action may be filed in any court . . . before application is made to the medical review commission and its decision is rendered."[13] The district court dismissed the action without prejudice for lack of subject matter jurisdiction due to the plaintiffs' failure to abide by this provision of the Act.[14] The court, however, granted leave to file an interlocutory appeal.[15] After the court of appeals declined to review the case, the New Mexico Supreme Court granted the plaintiffs' petition for certiorari.[16] In a 3-2 decision, the supreme court reversed the decision of the district court and held that the plaintiffs in this case could initiate their suit without first submitting their claim to the Medical Review Commission.[17]

III. DISCUSSION AND ANALYSIS

In *Jiron v. Mahlab,* the New Mexico Supreme Court ruled that the Medical Malpractice Act unconstitutionally violated the plaintiffs' due

7. N.M. Stat. Ann. § 38-1-16 (1978).
8. N.M. R. Civ. P. 4.
9. *Jiron,* 99 N.M. at 426, 659 P.2d at 312.
10. *Id.*
11. *Id.*
12. *Id.*
13. N.M. Stat. Ann. § 41-5-15(A) (Repl. Pamp. 1982).
14. *Jiron,* 99 N.M. at 426, 659 P.2d at 312.
15. *Id.* The district court acted pursuant to N.M. Stat. Ann. § 39-3-4 (1978).
16. *Jiron,* 99 N.M. at 426, 659 P.2d at 312.
17. *Id.* at 428, 659 P.2d at 314.

process right of access to the courts.[18] The court reasoned that the delay caused by the requirement that plaintiffs seek a hearing with the Medical Review Commission before filing a court action would unduly prejudice these plaintiffs, because the plaintiffs would thereby lose personal jurisdiction over a defendant who would soon be leaving the state.[19] The court ruled that the plaintiffs were deprived of a protected right of access to the courts by operation of the statute because, as a practical matter, it would be difficult to serve the defendant in Southeast Asia.[20] The court considered the prejudicial delay suffered by the plaintiffs to be an unconstitutional burden on their right of access to the courts. The court, therefore, held the Act unconstitutional as applied to these plaintiffs.[21]

The decision in *Jiron* was accompanied by a vigorous dissent.[22] The dissent argued that the court should not make an "unconstitutional as applied" exception for these plaintiffs.[23] The dissent accused the majority of disregarding "[t]he plain meaning of the statute . . . to avoid a harsh result."[24] The dissent believed that, in so doing, the majority had abused one of the basic principles of statutory interpretation by refusing to accept the presumptive constitutionality of an act of the Legislature. The majority's adjudication of the question on constitutional grounds should have been avoided, the dissent claimed, particularly because there was a nonconstitutional basis for upholding the legislative act.[25] The dissent maintained that the New Mexico long-arm statute which provides for service of process outside the state for any cause of action arising from "the commission of a tortious act within this state"[26] was a sufficient safeguard to protect a plaintiff from the loss of personal jurisdiction over a defendant in a tort action.[27]

18. *Id.*

19. *Id.* at 427, 659 P.2d at 313.

20. *Id.* at 427-28, 659 P.2d at 313-14.

21. *Id.*

22. *Id.* at 428, 659 P.2d at 314 (Stowers, J., Riordan, J., dissenting).

23. "If the majority feels that the statute is unconstitutional, the appropriate measure would be to say so and allow the Legislature to remedy the problem." *Id.*

24. *Id.*

25. *Id.* (citing Seidenberg v. New Mexico Board of Medical Examiners, 80 N.M. 135, 452 P.2d 469 (1969), and Village of Deming v. Hosdreg Co., 62 N.M. 18, 303 P.2d 920 (1956), as examples of decisions that avoided deciding a question on constitutional grounds).

26. The dissent advocated the use of N.M. Stat. Ann. § 38-1-16 (1978), which provides in part:

> A. Any person, whether or not a citizen or resident of this state, who . . . does any of the acts enumerated in this subsection thereby submits himself or his personal representative to the jurisdiction of the courts of this state as to any cause of action arising from:
>
> . . .
>
> (3) the commission of a tortious act within this state. . . .
>
> B. Service of process may be made upon any person subject to the jurisdiction of the courts of this state under this section by personally serving the summons upon the defendant outside this state and such service has the same force and effect as though service had been personally made within this state. . . .

See 99 N.M. at 428, 659 P.2d at 314 (Stowers, J., Riordan, J., dissenting).

27. 99 N.M. at 428, 659 P.2d at 314 (Stowers, J., Riordan, J., dissenting).

A. The Due Process Question

The *Jiron* majority concluded that the Medical Malpractice Act deprived the plaintiffs of their right of access to the courts without due process of law.[28] The court, however, failed to articulate the standard of review it applied in reaching this decision. Unfortunately, by failing to consider the difference between a liberty interest and a property interest, the court may have misapplied the United States Supreme Court's reasoning in *Boddie v. Connecticut*,[29] upon which it relied.

The *Jiron* court relied on *Boddie* to show that the state cannot deny access to the courts to an individual who seeks redress of a protected right.[30] In *Boddie*, the petitioner sought access to the courts in order to obtain a divorce when the only available means of doing so was by resorting to the judicial process.[31] The United States Supreme Court determined that an indigent plaintiff who was denied access to the courts while seeking to exercise a fundamental right was deprived of due process.[32] The Court, however, expressly stated that it did *not* decide that "access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment. . . ."[33]

The meaning of this limiting language became clearer in the subsequent case of *United States v. Kras*.[34] In *Kras*, the Court distinguished *Boddie* and refused to recognize a constitutionally protected right of access to the courts for an indigent petitioning for bankruptcy.[35] The Supreme Court held that the interest of discharging one's debts in bankruptcy did not rise to the same constitutional level as the right to adjust one's marital relationship.[36]

Boddie and *Kras* demonstrate that the United States Supreme Court does not recognize an absolute due process right of access to the courts;

28. 99 N.M. at 427-28, 659 P.2d at 313-14.
29. 401 U.S. 371 (1971).
30. 99 N.M. at 426, 659 P.2d at 312.
31. 401 U.S. at 380.
32. *Id.* at 380-81.
33. *Id.* at 382.
34. 409 U.S. 434 (1973).
35. *Id.* at 444-46. For an opposing view, see Justice Marshall's dissenting opinion in *Kras*:

> When a person raises a claim of right or entitlement under the laws, the only forum in our legal system empowered to determine that claim is a court. . . . There is no way to determine whether he has such a right except by adjudicating his claim. Failure to do so denies him access to the courts.

Id. at 462-63 (Marshall, J., dissenting) (footnotes omitted).

Commentators on the *Kras* decision have criticized the majority's failure to recognize access to the courts as a fundamental right. *See, e.g.*, Note, *Supreme Court Denies Indigents Access to the Courts*, 8 Val. U.L. Rev. 455, 462-64 (1974); Note, *United States v. Kras: Justice at a Price*, 40 Brooklyn L. Rev. 147, 173-74 (1973).

36. 409 U.S. at 445. *Cf.* Ortwein v. Schwab, 410 U.S. 656 (1973) (filing fee did not deny due process to indigents seeking to appeal an adverse welfare decision).

rather, it is the nature of the underlying interest that determines whether the due process clause protects access to the courts. The United States Supreme Court in *Boddie* was protecting a recognized liberty interest.[37] *Kras,* on the other hand, involved an economically based property interest.[38] The difference in outcomes of the two cases may be explained by the different standards of review the Court employs when considering economic and property interests on the one hand, and liberty interests on the other. Although the fourteenth amendment protects both liberty and property interests,[39] the United States Supreme Court has emphasized that property interests are not created by the Constitution.[40] While the Court strictly scrutinizes any attempt by a state to limit the exercise of a fundamental liberty interest (*e.g.* the right to dissolve one's marriage),[41] the Court is generally willing to defer to a state's determination as to which economic and property interests deserve protection.[42] As a result, liberty and property interests are on a different constitutional footing. Unlike liberty interests, which are either expressly mentioned in the Constitution (such as the freedoms of speech and religion)[43] or implicit in the Constitution (the right to marry and the right of privacy),[44] "[t]he hallmark of property . . . is an individual entitlement grounded in state law. . . ."[45]

1. The Right to Bring a Tort Action as a Property Right under the Due Process Clause

The right to bring a tort claim is a species of property created by the common law and protected by the due process clause.[46] A state may erect reasonable procedural requirements for triggering this right.[47] While the state cannot take away the right to an adjuducation without due process, the procedure may be changed at the will, or even at the whim, of the legislature.[48] Individuals do not have a vested interest in any particular

37. 401 U.S. at 376. Prior to *Boddie,* the Supreme Court had already determined that decisions involving marriage are constitutionally protected aspects of the right of privacy, implicit in the fourteenth amendment's concept of liberty. *See* Loving v. Virginia, 388 U.S. 1 (1967) (right to marry a person of a different race); Griswold v. Connecticut, 381 U.S. 479 (1965) (right of married persons to obtain contraceptives).

38. 409 U.S. at 446.

39. U.S. Const. amend. XIV, § 1: "[N]or shall any State deprive any person of life, liberty or property, without due process of law. . . ."

40. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

41. See the Court's discussion in *Boddie,* 401 U.S. at 374-75.

42. *See, e.g.,* Williamson v. Lee Optical, 348 U.S. 483 (1955); United States v. Carolene Products Co., 304 U.S. 144 (1938); *see generally* Monaghan, *Of "Liberty" and "Property",* 62 Cornell L. Rev. 405 (1977).

43. U.S. Const. amend. I.

44. *See supra* note 37.

45. Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982).

46. Martinez v. California, 444 U.S. 277, 281-82 (1980).

47. *Logan,* 455 U.S. at 437.

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

form of procedure that defines one's right to claim a property interest.[49] The United States Supreme Court has stated that "the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational."[50] State courts have upheld laws modifying the common law procedures for redress of personal injuries and injuries to property even though they burden or delay access to the courts.[51]

A state may modify many incidents of bringing a tort claim without violating due process. In fact, prior to *Jiron,* the New Mexico Court of Appeals upheld a due process challenge to a section of the Medical Malpractice Act which modified the statute of limitations applicable to wrongful death actions resulting from a physician's malpractice.[52] The court of appeals concluded that the Legislature had a rational basis for providing such a limitation.[53] The *Jiron* dissent similarly advocated a deferential stance towards the legislative choices contained in the Act.[54]

As long as legislation is not unreasonable, arbitrary, or capricious, it does not violate due process.[55] By failing to recognize the limitations of *Boddie* and the distinctive nature of a property interest, the *Jiron* majority did not give proper deference to the Legislature in the reformation of its tort laws. The interest of a legislature in modifying common law rules of adjudicating medical malpractice claims is not unreasonable, because the public has an important interest in the low cost and the availability of health care.[56] The legislative determination that a particular procedure is appropriate provides all the process that is due.[57]

Once a state has established a procedure for adjudicating a claim of right, a state may not, as a matter of federal due process, deny a potential litigant use of the procedure.[58] In *Logan v. Zimmerman Brush Co.,*[59] the Illinois Fair Employment Practices Commission negligently failed to hold a hearing within the time required by law, and the Commission subsequently dismissed the plaintiff's claim as time-barred.[60] The United States

49. *Id.* at 134. *See also* Silver v. Silver, 280 U.S. 117, 122 (1929).
50. *Martinez,* 444 U.S. at 282.
51. *See, e.g.,* Carter v. Sparkman, 335 So. 2d 802, 805 (Fla. 1976), *cert. denied,* 429 U.S. 1041 (1977).
52. Armijo v. Tandysh, 98 N.M. 181, 646 P.2d 1245 (Ct. App. 1981).
53. *Id.* at 183, 646 P.2d at 1247.
54. 99 N.M. at 428, 659 P.2d at 314 (Stowers, J., Riordan, J., dissenting).
55. Pruneyard Shopping Center v. Robins, 447 U.S. 74, 85 (1980).
56. *See* Everett v. Goldman, 359 So. 2d 1256, 1266 (La. 1978); State ex rel. Strykowski v. Wilkie, 81 Wis. 2d 491, 261 N.W.2d 434, 443 (1978).
57. *Logan,* 455 U.S. at 433.
58. *Id.* at 430 n.5.
59. 455 U.S. 422 (1982).
60. *Id.* at 426.

Supreme Court held that by preventing the plaintiff from using the established procedure, the state had deprived the plaintiff of a property interest protected by the due process clause.[61] In *Jiron*, in contrast, the state did nothing to prevent the plaintiffs from using the state-created procedure.

Thus, in *Jiron*, the state's action in creating a pre-judicial screening panel under the Medical Malpractice Act established a reasonable precondition for access to state courts. The state did nothing to interfere with the plaintiffs' right to have the Medical Review Commission consider their claim. Once the Commission had made its recommendation, the plaintiffs would then have been able to decide whether to proceed with a court action. On these bases, therefore, there was no violation of the plaintiffs' due process rights.

2. Tort Claims and Due Process under the New Mexico Constitution

Alternatively, the court could have invalidated the statute on state due process grounds.[62] In addition to relying on *Boddie*, the *Jiron* court also approvingly cited the Missouri Supreme Court's holding that Missouri's medical malpractice statute, which was similar to New Mexico's medical malpractice statute, was unconstitutional.[63] The Missouri court found that the requirement that a plaintiff submit his claim to a review board for evaluation before filing suit violated the litigant's right of access to the courts without delay.[64] Unlike the New Mexico Constitution, the Missouri Constitution expressly guarantees justice without delay,[65] thereby providing independent state grounds for the finding that the statute was unconstitutional.

The *Jiron* majority gave no indication that it had reached its decision on state constitutional grounds or that it was interpreting a specific state constitutional provision. Though the court appears to view a plaintiff as having an absolute right of access to the courts that may not be "prejudiced" or subject to "undue delay,"[66] there does not appear to be either a state or federal constitutional basis for holding that such a right actually exists. Unless the state constitution gives access to the court's protected status or unless the underlying interest for which a plaintiff seeks redress

61. *Id.* at 432-33.

62. The New Mexico Constitution's due process clause simply states: "No person shall be deprived of life, liberty or property without due process of law. . . ." N.M. Const. art. II, § 18.

63. 99 N.M. at 427, 659 P.2d at 313 (citing State ex rel. Cardinal Glennon Memorial Hospital for Children v. Gaertner, 583 S.W.2d 107 (Mo. 1979)).

64. State ex rel. Cardinal Glennon Memorial Hospital for Children v. Gaertner, 583 S.W.2d 107, 110 (Mo. 1979).

65. Mo. Const. art. I, § 14.

66. 99 N.M. at 427, 659 P.2d at 313.

is fundamental, there is no authority from which to conclude that the plaintiffs were denied due process under the New Mexico Constitution.

B. The Service of Process Question

The court failed to address the very important question of whether the absence of the defendant actually prejudiced the plaintiffs' ability to bring a lawsuit. A litigant's right to procedural due process normally is not prejudiced as long as he has "an opportunity to be heard at a reasonable time and in a reasonable manner."[67] The court should have considered whether the plaintiff could have effectuated service of process on the defendant under the New Mexico long-arm statute[68] or Rule 4 of the New Mexico Rules of Civil Procedure.[69]

The dissent suggested the long-arm statute as a possible means of securing personal jurisdiction over an out-of-state defendant in a tort action.[70] The long-arm statute authorizes personal service outside of the state as a means of securing jurisdiction over a defendant who has committed a tortious act within the state, regardless of whether the defendant is a resident of New Mexico.[71] The dissent was satisfied that there was no need to reach the question of the constitutionality of the Medical Malpractice Act because the availability of the long-arm statute provided the possibility of relief for these plaintiffs.[72] The majority seemed to be particularly sympathetic to the problems of serving a defendant traveling in Southeast Asia.[73] One wonders whether the court would have reached the same result if the defendant had been traveling throughout the United States.

Neither the dissent nor the majority considered the possibility that Rule 4 might have provided an additional method of securing personal jurisdiction over the defendant. Had the justices considered the use of constructive or substituted service for this defendant, the court might have concluded that the defendant was susceptible to service of process. The court then would have been able to avoid the question of whether the Act violated the plaintiffs' due process rights.

The court's failure to consider this strand of analysis could be related to the insufficiency of the facts available for adjudication.[74] The court

67. Milliken v. Meyer, 311 U.S. 457, 463 (1940).
68. N.M. Stat. Ann. § 38-1-16 (1978).
69. N.M. R. Civ. P. 4.
70. 99 N.M. at 428, 659 P.2d at 314 (Stowers, J., Riordan, J., dissenting).
71. N.M. Stat. Ann. § 38-1-16 (1978), *quoted in part, supra* note 26.
72. 99 N.M. at 428, 659 P.2d at 314 (Stowers, J., Riordan, J., dissenting).
73. 99 N.M. at 427, 659 P.2d at 313.
74. The basic facts available to the court were: 1) Defendant Mahlab was a Canadian citizen; 2) Defendant was leaving on an extended tour of Southeast Asia; 3) Defendant did not know how he could be contacted while on that tour; 4) Defendant stated "I may just like one place and stay there

should have simply remanded the case to the district court for development of additional facts. The court seemingly failed to inquire into the likely duration of the defendant's absence and his intention of returning to New Mexico. By failing to ascertain the likely duration of the defendant's absence from New Mexico, the court neglected to consider that the defendant might have returned from abroad by the time the Medical Review Commission had rendered a decision. The defendant would have then been amenable to personal service, and the plaintiffs' claim would not have been prejudiced because the statute of limitations would have been tolled during the Commission's deliberations.[75]

The court also overlooked the fact that one of the primary purposes of the review procedure is to screen out frivolous claims and encourage settlement of meritorious claims.[76] Once the Commission had made its recommendation, the plaintiffs might have chosen not to pursue their action at all (were the recommendation unfavorable to them), or, alternatively, the defendant's insurer might have wished to settle the claim out of court (were the recommendation unfavorable to the defendant). The problem of service, therefore, would have been totally moot, as the plaintiffs would not then need to seek a court action.

The plaintiffs did not allege that the defendant would remain permanently unavailable for service of process. Even if a defendant is temporarily out of the state, Rule 4 provides that substituted service may be effectuated on a state resident by "delivering a copy of the process . . . to some person residing at the usual place of abode of the defendant. . . ."[77] If a person has an established home in the state, a mere absence, even of considerable duration, does not destroy this residence as a usual place of abode, so long as the person has an intention to return.[78] The court should have remanded the case to ascertain whether the defendant was a New Mexico resident,[79] whether he planned to return to the state, and whether he continued to maintain a place of residence here.

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for a while"; and 5) Defendant left on his tour in June of 1982. *See* Petition for Certiorari at p. 2, Transcript of Record on Appeal. The Record is available at the New Mexico Supreme Court library.

The supreme court derived the facts upon which it relied solely from the allegations contained in the plaintiffs' petition for certiorari. The defendant was not asked to submit any evidence disputing or supporting the facts that the plaintiffs alleged. The parties filed no briefs, and the court did not hear oral argument on the questions presented. Per author's telephone interviews with counsel for the plaintiffs, Ron Andazola, and counsel for defendant Mahlab, Alan Torgerson (Oct. 1983).

75. *See* N.M. Stat. Ann. § 41-5-22 (Repl. Pamp. 1982).

76. *See* Kovnat, *supra* note 2, for a discussion of the reasons for enacting the Act.

77. N.M. R. Civ. P. 4(e).

78. *See* Annot., 32 A.L.R.3d 112, 119 (1970) and cases cited therein at § 27. *See also* Karlin v. Avis, 326 F. Supp. 1325 (D.N.Y. 1971).

79. Defendant Mahlab, although a Canadian citizen, was a practicing physician in New Mexico and thus was likely a resident of the state.

Alternatively, service by publication may have been constitutionally adequate in this situation.[80] The New Mexico Supreme Court in *Clark v. LeBlanc*[81] authorized service by publication even for actions *in personam* if the defendant 1) is a resident of the state; 2) is aware that a civil action may be instituted against him; and 3) attempts to conceal himself to avoid service of process.[82] If the defendant had purposefully tried to conceal himself, such actions would constitute a waiver of service of process.[83] Under *Clark,* if the plaintiff could show that the defendant was leaving the country in an attempt to avoid service of process or had wilfully refused to cooperate in providing an address where he could be contacted while overseas, service by publication would be an acceptable alternative to personal service.[84]

Other states have rules of procedure that are more flexible in providing alternatives to personal service.[85] Their rules of civil procedure grant their courts much greater latitude in determining which mode of service is permissible in a given situation. For example, Michigan's rule provides that, in addition to formally recognized means of service, "the court in which an action has been commenced may, in its discretion, allow service of process to be made upon a defendant in any other manner which is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard. . . ."[86] On this basis, the Michigan Supreme Court upheld service on a defendant's insurer when the defendant was unavailable for service of process.[87]

Unfortunately, the *Jiron* court did not have the opportunity to consider expanding the uses or revising the language of Rule 4 because it failed entirely to address the service of process question. The court should have declined to render any decision until service had actually been attempted

80. The United States Supreme Court, in Mullane v. Central Hanover Bank and Trust, 339 U.S. 306 (1950), held that, at a minimum, the method of service chosen must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendancy of the action and afford them an opportunity to present their objections. . . ." *Id.* at 314. *Mullane* recognized that "in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification . . . creates no constitutional bar. . . ." *Id.* at 317.

81. 92 N.M. 672, 593 P.2d 1075 (1979).

82. *Id.* at 673-74, 593 P.2d at 1076-77.

83. *Id.* at 673, 593 P.2d at 1076.

84. One commentator believes that the *Jiron* majority implicitly rejected the possibility of obtaining personal jurisdiction over this defendant through the use of the long-arm statute. This would be consistent with New Mexico law if the defendant were a non-resident. *See* Occhialino, *Civil Procedure,* 14 N.M.L. Rev. 17, 24-25 (1984). However, the available facts are insufficient to conclude that Dr. Mahlab was not a New Mexico resident. *See supra* note 79.

85. *See, e.g.,* Mich. Gen. Ct. R. 105.8.

86. *Id.*

87. Krueger v. Williams, 410 Mich. 144, 300 N.W.2d 910 (1981). See Note, *Civil Procedure-Jurisdictional Due Process and Substitute Service on the Liability Carrier,* 28 Wayne L. Rev. 1553 (1982) for a discussion of this opinion.

on the defendant, following a conscious decision by the plaintiffs to go forward with their action in district court. The critical question for purposes of personal jurisdiction is whether the defendant would have been available for service of process after the Medical Review Commission rendered its decision. The facts in existence at that time would have provided the proper context for adjudication of the service of process issue. Allowing a plaintiff to bypass the Medical Review Commission contravenes the very purposes of enacting such reform legislation: to screen out unmeritorious claims and to avoid unnecessary litigation.

C. Ramifications of the Court's Decision

Had the court addressed the service of process question, future litigants would have been provided clearer guidelines on the application of Rule 4 in instances where it is difficult to effect personal service on an elusive tortfeasor. As an alternative resolution of the question, the court could have endorsed the use of the long-arm statute to obtain jurisdiction over this defendant. Instead the court offered a confusing decision on due process grounds that may be strictly limited to its facts.

A future medical malpractice litigant may find it troublesome to determine what degree of difficulty or delay in acquiring personal jurisdiction over a defendant will be sufficient to permit reliance on the *Jiron* decision.[88] A plaintiff may not know whether he can file an action directly with the district court or whether he must first take his claim to the Medical Review Commission. As a result of the *Jiron* decision, however, two things are apparent. First, practioners should thoroughly develop the record so that the reviewing court can properly evaluate the situation. Second, practioners should make sure that the reviewing court is aware of all the alternatives available to effectuate service of process.

IV. CONCLUSION

The court's decision in *Jiron v. Mahlab* is very unclear as to the basis for its holding that the plaintiffs had a constitutionally protected due process right of access to the courts. The court may have misapplied the United States Supreme Court's decision in *Boddie v. Connecticut*.[89] *Bod-*

88. The recent case of Otero v. Zouhar, 23 N.M. Bar Bull. 670 (Ct. App., June 21, 1984) suggests that future application of the *Jiron* holding (that the Act may deprive a plaintiff of access to the courts) will be strictly limited to situations in which a loss of parties or witnesses occurred through no fault of the plaintiff. In *Otero*, the court refused to allow a plaintiff to file a lawsuit in court one day before the statute of limitations was to expire when the plaintiff had neglected to seek review by the Medical Review Commission. *Id.* at 674. The court distinguished the facts in *Otero* from those in *Jiron*. In *Otero*, the plaintiff's problems arose from plaintiff's own delay in filing suit rather than from delay in compliance with the Act. *Id.* at 676. Thus, the court concluded that the Act itself in no way denied the plaintiff his right of access to the courts. *Id.*

89. 401 U.S. 371 (1971).

die dealt with a liberty interest (the right to make marital decisions free from governmental restrictions) while *Jiron* dealt with a property interest (the right to bring an action in tort). The Supreme Court's line of reasoning in *United States v. Kras*[90] and *Logan v. Zimmerman Brush Co.*[91] seems more applicable to the interest involved in *Jiron*. *Kras* and *Logan* show that access to the courts is not, by itself, a fundamental right. A state can reasonably condition access to its courts, but once the state has created a procedure, it cannot abridge an individual's right to use that procedure. In *Jiron,* any restriction on access to the courts was reasonable in light of the legislative goal of controlling the number of medical malpractice claims. Additionally, the state in no way prevented the plaintiffs from seeking access to its courts through the use of an established procedure. The plaintiffs, therefore, did not suffer a violation of their due process rights.

If the court believed that the statute was offensive on state constitutional grounds, the court should have encouraged the Legislature to redraft the Act so as to permit all plaintiffs to file their actions with the district court and to serve the defendants before proceeding to the Medical Review Commission. Other jurisdictions employ this type of procedure.[92]

The court could have avoided the whole due process issue entirely. It was premature to conclude that these plaintiffs were denied access to the courts because of loss of jurisdiction over the defendant. The court should have remanded *Jiron* to the district court as the case was not yet ripe for constitutional adjudication. By failing to consider the New Mexico long-arm statute and Rule 4, the court overlooked the possible alternatives to personal in-hand, in-state service, such as substituted or constructive service. Consideration of the provisions of Rule 4 should be the first step in situations where service on the defendant presents a potential barrier to the plaintiff's access to the courts. As an alternative, the court might have considered amending Rule 4 using language similar to that of the Michigan rule.[93] A more flexible rule would minimize the chance that an elusive tortfeasor might be able to avoid service of process. A practitioner confronted with a similar situation would do well to develop a record with sufficient facts regarding a defendant's whereabouts and should consider the alternatives to personal service of process contained in Rule 4.

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90. 409 U.S. 434 (1973).

91. 455 U.S. 422 (1982).

92. *See, e.g.*, Ariz. Rev. Stat. Ann. § 12-567(A) (Cum. Supp. 1983-84); Mass. Gen. Laws Ann. ch. 231, § 60B (West Cum. Supp. 1983-84); N.Y. Judiciary Law § 148-a (McKinney 1983); Ohio Rev. Code Ann. § 2711.21(A) (Page 1981).

93. *See supra* notes 85-87 and accompanying text.