

1977

## Arbitration - Compulsory Arbitration in Pennsylvania - Arbitration Act - De Novo Appeals

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### Recommended Citation

Ronald L. Slater, *Arbitration - Compulsory Arbitration in Pennsylvania - Arbitration Act - De Novo Appeals*, 16 Duq. L. Rev. 443 (1977).

Available at: <https://dsc.duq.edu/dlr/vol16/iss3/11>

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ARBITRATION—COMPULSORY ARBITRATION IN PENNSYLVANIA— ARBITRATION ACT—DE NOVO APPEALS—The Pennsylvania Supreme Court has held that a local court rule preventing a witness who had not testified at an arbitration hearing from testifying in a subsequent trial on appeal contravened the express mandate of the Arbitration Act that all appeals should be de novo and thus exceeded the rule-making authority of the common pleas courts.

*Weber v. Lynch*, 375 A.2d 1278 (Pa. 1977).

Ruth M. Weber and her husband, C. Kenneth Weber, commenced an action in the Court of Common Pleas of Allegheny County on June 18, 1972, against Mary Katherine Lynch, alleging negligence and claiming, *inter alia*, damages for personal injuries sustained as a result of a motor vehicle accident which occurred on July 5, 1970. Newton M. Weir was joined as an additional defendant by Lynch.<sup>1</sup>

On January 4, 1974, an arbitration hearing<sup>2</sup> was held resulting in an award for the plaintiffs in the amount of four thousand dollars against Lynch and Weir. At the arbitration hearing the plaintiffs presented several witnesses, including two doctors who had examined and treated Mrs. Weber after the accident;<sup>3</sup> but Dr. Mallory, who had been the first to treat her, did not testify.<sup>4</sup> The Webers filed

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1. *Weber v. Lynch*, 375 A.2d 1278, 1279 (Pa. 1977). Ruth Weber was a passenger seated on the right side of the car owned by her husband, being driven by her son, which had stopped at a stop light. Lynch ran into the rear of the Weber vehicle and then Weir hit the Lynch vehicle and drove it for a second time into the Weber vehicle.

2. The Arbitration Act of 1836, as amended, provides in pertinent part:

The several courts of common pleas may by rules of court, provide that all cases which are at issue where the amount in controversy shall be ten thousand dollars (\$10,000) or less in counties of the first and second class, second class A, and third class and five thousand dollars (\$5,000) or less in all other counties, except those involving title to real estate, shall first be submitted to and heard by a board of three (3) members of the bar within the judicial district . . . .

PA. STAT. ANN. tit. 5, § 30 (Purdon Supp. 1977-1978). Allegheny county is a county of the first class.

For an interesting and thorough analysis of the results of a study of Pennsylvania's system of compulsory arbitration of small claims, see Rosenberg & Schubin, *Trial By Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania*, 74 HARV. L. REV. 448 (1961) [hereinafter cited as Rosenberg].

3. The two doctors testified that Ruth Weber's shoulder injury was caused by the accident of July 5, 1970; however, neither had seen her within the three months directly subsequent to her injury while Dr. Mallory had. 375 A.2d at 1280; Brief for Appellees at 2-3, *Weber v. Lynch*, 375 A.2d 1278 (Pa. 1977) [hereinafter cited as Brief for Appellees].

4. Dr. Mallory had been scheduled to testify at the arbitration hearing, but on the day it

a timely appeal<sup>5</sup> from the arbitration award requesting a jury trial in the court of common pleas.

At the trial on May 23, 1974, plaintiffs proposed to call Dr. Mallory as a witness.<sup>6</sup> The defendants, invoking rule 303 J of the Allegheny County Court of Common Pleas Rules of Civil Procedure,<sup>7</sup> which generally restricts a party from calling at trial witnesses not called at the arbitration hearing,<sup>8</sup> objected to the proffer of Dr.

was held he could not appear because of urgent medical appointments. 375 A.2d at 1280.

5. Section 27 of the Arbitration Act provides:

Either party may appeal from an award of arbitrators, to the court in which the cause was pending at the time the rule or agreement of reference was entered, under the following rules, regulations and restrictions, viz.:

I. The party appellant, his agent, or attorney, shall make oath or affirmation, that "it is not for the purpose of delay such appeal is entered, but because he firmly believes injustice has been done."

II. Such party, his agent, or attorney, shall pay all the costs that may have accrued in such a suit or action.

III. The party, his agent, or attorney, shall enter into the recognizance hereinafter mentioned.

IV. Such appeal shall be entered, and the costs paid, and the recognizance filed, within twenty days after the day of the entry of the award of the arbitrators on the docket.

V. In all cases under section 8.1 hereof, any party appealing shall first repay to the county the fees of the members of the board of arbitrators herein provided for, but not exceeding fifty per cent of the amount in controversy. The balance of the arbitrator's fees shall be absorbed and paid by the county. Such fees shall not be taxed as costs or be recoverable in any proceeding. *All appeals shall be de novo.*

PA. STAT. ANN. tit. 5, § 71 (Purdon 1963) (emphasis added) [hereinafter referred to as section 27].

6. Although Dr. Mallory did not appear as a witness at the arbitration hearing, the defendants were not only advised prior to the jury trial that he would appear as a witness but were also given a copy of his medical report. *Weber v. Lynch*, No. 2156, slip op. at 1 (Pa. C.P. Allegheny County Oct. 24, 1974). He was prepared to testify that he had treated Ruth Weber for her left shoulder injury shortly after the accident of July 5, 1970, and that it was his professional opinion that she had traumatic bursitis of the left shoulder caused by the accident. Brief for Appellees, *supra* note 3, at 3. Dr. Mallory's testimony was significant because there was evidence that Mrs. Weber had suffered other accidents affecting her shoulder. 375 A.2d at 1280.

7. Rule 303 J provides: "Except by allowance of the court for good cause shown, no witness, other than an after discovered witness, may be called by a party at any subsequent trial who was not called as a witness by that party at the arbitration hearing." ALLEGHENY COUNTY C.P.R. CIV. P. 303 J.

8. The Arbitration Act of 1836 provides in pertinent part:

Each of the said courts shall have full power and authority to establish such Rules for regulating the practice thereof respectively, and for expediting the determination of suits, causes and proceedings therein, as in their discretion they shall judge necessary or proper: Provided, that such rules shall not be inconsistent with the Constitution and the laws of this commonwealth.

PA. STAT. ANN. tit. 17, § 2076 (Purdon 1963).

Mallory's testimony. The plaintiffs argued that the doctor's testimony was within the "good cause" exception to the rule<sup>9</sup> and that, alternatively, the rule was invalid because it improperly restricted their right to de novo appeal.<sup>10</sup> The trial judge, however, held the rule valid, and found that the testimony of Dr. Mallory did not come within the "good cause" exception because the plaintiffs might have subpoenaed the doctor to appear at the arbitration hearing but did not. Accordingly, he refused to allow Dr. Mallory to testify.<sup>11</sup>

Upon the Webers' motion for a new trial, the common pleas court en banc reversed the decision of the trial judge and granted a new trial, holding that rule 303 J not only unconstitutionally infringed upon the right to trial by jury but also violated due process rights.<sup>12</sup>

On direct appeal by defendants Lynch and Weir, the Superior Court of Pennsylvania, in a 4-3 decision, affirmed the order<sup>13</sup> solely on the ground that rule 303 J conflicted with the Arbitration Act's provision that "all appeals shall be de novo" and therefore impermissibly exceeded the rule making authority of the common pleas courts.<sup>14</sup> A determination of the rule's constitutionality thus became unnecessary and was not addressed.<sup>15</sup> The Pennsylvania Supreme

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9. 375 A.2d at 1280. See notes 4 & 7 *supra*.

10. 375 A.2d at 1280. Section 27 (V) of the Arbitration Act provides for de novo appeals. See note 5 *supra*. Furthermore, Allegheny County Rule 306 B also provides that such appeals be de novo. ALLEGHENY COUNTY C.P.R. CIV. P. 306 B. See note 22 *infra* for a discussion of cases treating the issue of de novo appeal.

11. See 375 A.2d at 1280.

12. See *Weber v. Lynch*, No. 2156, slip op. at 10 (Pa. C.P. Allegheny County Oct. 24, 1974). The court en banc, speaking through an opinion by the trial judge, said that any rule of court which forbids the reception of competent and relevant evidence impairs the right to trial by jury and denies due process in violation of the Pennsylvania and United States Constitutions. The source of the potential constitutional conflict was article V, section 9, of the Pennsylvania Constitution, which provides:

There shall be a right of appeal in all cases to a court of record from a court not of record; and there shall also be a right of appeal from a court of record or from an administrative agency to a court of record or to an appellate court, the selection of such court to be as provided by law; and there shall be such other rights of appeal as may be provided by law.

PA. CONST. art. V, § 9. See *Weber v. Lynch*, 237 Pa. Super. Ct. 48, 52 n. 4, 346 A.2d 363, 364 n.4 (1975), *aff'd*, 375 A.2d 1278 (Pa. 1977).

13. 237 Pa. Super. Ct. 48, 346 A.2d 363 (1975), *aff'd*, 375 A.2d 1278 (Pa. 1977). President Judge Watkins and Judges Hoffman and Spaeth joined in the opinion written by Judge Jacobs. Judge Cercone filed a dissenting opinion, and Judge Price filed a dissenting opinion in which Judge Van der Voort joined.

14. *Id.* at 54, 346 A.2d at 366.

15. "The true issue thus before us is not initially one of constitutionality but rather whether Rule 303 J impermissibly conflicts with a legislative mandate." *Id.* at 53, 346 A.2d at 365. See notes 50 & 51 and accompanying text *infra*.

Court unanimously affirmed, also finding rule 303 J to be in conflict with section 27 of the Arbitration Act and violative of plaintiffs' statutory right to a de novo appeal.<sup>16</sup>

The supreme court recognized the power of the courts of common pleas in Pennsylvania to promulgate and enforce rules of procedure to aid them in expediting the business of the courts.<sup>17</sup> This power, however, was limited by the requirement that such rules be consistent with the constitution and laws of the commonwealth.<sup>18</sup>

The court examined prior Pennsylvania decisions<sup>19</sup> in light of the constitutional right to a trial by jury, distinguishing between procedures that must be fulfilled in order to be granted an appeal to the jury from an arbitration award and restrictions on the subsequent jury trial itself. While the cases have clearly permitted procedural restrictions to perfecting an appeal, none have set evidentiary limitations on the resulting jury trial.<sup>20</sup> Further, the court found that the legislature, in providing for compulsory arbitration, did not intend to limit the evidence presented at the de novo jury trial to that

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16. 375 A.2d 1278 (Pa. 1977). Justices O'Brien, Pomeroy, and Nix joined in the opinion written by Chief Justice Eagen, and Justice Roberts filed a concurring opinion in which Justice Manderino joined.

17. *Id.* at 1281.

18. *Id.* See note 8 and accompanying text *supra*.

19. One of the cases the court analyzed was *Emerick v. Harris*, 1 Binn. 416 (Pa. 1808), in which the Pennsylvania Supreme Court upheld the constitutionality of a statute which enlarged the original jurisdiction of the alderman's court so long as it provided the right to a trial by jury on appeal. The court also examined *Application of Smith*, 381 Pa. 223, 112 A.2d 625, *appeal dismissed*, 350 U.S. 858 (1955), in which the Pennsylvania Supreme Court dealt specifically with the constitutionality of compulsory arbitration, as enlarged in 1952, in the context of the right to trial by jury. The court in *Smith* recognized that a statute having the effect of compelling parties to submit to arbitration against their will or without their assent would violate not only the provision of the state constitution guaranteeing trial by jury but also the due process provision contained in the fourteenth amendment of the United States Constitution. But the court held that the statute before it was not unconstitutional because it provided for a right of appeal from the decision of the arbitrators. All that was required was that the right of appeal not be burdened by the imposition of onerous conditions, restrictions, or regulations which would make the right practically unavailable. For examples of restrictions that have been held permissible, see note 20 *infra*.

20. 375 A.2d at 1282. See, e.g., *Capital Traction Co. v. Hof*, 174 U.S. 1 (1898) (constitutional provision of trial by jury is not violated by a requirement that security for the prosecution of the appeal and satisfaction of the final judgment be furnished); *Gottschall v. Campbell*, 234 Pa. 347, 83 A. 286 (1912) (upheld requirement of payment of jury fee in advance of trial); *Haines v. Levin*, 51 Pa. 412 (1866) (upheld requirement of giving bail for the payment of costs accrued and to accrue or for the performance of some other duty); *McDonald v. Schell*, 6 Serg. & Rawl. 239 (Pa. 1820) (upheld requirement of payment of costs before the entry of an appeal in order to obtain a jury trial). See also note 45 *infra*. The superior court had also made this distinction. 237 Pa. Super. Ct. at 53, 346 A.2d at 365.

presented before the arbitrators.<sup>21</sup> Instead, there were to be no evidentiary limitations upon the parties other than those which would be applicable to an original trial.<sup>22</sup> The court therefore rejected appellants' argument that the right to a de novo appeal from the award of the arbitrators encompassed no more than that the trial judge and jury be free to reach a totally new decision based on essentially the same evidence and testimony which was presented to the arbitrators, and declared rule 303 J to be invalid.<sup>23</sup> In doing so, the court found the rule to be inconsistent with the interpretation of the Arbitration Act in prior judicial decisions<sup>24</sup> and agreed with the superior court's overruling of the 1973 superior court decision of *Hayes v. Wella Corp.*,<sup>25</sup> which had upheld rule 303 J.<sup>26</sup>

The court next rejected appellants' contention that rule 303 J did not constitute an onerous burden on the right of de novo appeal<sup>27</sup> because the rule allowed a witness to testify at trial even though he

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21. In *Sipe v. Pennsylvania R. R.*, 219 Pa. 210, 68 A. 705 (1908), the court held that a party who had failed to appear or offer testimony before the arbitrators could nevertheless appeal and secure a trial by jury. The court in *Weber* concluded that the legislature's failure, despite subsequent legislative revisions of compulsory arbitration, to change the Arbitration Act cited in *Sipe*, showed approval of the court's interpretation of the Act. 375 A.2d at 1283 n.6. The sections of the act interpreted in *Sipe* were: Act of June 16, 1836, No. 186, § 17, 1836 Pa. Laws 715 (current version at PA. STAT. ANN. tit. 5, § 41 (Purdon 1963)), which provides for the method of proceeding before the arbitrators where only one party attends, and Act of June 16, 1836, No. 186, § 27, 1836 Pa. Laws 715 (current version at PA. STAT. ANN. tit. 5, § 71 (Purdon 1963)), which provides for an appeal by either party. Reading the two sections in pari materia, the court in *Sipe* concluded that a party who failed to appear before the arbitration board was not denied a right of appeal. See 375 A.2d at 1282-83.

22. 375 A.2d at 1283. A de novo trial includes the "unfettered right" to present at trial competent and relevant evidence of the sort here excluded by application of rule 303 J. See *Dickerson v. Hudson*, 223 Pa. Super. Ct. 415, 302 A.2d 444 (1973) (in view of the statutory provision for de novo appeals from compulsory arbitration, the fact that no defense evidence on the question of liability was presented at the arbitration hearing did not limit the appellant's right to appeal for a jury trial on the issue of damages). See also *Bell v. Shetrom*, 214 Pa. Super. Ct. 309, 312, 257 A.2d 323, 324-25 (1969) ("An appeal from compulsory arbitration is tried de novo before the court and jury and plaintiffs are free to present such evidence as they may have whether it was presented before the arbitrators or not.").

23. 375 A.2d at 1281.

24. *Id.* at 1283-84. See notes 21 & 22 and accompanying text *supra*.

25. 226 Pa. Super. Ct. 728, 309 A.2d 817 (1973).

26. The trial judge in *Hayes v. Wella Corp.* described 303 J as "clearly consistent with the laws of the Commonwealth in that it protects the integrity and efficacy of the statute providing for compulsory arbitration, and is not inconsistent with the Constitution in that it is but one of a number of reasonable conditions to which the right of trial by jury may be subjected." *Hayes v. Wella Corp.*, Nos. 481 & 482, slip op. at 6 (Pa. C.P. Allegheny County Oct. 20, 1972).

27. 375 A.2d at 1284. See the discussion of *Smith* in note 19 *supra*.

did not at the arbitration proceeding if "good cause" were shown.<sup>28</sup> The burden of showing "good cause" as a prerequisite to presenting the testimony was clearly inconsistent with the unrestricted statutory right to a trial de novo.<sup>29</sup> The court also disposed of appellants' arguments that failure to sustain rule 303 J would jeopardize the integrity and efficacy of the arbitration system by making the arbitration hearing a mere dress rehearsal for the trial de novo<sup>30</sup> and opening up the courts to unnecessary appeals.<sup>31</sup> The court noted that compulsory arbitration had functioned elsewhere in the commonwealth without such a rule,<sup>32</sup> and concluded that the existing statutory prerequisites to appeal<sup>33</sup> were sufficient to assure meaningful arbitration and to discourage frivolous appeals.<sup>34</sup> Moreover, a rule such as 303 J might discourage the relative informality and flexibility of the proceedings which were perceived as valuable aspects of arbitration.<sup>35</sup>

Finally, the court found its decision in *Weber* to be consistent with *Commonwealth v. Harmon*,<sup>36</sup> where the court held that a criminal defendant was not denied his "unfettered right" to a trial by jury in a constitutionally-granted appeal de novo even though he

28. 375 A.2d at 1284. In the superior court, Judge Cercone stated in his dissenting opinion: Thus Rule 303 J does not absolutely prohibit the calling of a witness at trial who was not called at the arbitration hearing. The Rule contemplates exceptions when extenuating circumstances exist. I believe that this caveat, that is, "except by allowance of the court for good cause shown," preserves the validity of Rule 303 J. Where a party voluntarily refrains from calling a witness, or fails to advance a reasonable explanation for not calling the witness, I do not think a rule of court which precludes that witness from testifying at a subsequent trial is inconsistent with either the Constitution or laws of this Commonwealth.

237 Pa. Super. Ct. at 55, 346 A.2d at 366.

29. 375 A.2d at 1284.

30. The trial judge, speaking for the common pleas court en banc, considered this possibility and reasoned that the desire for full exposition and minimal appeals is outweighed by the fundamental rights of the people. *Weber v. Lynch*, No. 2156, slip op. at 9 (Pa. C.P. Allegheny County Oct. 24, 1974).

31. In his dissenting opinion in the superior court, Judge Price expressed the belief that the preservation of the compulsory arbitration system, its integrity and efficacy, would be emasculated if rules like 303 J were not sustained since it would encourage parties to refrain from meaningful participation. 237 Pa. Super. Ct. at 56, 346 A.2d at 366.

32. 375 A.2d at 1284. See note 53 *infra*.

33. See note 5 *supra* for a discussion of these prerequisites.

34. 375 A.2d at 1284. For a comprehensive examination of appeal statistics in Philadelphia, and a discussion of the probabilities of increasing appeals as a result of increasing jurisdictional amounts, see 113 U. PA. L. REV. 1117 (1965).

35. 375 A.2d at 1284.

36. 469 Pa. 490, 366 A.2d 895 (1976).

was not entitled to relitigate a previously determined pretrial motion to suppress evidence.<sup>37</sup> In concurring in *Weber*, however, Justice Roberts reasoned that the results in the two were irreconcilable, for while *Weber* granted a "clean slate" to civil litigants in an appeal de novo, *Harmon* denied the same right to a criminal defendant.<sup>38</sup>

The Pennsylvania Supreme Court utilized *Weber* to clearly define the phrase "de novo" as it pertains to civil litigation throughout the commonwealth, an issue which had been in doubt because of conflicting case law.<sup>39</sup> In interpreting the Arbitration Act, which provided that all appeals be de novo, the court concentrated on how the phrase had been interpreted by both the courts and the legislature. By agreeing with the superior court's overruling of *Hayes v. Wella Corp.*,<sup>40</sup> the supreme court freed itself to follow other superior court decisions holding that parties who fail to appear before arbitrators and offer no testimony, or who appear but fail to present all of their evidence,<sup>41</sup> may nevertheless appeal and secure a trial by jury; thus, the court defined de novo to mean that the trial by jury shall take place as if there had never been an arbitration hearing. All parties should have the right to present at the subsequent trial on appeal all competent and relevant evidence and this right cannot be restricted by rules such as 303 J.<sup>42</sup> Such a rule defeats the purpose of a jury, *i.e.*, to hear the evidence, determine the facts, and render a true verdict according to the facts found by it and the law given by the court. It is questionable that a jury could perform this function if it were not presented with all the competent and relevant evidence available.

This definition of de novo is clearly demonstrated in the distinction drawn by both the superior<sup>43</sup> and supreme courts<sup>44</sup> between conditions which operate as a prerequisite to an appeal and restric-

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37. *Id.* See *Weber v. Lynch*, 375 A.2d at 1283.

38. 375 A.2d at 1284-85. See notes 61-73 and accompanying text *infra*.

39. See notes 22 & 26 and accompanying text *supra*.

40. *Hayes v. Wella Corp.*, 226 Pa. Super. Ct. 728, 309 A.2d 817 (1973). See note 26 and accompanying text *supra*.

41. See note 26 *supra*. See also *Cellutron Prods. Corp. v. Stewart*, 223 Pa. Super. Ct. 391, 300 A.2d 900 (1972) (held that on an appeal from an arbitration award, the trial is de novo before the court, and the parties are free to present the evidence they may have, whether presented before the arbitrators or not).

42. 375 A.2d at 1283.

43. 237 Pa. Super. Ct. at 53, 346 A.2d at 365.

44. 375 A.2d at 1282.

tions which operate on the subsequent trial itself. The former are allowed if reasonable;<sup>45</sup> however, no restrictions can be imposed on the subsequent trial itself without conflicting with the phrase "all appeals shall be de novo" as it appears in the Arbitration Act.<sup>46</sup> It seems that the courts of common pleas are either going to be trial courts or appellate courts, but not both. If the latter, then even 303 J would not be strict enough. The court would have to be limited to considering not only the same witnesses but also the same testimony. Clearly, such a construction is contrary to the concept of de novo.<sup>47</sup>

Neither the superior court nor the supreme court considered whether "good cause" was actually shown for Dr. Mallory's failure to testify at the arbitration hearing—a viable alternative solution to the case. It would seem logical that urgent medical appointments could conceivably be construed as "good cause" within the meaning of rule 303 J.<sup>48</sup> Although the plaintiffs could have subpoenaed the doctor, it is arguable that this would have resulted in a hostile witness, thereby defeating plaintiffs' purpose. Nevertheless, the failure of both courts to evaluate the facts in light of the "good cause" test evidences that a rule such as 303 J, restricting the basic and fundamental right to trial by jury, was unacceptable per se despite any safeguards contained in it.

The Pennsylvania Supreme Court avoided the constitutional

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45. See notes 19 & 20 *supra*. Cf. *Dickerson v. Hudson*, 223 Pa. Super. Ct. 415, 302 A.2d 444 (1973) (court held that in depth review of an arbitration award, including consideration of a petition to quash the appeal, answer thereto, argument, affidavits on both sides, and other pleadings, all for the purpose of determining whether sworn affidavit of no delay is taken in good faith, unduly burdens the appellant's constitutional right to trial by jury). See also *Black and Brown, Inc. v. Home for the Accepted, Inc.*, 233 Pa. Super. Ct. 518, 335 A.2d 722 (1975) (held that nonpayment of costs warranted dismissal of an appeal from an arbitration award where no timely attempt to tender costs was made by appellant despite express notice of the requirement that this be done). This case overruled *Meta v. Yellow Cab Co.*, 222 Pa. Super. Ct. 469, 294 A.2d 898 (1972), which held that attorney fees are part of record cost of arbitration but that this payment is directory rather than mandatory. *But see Lanigan v. Lewis*, 210 Pa. Super. Ct. 273, 232 A.2d 50 (1967) (court held that attorney's fees were not properly part of the record costs to be paid as a condition of taking an appeal from the award of the arbitrators).

46. See PA. STAT. ANN. tit. 5, § 71 (Purdon 1963). For text of statute, see note 5 *supra*.

47. See notes 41-46 and accompanying text *supra*.

48. However, at the superior court, Judge Cercone in his dissenting opinion felt that the trial judge correctly concluded that plaintiffs' excuse did not constitute "good cause" in light of the fact that plaintiffs had elected not to subpoena Dr. Mallory. 237 Pa. Super. Ct. at 55 n.1, 346 A.2d at 366 n.1.

issue raised by rule 303 J.<sup>49</sup> Traditionally, courts will not reach the constitutional issue if there is no need to do so.<sup>50</sup> Here, the supreme court had available the narrower ground of statutory construction. Further, the fact that the Pennsylvania Supreme Court had already declared compulsory arbitration unconstitutional when it failed to provide a right of appeal to trial by jury arguably decided the issue.<sup>51</sup>

The purposes of compulsory arbitration in Pennsylvania are twofold: to expedite the processing of smaller claims and, at the same time, to relieve the congestion and backlog in the courts of common pleas.<sup>52</sup> The Pennsylvania Supreme Court, finding compulsory arbitration to be functioning elsewhere in the commonwealth without a rule comparable to 303 J,<sup>53</sup> expressed fear that such a rule would discourage the relative informality and flexibility which are valuable aspects of arbitration, necessary to accomplish its purposes.<sup>54</sup> If

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49. 375 A.2d at 1281. See note 12 and accompanying text *supra*.

50. See *Dandridge v. Williams*, 397 U.S. 471, 475-76 (1970) ("We consider the statutory question first, because if the appellees' position on this question is correct, there is no occasion to reach the constitutional issues.").

51. In *Cutler v. Richley*, 151 Pa. 195, 25 A. 96 (1892), the Pennsylvania Supreme Court ruled that a statute, when it failed to provide a right of appeal and trial by jury, was unconstitutional as inconsistent with the right of litigants to jury trials. The court indicated that no unconstitutionality inhered in the fact that arbitration was compulsory as to the party that entered the rule to arbitrate, but that instead, the fatal defect lay in the fact that the party not entering the rule and not otherwise consenting to a legal arbitration had no right to a jury trial if he was dissatisfied with the arbitrator's award.

52. See *Rosenberg*, *supra* note 2, at 453. In *Application of Smith*, 381 Pa. 223, 112 A.2d 625 (1955), the court discussed the effects of arbitration on the court dockets:

It is clearly designed to meet the situation which prevails in some communities of jury lists being clogged to a point where trials can be had only after long periods of delay—a condition resulting largely from the modern influx of negligence cases arising from automobile accidents in a great number of which no serious personal injuries are involved. Removing the smaller claims from the lists not only paves the way for the speedier trial of actions involving larger amounts, but, what is of equal or perhaps even greater importance, makes it possible for the immediate disposition of the smaller claims themselves, thus satisfying the need for prompt relief in such cases. By the same token, and working to the same end, the use of the Act will free courts for the speedier performance of other judicial functions.

*Id.* at 229, 112 A.2d at 629.

53. 375 A.2d at 1284. There were 29,554 new arbitration cases added in Pennsylvania in 1976 and 28,634 dispositions. Allegheny County added 10,164 new cases in 1976 while disposing of 9,859. Philadelphia added 9,618 and disposed of 10,073. [1976] AD. OFF. OF PA. CT. REPORT 50, 58. From these statistics it is reasonable to conclude that arbitration is working well in Philadelphia even though it has no rule comparable to 303 J and even though its own rule for compulsory arbitration, rule VI(B), provides that "[a]ll appeals shall be *de novo*."

54. 375 A.2d at 1284. See *Application of Smith*, 381 Pa. 223, 229, 112 A.2d 625, 629 (1955) (court found that arbitration would save claimants both time and money by reason of greater flexibility in fixing the time and date of the arbitration hearing as compared to the less

303 J-type rules were sustained, the likely result of arbitration would not be the ridding of the monster of overcrowded dockets in the courts of common pleas, but instead, the creation of another in the formalized arbitration hearing. The arbitration proceedings would suffer the same problem of congestion that has limited the effectiveness of the courts.<sup>55</sup> Even if, as feared, some parties and their attorneys, especially those with larger claims, utilize arbitration for pretrial discovery, this discovery is less expensive and burdensome on the judicial system as a whole than it would be if it occurred in the courts.<sup>56</sup> Also, had 303 J been sustained, what of a party who changes counsel between the arbitration proceeding and the trial? Is it fair to the litigant to burden his trial counsel with the strategies or follies of prior counsel? Limiting the litigant's remedies to a malpractice suit<sup>57</sup> against arbitration counsel would have the counter-productive effect of adding still another case to the overcrowded court dockets that the arbitration procedure was created to alleviate.

It seems that the supreme court's conception of de novo appeal, as an unrestricted subsequent jury trial, is logical. Although encouragement of full and complete participation before the board of arbitrators might make more likely a just award that the litigants would not wish to challenge,<sup>58</sup> it must be balanced against the individual's right to a de novo appeal. Furthermore, the present statutory prerequisites to appeal guard against abuses of the arbitration system.<sup>59</sup> Under the present statute, a party appealing must repay the county

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adaptable court calendars).

For an interesting article in which the author discusses areas of litigation which are susceptible to the use of arbitration, such as consumer justice and medical malpractice, and in which it may prove superior to the present court system, see Lippman, *Arbitration As An Alternative to Judicial Settlement: Some Selected Perspectives*, 24 MAINE L. REV. 215 (1972) [hereinafter cited as Lippman].

55. See Lippman, *supra* note 54, at 238.

56. See Adams, *The Arbitration System*, 30 SHINGLE 3, 3-4 (1967).

57. See *Dilliaine v. Lehigh Valley Trust Co.*, 457 Pa. 255, 322 A.2d 114 (1974), where Justice Manderino pointed out in his concurring opinion: "An aggrieved party in a civil case, involving only private litigants unlike a defendant in a criminal case, does not have a constitutional right to the effective assistance of counsel. The remedy in a civil case, in which chosen counsel is negligent, is an action for malpractice." *Id.* at 260, 322 A.2d at 117-18.

58. See 237 Pa. Super. Ct. at 55-57, 346 A.2d at 366-67 (Price, J., dissenting).

59. 375 A.2d at 1284. In *Dickerson v. Hudson*, 223 Pa. Super. Ct. 415, 302 A.2d 444 (1973), the court stated: "These preconditions to appeal, together with counsel costs, witness fees, and other expenses which would be necessary to go to trial have proved sufficient to deter enough appeals so that the arbitration program has been successful. . . ." *Id.* at 425, 302 A.2d at 449. See notes 30-35 and accompanying text *supra*.

the cost of the arbitration proceeding, not to exceed fifty per cent of the amount in controversy. This payment is not a recoverable item of costs even if the appealing party prevails.<sup>60</sup> This provision alone would discourage frivolous appeals.

Although *Weber* has finally clarified what has been an area of uncertainty in civil litigation in Pennsylvania, it has also raised a cloud over the same area in criminal litigation. In his concurring opinion in *Weber*,<sup>61</sup> Justice Roberts expressed continued adherence to Justice Manderino's dissenting opinion in *Commonwealth v. Harmon*<sup>62</sup> that the right to a trial de novo in criminal litigation encompasses a right to a de novo hearing on the suppression of evidence. In *Harmon*, the defendant was convicted in the Philadelphia Municipal Court for possession of narcotics.<sup>63</sup> When he appealed to the court of common pleas for the trial de novo provided by the Pennsylvania Constitution,<sup>64</sup> the trial judge refused, on the basis of General Court Regulation 72-7, to relitigate the suppression motion denied in the municipal court. The regulation provided, in effect, that a motion to suppress which has been denied by municipal court may not be relitigated in an appeal to common pleas.<sup>65</sup> The Superior Court of Pennsylvania reversed, holding that General Court Regulation 72-7 was unconstitutional, and awarded a new trial.<sup>66</sup> The Pennsylvania Supreme Court then reversed the superior court, holding that General Court Regulation 72-7 did not transgress any constitutional provision.<sup>67</sup>

In its analysis, the supreme court looked at the constitutional

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60. See PA. STAT. ANN. tit. 5, § 71(V) (Purdon 1963). For text of statute, see note 5 *supra*.

61. 375 A.2d at 1284. Justice Manderino joined in the opinion.

62. 469 Pa. 490, 498-503, 366 A.2d 895, 899-902 (1976). Justice Roberts joined in the opinion.

63. See *id.* at 492, 366 A.2d at 896. The Pennsylvania Constitution conferred jurisdiction in certain criminal cases in the Municipal Court of Philadelphia. See *id.* at 493, 366 A.2d at 897. See also note 64 *supra*.

64. By statute, now, jurisdiction in certain criminal cases is conferred in the municipal court. The statute further provides: "In these cases, the defendant shall have no right of trial by jury in the municipal court, but he shall have the right of appeal for trial de novo including the right of trial by jury to the trial division of the court of common pleas." PA. STAT. ANN. tit. 17, § 711.18 (Purdon Supp. 1977-1978).

65. 469 Pa. at 493-94, 366 A.2d at 897. This rule of court was issued jointly by the president judges of the Court of Common Pleas of Philadelphia County and the Municipal Court of Philadelphia. *Id.*

66. *Commonwealth v. Harmon*, 229 Pa. Super. Ct. 326, 324 A.2d 473 (1974), *rev'd*, 469 Pa. 490, 366 A.2d 895 (1976).

67. *Commonwealth v. Harmon*, 469 Pa. 490, 366 A.2d 895 (1976).

criteria for "right of appeal for a trial de novo" and focused on the word "trial."<sup>68</sup> Agreeing that the words "de novo" required a new consideration of the subject, the court felt this did not answer the question of which events constituted the "trial" to be reconsidered in the "trial de novo" on appeal.<sup>69</sup> The court then interpreted the word "trial" as not including the pretrial motions,<sup>70</sup> finding that the objective of relieving the congestion and backlog in the county's courts would be defeated if General Court Regulation 72-7 were to be read as allowing the municipal court to become a mere rehearsal for further proceedings in the common pleas courts.<sup>71</sup> In his concurring opinion in *Weber*,<sup>72</sup> Justice Roberts argued that the holding in *Weber* could not be reconciled with the holding of the majority in *Harmon*. Roberts pointed to the irony of a civil litigant being afforded a truly clean slate in a trial de novo while a criminal defendant was denied the same right.<sup>73</sup>

The reasoning used to support the majority opinion in *Harmon*, that General Court Regulation 72-7 was needed to prevent the proceeding before the municipal court from becoming a useless exer-

68. *Id.* at 494, 366 A.2d at 897.

69. *Id.*

70. *Id.* at 495, 366 A.2d at 898. In his dissenting opinion in *Harmon*, Justice Manderino reasoned that the suppression hearing is nothing more than a determination of the admissibility of trial evidence, held outside the presence of the jury only to prevent uneconomical use of the jury's time, and therefore need not necessarily be held pretrial. He pointed out that questions as to the admissibility of evidence have traditionally been, and remain, an integral part of a trial and therefore the timing of admissibility hearings did not make them any less a part of the trial. 469 Pa. at 499, 366 A.2d at 900.

71. *Id.* at 497, 366 A.2d at 899.

72. 375 A.2d at 1284-85.

73. *Id.* The majority in *Harmon* were apparently aware of, but attached no significance to, the United States Supreme Court decision in *Colten v. Kentucky*, 407 U.S. 104 (1972). Kentucky has a two-tier system for adjudicating certain criminal cases under which a person charged with a misdemeanor may be tried first in an inferior court and, if dissatisfied with the outcome, have a trial de novo in a court of general criminal jurisdiction. In holding that Kentucky's two-tier system did not violate the due process clause because no penalty was imposed on those who sought a trial de novo after having been convicted in the inferior court, the United States Supreme Court stated:

If he seeks a new trial, the Kentucky statutory scheme contemplates that the slate be wiped clean . . . . Prosecution and defense begin anew. By the same token neither the judge nor jury that determines guilt or fixes a penalty in the trial *de novo* is in any way bound by the inferior court's findings or judgment. The case is to be regarded exactly as if it had been brought there in the first instance.

*Id.* at 113. This case was discussed in Justice Manderino's dissenting opinion in *Harmon*. He reasoned that *Colten* required that the defendant on a de novo appeal must not be prejudiced by the proceedings or outcome of the previous trial, this being one of the bases on which "two-tier" judicial systems are justified. 469 Pa. at 500-01, 366 A.2d at 901.

cise, is the same as that advanced by appellants for sustaining 303 J and rejected by the court in *Weber* on the grounds that it was outweighed by the fundamental right to a jury trial. Arguably, this fundamental right is just as important, if not more so, to criminal litigants. Although the court in *Harmon* focused on the word "trial" while *Weber* addressed "de novo," the clear implication is that the two cases have arrived at inconsistent definitions of de novo. It seems the court was correct as far as it went pertaining to civil litigation, but in its continued adherence to its decision in *Harmon*, the court has created a conflict between civil and criminal litigation which it will soon have to resolve. In the future, any attorney for a criminal defendant appealing to the court of common pleas for his "trial de novo" will be sure to cite *Weber v. Lynch* in an attempt to secure for his client a *complete* trial by jury on *all* aspects of the case.

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