

MAINE STATE LEGISLATURE

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1 SECOND REGULAR SESSION
2

3 ONE HUNDRED AND TWELFTH LEGISLATURE
4

5 Legislative Document

No. 1945

7 S.P. 773

In Senate, January 30, 1986

8 Approved for introduction by a majority of the Legislative Council
9 pursuant to Joint Rule 26.

Reference to the Committee on Judiciary suggested and ordered printed.

10 JOY J. O'BRIEN, Secretary of the Senate

Presented by Senator Twitchell of Oxford.

Cosponsored by Representative Jackson of Harrison.

11
12 STATE OF MAINE
13

14 IN THE YEAR OF OUR LORD
15 NINETEEN HUNDRED AND EIGHTY-SIX
16

17 AN ACT to Establish Policies Governing
18 Medical Malpractice Claims.
19

20 Be it enacted by the People of the State of Maine as
21 follows:

22 14 MRSA c. 745 is enacted to read:

23 CHAPTER 745

24 MEDICAL MALPRACTICE

25 §8301. Definitions

26 As used in this chapter, unless the context indi-
27 cates otherwise, the following terms have the follow-
28 ing meanings.

29 1. Health care. "Health care" means any act or
30 treatment performed or furnished, or which should
31 have been performed or furnished, by any health care
32 provider for, to or on behalf of a patient during the
33 patient's medical care, treatment or confinement.

1 2. Health care provider. "Health care provider"
2 means a person, partnership, corporation, profession-
3 al corporation, facility or institution licensed or
4 legally authorized by this State to provide health
5 care or professional services as a physician, psychi-
6 atric hospital, optometrist, podiatrist, chiroprac-
7 tor, physical therapist, psychologist or as an offi-
8 cer, employee or agent thereof acting in the course
9 and scope of his employment.

10 3. Hospital. "Hospital" means a public or pri-
11 ivate institution licensed as a hospital under the
12 laws of the State.

13 4. Malpractice. "Malpractice" means any tort or
14 breach of contract based on health care or profes-
15 sional services rendered, or which should have been
16 rendered, by a health care provider to a patient.

17 5. Patient. "Patient" means a natural person
18 who received or should have received health care from
19 a licensed health care provider under a contract, ex-
20 pressed or implied, and includes any and all persons
21 having a claim of any kind, whether derivative or
22 otherwise, as a result of alleged malpractice on the
23 part of a health care provider. Derivative claims
24 include, but are not limited to, the claim of a par-
25 ent or parents, guardian, trustee, child, relative,
26 attorney or any other representative of a patient,
27 including claims for loss of services, loss of con-
28 sortium, expenses and all such claims.

29 6. Physician. "Physician" means a person with
30 an unlimited license to practice medicine in this
31 State.

32 7. Representative. "Representative" means the
33 spouse, parent, guardian, trustee, attorney or other
34 legal agent of the patient.

35 8. Superintendent. "Superintendent" means the
36 Superintendent of Insurance.

37 §8302. Pretrial screening panel

38 1. Presentation to panel; exception. No action
39 against a health care provider may be commenced in

1 any court of this State before the claimant's pro-
2 posed compliant has been presented to a medical re-
3 view panel established pursuant to this chapter and
4 an opinion is rendered by the panel. A claimant may,
5 however, commence an action in court for malpractice
6 without the presentation of the claim to a medical
7 review panel if the claimant and all parties named as
8 defendants in the action agree that the claim is not
9 to be presented to a medical review panel. The
10 agreement must be in writing and must be signed by
11 each party or an authorized agent of the party. The
12 claimant must attach a copy of the agreement to the
13 complaint filed with the court in which the action is
14 commenced.

15 2. Composition of panel. The medical review
16 panel shall consist of one attorney and 3 health care
17 providers. The attorney shall act as chairman of the
18 panel and in an advisory capacity, but shall have no
19 vote. It is the duty of the chairman to expedite the
20 selection of the other panel members, to convene the
21 panel and to expedite the panel's review of the pro-
22 posed complaint: The chairman may establish a rea-
23 sonable schedule for submission of evidence to the
24 medical review panel, but must allow sufficient time
25 for the parties to make full and adequate presenta-
26 tion of related facts and authorities. The medical
27 review panel shall be selected in the following man-
28 ner.

29 A. Within 15 days after filing the request for
30 formation of a medical review panel under subsec-
31 tion 1, the parties shall select a panel chairman
32 by agreement or, if no agreement can be reached,
33 either party may request the clerk of the Supreme
34 Judicial Court to draw at random a list of 5
35 names of attorneys qualified to practice and
36 presently on the rolls of the Supreme Judicial
37 Court and maintaining offices in the county of
38 venue designated in the proposed complaint or in
39 a contiguous county. Prior to selecting the ran-
40 dom list, the clerk shall collect a \$25 medical
41 review panel selection fee from the party making
42 the request for the formation of the random list.
43 The clerk shall notify the parties and the par-
44 ties shall strike names alternatively, with the
45 plaintiff striking first, until one name remains

1 and that remaining attorney shall be the chairman
2 of the panel. After the striking, the plaintiff
3 shall notify the chairman and all other parties
4 of the name of the chairman. If a party does not
5 strike a name within 5 days after reviewing no-
6 tice from the clerk:

7 (1) The opposing party shall, in writing,
8 request the clerk to strike for the party;
9 and

10 (2) The clerk shall strike for that party.

11 When one name remains, the clerk shall within 5
12 days notify the chairman and all other parties of
13 the name of the chairman. The chairman shall,
14 within 15 days after being notified by the clerk
15 of his selection, send a written acknowledgment
16 of his appointment to the clerk or shall show
17 good cause for relief from serving as provided in
18 paragraph F.

19 B. All health care providers in this State,
20 whether in the teaching profession or otherwise,
21 who hold a license to practice in their profes-
22 sion, shall be available for selection as members
23 of the medical review panel. Each party to the
24 action shall have the right to select one health
25 care provider and, upon selection, the 2 health
26 care providers selected shall select a 3rd
27 panelist. When there are multiple plaintiffs or
28 defendants, there shall be only one health care
29 provider and the defendant, whether single or
30 multiple, shall have the right to select one
31 health care provider. If there is only one party
32 defendant who is an individual, 2 of the
33 panelists selected must be members of the profes-
34 sion of which the defendant is a member and, if
35 the individual defendant is a health care profes-
36 sional who specializes in a limited area, 2 of
37 the panelists selected must be health care pro-
38 fessionals who specialize in the same area as the
39 defendant.

40 C. Within 15 days after the chairman is se-
41 lected, each party shall select a health care
42 provider and shall notify the other party and the

1 chairman of his selection. If a party fails to
2 make a selection within the time provided, the
3 chairman shall make the selection and notify both
4 parties. Within 15 days after their selection,
5 the health care provider members shall select the
6 3rd member within the time provided and notify
7 the chairman and the parties. If they fail to
8 make a selection, the chairman shall make the se-
9 lection and notify both parties.

10 D. Within 10 days after any selection, written
11 challenge without cause may be made to the panel
12 member. Upon challenge or excuse, the party
13 whose appointee was challenged or dismissed shall
14 select another panelist. If the challenged or
15 dismissed panel member was selected by the other
16 2 panel members, they shall make a new selection.
17 If 2 challenges are made and submitted, the
18 chairman shall within 10 days appoint a panel
19 consisting of 3 qualified panelists and each side
20 shall within 10 days after the appointment strike
21 one with the party whose appointment was chal-
22 lenged striking last and the remaining member
23 shall serve.

24 E. When a medical review panel is formed, the
25 chairman shall within 5 days notify the superin-
26 tendent and the parties by registered or certi-
27 fied mail of the names and addresses of the panel
28 members and the date on which the last member was
29 selected.

30 F. A panelist selected, as provided in this sub-
31 section shall serve unless the parties by agree-
32 ment excuse him or, for good cause shown, he may
33 be excused as provided in this subsection. To
34 show good cause for relief from serving, the at-
35 torney selected as chairman must serve the affi-
36 davit upon the clerk of the Supreme Judicial
37 Court. The affidavit shall set out the facts
38 showing the service would constitute an unreason-
39 able burden or undue hardship. The clerk may ex-
40 cuse the attorney from serving and the attorney
41 shall notify all parties who shall then select a
42 new chairman as provided in paragraph A. To show
43 good cause for relief from serving, a health care
44 provider member must serve an affidavit upon the

1 panel chairman. The affidavit shall set out the
2 facts showing the service would constitute an un-
3 reasonable burden or undue hardship. The chair-
4 man may excuse the member from serving and notify
5 all parties.

6 3. Evidence. The evidence in written form to be
7 considered by the medical review panel shall be
8 promptly submitted by the respective parties. The
9 evidence may consist of medical charts, x rays, labo-
10 ratory tests, excerpts of treatise, depositions of
11 witnesses including parties and any other form of ev-
12 idence allowable by the medical review panel. Depo-
13 sitions of parties and witnesses, including parties
14 and any other form of evidence allowable by the medi-
15 cal review panel. Depositions or parties and wit-
16 nesses may be taken prior to the convening of the
17 panel. The chairman shall ensure that before the
18 panel renders its expert opinion, each panel member
19 has the opportunity to review every item of evidence
20 submitted by the parties.

21 A. Before considering any evidence or deliberat-
22 ing with other panel members, each member of the
23 medical review panel shall take on oath in writ-
24 ing on a form provided by the panel chairman,
25 which must read as follows:

26 "I (swear) (affirm) under penalties of per-
27 jury that I will well and truly consider the
28 evidence submitted by the parties and that I
29 will render my opinion without bias thereon;
30 that I have not and will not communicate
31 with any party or representative of a party
32 before rendering my opinion, except as au-
33 thorized by law."

34 Neither a party, party's agent, party's attorney
35 nor party's insurance carrier may communicate
36 with any member of the panel, except as autho-
37 rized by law, before the rendering of the panel's
38 opinion.

39 B. The chairman of the panel shall advise the
40 panel relative to any legal question involved in
41 the review proceeding and shall prepare the opin-
42 ion of the panel as provided in subsection 4.

1 4. Notice; communications; report. A health
2 care provider's insurance shall notify the superin-
3 tendent of any malpractice case upon which it has
4 placed a reserve of \$50,000 or more. The insurer
5 shall give notice to the superintendent under this
6 subsection immediately after placing the reserve.
7 The notice and all communications and correspondence
8 relating to it are confidential and may not be made
9 available to any person or public or private agency.

10 All malpractice claims settled or adjudicated to fi-
11 nal judgment against a health care provider shall be
12 reported to the superintendent by the plaintiff's at-
13 torney and by the health care provider or his insurer
14 or risk manager within 60 days following final dispo-
15 sition of the claim. The report to the commission
16 shall state the following:

17 A. Nature of the claim;

18 B. Damages asserted and alleged injury;

19 C. Attorney's fees and expenses incurred in con-
20 nection with the claim or defense; and

21 D. The amount of any settlement or judgment.

22 §8303. Qualifications of expert witnesses

23 All health care providers who hold a license to
24 practice in their profession shall be eligible to
25 serve as expert witnesses in medical malpractice
26 suits if one of the following qualifications are met:

27 1. Medical specialty. The plaintiff's physician
28 or other professional has spent at least 75% of his
29 time practicing or teaching medicine in the same spe-
30 cialty as the defendant against whom suit has been
31 filed; or

32 2. Current employment. The expert witness is
33 currently practicing his profession or teaching in an
34 academic setting.

35 §8304. Itemized verdict in medical malpractice ac-
36 tions

1 In a medical malpractice action, the court shall
2 instruct the jury that, if the jury finds a verdict
3 awarding damages, it shall in its verdict specify the
4 applicable elements of special and general damages
5 upon which the award is based and the amount assigned
6 to each element, including, but not limited to, medi-
7 cal expenses, loss of earnings, impairment of earning
8 ability and pain and suffering; provided that in any
9 action no verdict may award damages for pain and suf-
10 fering which exceed the sum of \$250,000.

11 §8305. Contingency fees

12 1. Limitation. In all medical malpractice ac-
13 tions, the total contingent fee for plaintiff's at-
14 torney or attorneys shall not exceed the following
15 amounts:

16 A. Thirty-three and one-third percent of the
17 first \$100,000 of the sum recovered;

18 B. Twenty-five percent of the next \$100,000 of
19 the sum recovered; and

20 C. Twenty percent of any amount recovered over
21 \$200,000 of the sum recovered.

22 2. Future damages; lump sum value. For purposes
23 of determining any lump sum contingent fee, any fu-
24 ture damages recoverable by the plaintiff in periodic
25 installments shall be reduced to lump sum value.

26 3. Review. The court may review contingent fee
27 agreements for fairness. In special circumstances,
28 where an attorney performs extraordinary services in-
29 volving more than usual participation in time and ef-
30 fort the attorney may apply to the court for approval
31 of additional compensation.

32 4. Definition. As used in this section, "con-
33 tingent fee basis" includes any fee arrangement under
34 which the compensation is to be determined in whole
35 or in part on the result obtained.

36 §8306. Malicious prosecution

1 In all cases alleging malicious prosecution arising
2 out of proceedings seeking damages for injuries
3 or death by reason of medical, hospital or other
4 healing art malpractice, the plaintiff need not plead
5 or prove special injury to sustain his cause of ac-
6 tion. In all such cases alleging malicious prosecu-
7 tion, no exemplary or punitive damages may be al-
8 lowed.

9 In all cases alleging damages by reason of medi-
10 cal, hospital or other healing art malpractice, alle-
11 gations and denials, made without reasonable cause
12 and found to be untrue, shall subject the party
13 pleading them or his attorney, or both, to the pay-
14 ment of reasonable expenses, actually incurred by the
15 other party by reason of the untrue pleading, togeth-
16 er with reasonable attorneys' fees, to be summarily
17 taxed by the court upon motion made within 30 days of
18 the judgment or dismissal.

19 §8307. Punitive damages

20 In all cases, whether in tort, contract or other-
21 wise, in which the plaintiff seeks damages by reason
22 of legal, medical, hospital or other healing art mal-
23 practice, no punitive, exemplary, vindictive or ag-
24 gravated damages shall be allowed.

25 STATEMENT OF FACT

26 This bill intends to introduce malpractice claim
27 reforms to respond to the impact of the current
28 availability and cost of that coverage.

29 The cost of coverage has increased twofold and
30 threefold for hospital and physician providers in the
31 last 12 to 18 months. This increase in cost is in
32 response to a rising frequency of claims. The impact
33 of these increases has placed an insurmountable bur-
34 den on the premium-paying hospitals and physicians of
35 this State. For many established physicians, it will
36 cause early retirement, relocation or limiting the
37 scope of services offered. The health care delivery
38 system can ill-afford these trends.

This bill intends to provide a mechanism to enact measures that will have a meaningful effect on controlling premiums.

This bill does the following:

1. Provides definition for the various terminology utilized in the bill;

2. Establishes a pretrial screening panel. This panel would provide for a nonlitigious mechanism to screen malpractice claims and settle these cases where injury had occurred as a result of a malpractice action;

3. Establishes the qualifications of individuals representing themselves as expert witnesses in these cases;

4. Establishes limits on awards for pain and suffering and will prevent unreasonable awards, yet will not deprive an injured claimant from due compensation;

5. Establishes a reasonable fee basis retaining the contingency fee system providing access to legal counsel for any party;

6. Provides that proof of damages will be just cause for a countersuit in malicious prosecution cases; and

7. Denies punitive damages award in medical malpractice cases.

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