

# MAINE STATE LEGISLATURE

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1 SECOND REGULAR SESSION  
2

3 ONE HUNDRED AND TWELFTH LEGISLATURE  
4

5 Legislative Document

No. 2109

6  
7 H.P. 1496

House of Representatives, March 3, 1986

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

10 Reference to the Committee on Business and Commerce suggested and  
ordered printed.

EDWIN H. PERT, Clerk

Presented by Representative Bonney of Falmouth.

11 Cosponsored by Representative Brown of Livermore Falls and Senator  
Perkins of Hancock.

12 STATE OF MAINE  
13

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

17 AN ACT Concerning Medical Malpractice  
18 Insurance.  
19

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

22 Sec. 1. 14 MRSA c. 745 is enacted to read:

23 CHAPTER 745

24 MEDICAL MALPRACTICE

25 SUBCHAPTER I

26 GENERAL PROVISION

27 §8301. Definitions

28 As used in this chapter, unless the context indi-  
29 icates otherwise, the following terms have the follow-  
30 ing meanings.

1           1. Healing arts. "Healing arts" means allopathic  
2 or osteopathic medicine, podiatry, optometry, dentis-  
3 try or chiropractic.

4           2. Health care professional. "Health care pro-  
5 fessional" means physicians and all others certified,  
6 registered or licensed in the healing arts. This term  
7 includes, but is not limited to, nurses, physical  
8 therapists, psychologists and physicians' assistants.

9           3. Medical malpractice action. "Medical malprac-  
10 tice action" means an action, whether in contract,  
11 tort or otherwise, in which the plaintiff seeks dam-  
12 ages for injury or death by reason of medical, hospi-  
13 tal or other healing art malpractice.

14                                   SUBCHAPTER II

15                                   REVIEW PANEL

16           §8321. Formation of panel

17           In any medical malpractice action, the court  
18 shall order the formation of a review panel to which  
19 that action shall be assigned for hearing and deter-  
20 mination. The order shall be issued no later than 30  
21 days after the parties are at issue on the pleadings.

22           §8322. Appointment of panel

23           1. Members. A review panel shall consist of 3  
24 members of whom one shall be a retired judge or a  
25 person with judicial experience, one shall be an at-  
26 torney and one shall be a health care professional.  
27 The appointed judge or person with judicial experi-  
28 ence shall serve as the chairman of the panel and all  
29 his procedural rulings shall be final. Each member of  
30 the panel has absolute immunity from civil liability  
31 for all actions taken in course and scope of his du-  
32 ties.

33           2. Selection; compensation. The panel members  
34 shall be selected by the court. Panel members other  
35 than the chairman shall be selected from pools of at-  
36 torneys and health care professionals. The pools  
37 shall be composed of the names of persons provided by  
38 the medical and legal professions. Compensation for

1 the members of the panel shall be as provided for by  
2 rule of the Supreme Judicial Court and shall include  
3 reimbursement for expenses. Service on the panel is  
4 voluntary.

5 If any panel member other than the chairman is unable  
6 or unwilling to serve or is challenged for cause by  
7 any person who is a party to a proceeding, the party  
8 challenging that member shall request a replacement  
9 from the pool chosen by the chairman. Only challenges  
10 for cause may be allowed.

11 §8323. Date of hearing; pleadings; records; discov-  
12 ery; subpoena

13 The panel shall hold a hearing on any action  
14 within 120 days from the date of the order forming  
15 the panel. The panel shall establish a timetable for  
16 filing all relevant records and pleadings and shall  
17 set a date for the hearing. The chairman, upon appli-  
18 cation of a party, may permit limited discovery. The  
19 panel has the same subpoena power as a Superior Court  
20 Judge.

21 §8324. Procedures

22 1. Chairman to preside. The chairman shall pre-  
23 side at all proceedings of the panel and shall deter-  
24 mine all questions of law, including matters of evi-  
25 dence. The Maine Rules of Evidence and the Maine  
26 Rules of Civil Procedure shall apply to all proceed-  
27 ings of the panel.

28 2. Presentation. Each party may call and cross-  
29 examine witnesses and introduce evidence. The panel  
30 may require that either party submit additional  
31 facts, records or other information or may call addi-  
32 tional witnesses and examine or cross-examine any  
33 witness.

34 §8325. Findings; notice

35 1. Findings. The panel shall, within 30 days of  
36 the completion of the presentation of any action,  
37 make its findings, in writing, on the questions of  
38 liability and damages. The written opinion shall in-  
39 clude findings of fact and law. A dissenting member  
40 may file a written dissent.

1           2. Notice. The panel shall notify all parties  
2 and attorneys of record, in writing, of its decision  
3 within 7 days of that decision. The panel shall file  
4 a copy of its decision and findings with the court.

5           §8326. Effect of decision

6           1. Decision binding. If all parties, prior to  
7 hearing, elect by unanimous written agreement to be  
8 bound by the determination of the panel, the determi-  
9 nation of the panel is binding and conclusive and the  
10 court shall enter judgment accordingly, unless the  
11 parties unanimously agree that no judgment be en-  
12 tered.

13           2. Unanimous decision of panel; no prior agree-  
14 ment. If the determination of the panel is unanimous  
15 and the parties have not unanimously agreed to be  
16 bound by that determination, each party must file  
17 with the court his written acceptance or rejection of  
18 that determination within 21 days of notice of that  
19 determination. Any party not filing a timely rejec-  
20 tion of a determination is deemed to have accepted  
21 that determination. If the determination is accepted  
22 by all parties, the court shall enter judgment ac-  
23 cordingly.

24           3. Trial. If the parties have not unanimously  
25 agreed to be bound by the determination of the panel  
26 or have not unanimously accepted the determination of  
27 the panel, the case shall proceed to trial.

28           4. Admissibility of determination at trial. The  
29 determination of the panel and any dissent is not ad-  
30 missible in evidence at any subsequent trial as to  
31 liability or the amount of damages.

32           5. Costs. A party who has rejected the unanimous  
33 determination of the panel, who does not prevail on  
34 the issue of liability at trial and who has not been  
35 granted a post-trial motion to overturn the court's  
36 decision, is liable for the costs, reasonable attor-  
37 neys' fees and expenses of the prevailing party in-  
38 curred in connection with the review panel and trial.  
39 Such a party is not liable for these costs and ex-  
40 penses if the prevailing party also rejected the de-  
41 termination of the panel.

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SUBCHAPTER III

MALPRACTICE ACTIONS

§8351. Untrue statements in medical malpractice actions

In any medical malpractice action, allegations, denials and any statements made in affidavit or pleading, made without reasonable cause and found to be untrue, shall subject the party pleading them to the payment of reasonable expenses actually incurred by the other party by reason of the untrue pleading, together with reasonable attorneys' fees, to be assessed by the court upon motion made within 21 days of the judgment or dismissal. The State or any agency of the State is subject to this section in the same manner as any other party.

§8352. Malicious prosecution

In all cases alleging malicious prosecution arising out of a medical malpractice action, the plaintiff need not plead or prove special injury to sustain the cause of action. In all such cases alleging malicious prosecution, no exemplary or punitive damages may be allowed.

§8353. Medical malpractice actions; prior consultations

In any medical malpractice action, the plaintiff shall file an affidavit declaring one of the following:

1. Prior consultation. That the plaintiff or his attorney has consulted and reviewed the facts of the case with a health care professional whom he reasonably believes is knowledgeable in the relevant issues involved in the particular action and who practices in the same speciality or area of practice as the defendant; that the reviewing health care professional has determined in a written report, after a review of the medical record and other relevant material, that there is a reasonable and meritorious cause for the filing of the action; and that the plaintiff has concluded on the basis of the review and consultation

1 that there is a reasonable and meritorious cause for  
2 the filing of the action. The report shall be at-  
3 tached to the affidavit;

4 2. No prior consultation. That the plaintiff was  
5 unable to obtain a consultation, as set out in sub-  
6 section 1, because the consultation could not be ob-  
7 tained before the expiration of the statute of limi-  
8 tations. If an affidavit is executed pursuant to this  
9 subsection, a consultation and review shall be ob-  
10 tained and a report filed, as set out in subsection  
11 1, within 60 days of the filing of the complaint. A  
12 defendant in the action is excused from answering or  
13 otherwise pleading until 21 days after being served  
14 with a copy of the report set out in subsection 1; or

15 3. Failure to produce records. That a request  
16 has been made by the plaintiff for examination and  
17 copying of records to which the plaintiff may obtain  
18 access pursuant to any state law and the party re-  
19 quired to comply with that request has failed to  
20 produce those records within 30 days of the receipt  
21 of the request. If an affidavit is executed pursuant  
22 to this subsection, a consultation and review shall  
23 be obtained and a report filed, as set out in subsec-  
24 tion 1, within 60 days of the receipt of the re-  
25 quested records. All defendants, except those whose  
26 failure to comply with a request is the basis for an  
27 affidavit under this subsection, shall be excused  
28 from answering or otherwise pleading until 21 days  
29 after being served with a copy of the report set out  
30 in subsection 1.

31 Any health care professional who, in good faith,  
32 prepares a report used in connection with an affida-  
33 vit required by this section has civil immunity from  
34 liability which might otherwise result from the prep-  
35 aration of the report.

36 Failure to file an affidavit required by this  
37 section is grounds for dismissal of any medical mal-  
38 practice action.

39 §8354. Punitive damages

40 In any medical malpractice action, no punitive,  
41 exemplary or aggravated damages may be allowed.

1     §8355. Contingent fees for attorneys

2             1. Limitation. In any medical malpractice ac-  
3 tion, the total contingent fee for the plaintiff's  
4 attorney or attorneys may not exceed the following  
5 amounts:

6             A. One-third of the first \$150,000 of the sum  
7 recovered;

8             B. One-fourth of the next \$850,000 of the sum  
9 recovered; and

10            C. One-fifth of any amount over \$1,000,000 of  
11 the sum recovered.

12            2. Judicial review. The court may review contin-  
13 gent fee agreements for fairness. In special circum-  
14 stances where an attorney performs extraordinary ser-  
15 vices involving more than usual participation in time  
16 and effort, the attorney may apply to the court for  
17 approval of additional compensation.

18     §8356. Reduction in amount of recovery

19            Damages allowed in any medical malpractice action  
20 shall be reduced by an amount equal to the value of  
21 any benefits provided for medical charges, hospital  
22 charges or nursing or caretaking charges which have  
23 been paid, or which have become payable to the plain-  
24 tiff by any other person, corporation, insurance com-  
25 pany or fund in relation to a particular injury; ex-  
26 cept that damages allowed shall be increased by an  
27 amount equal to the value of any insurance premiums  
28 or the direct costs paid by the plaintiff for those  
29 benefits in the 2 years prior to the plaintiff's in-  
30 jury or death or to be paid by the plaintiff in the  
31 future for those benefits. No reduction in damages  
32 may be made for charges paid for medical expenses  
33 which were directly attributable to the adjudged neg-  
34 ligent acts or omission of the defendants found lia-  
35 ble.

36            Sec. 2. 24 MRSA c. 21, sub-c. IV, as amended, is  
37 repealed.



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STATEMENT OF FACT

2           This bill makes major reforms in medical malprac-  
3           tice actions. The legislation provides for limita-  
4           tions on contingency fees and establishes a pretrial  
5           screening panel to judge liability and render opin-  
6           ions on award amounts. Under the new law, physicians  
7           are no longer required to prove special damages if  
8           they file a countersuit and plaintiffs may not file  
9           for punitive damages. In addition, individuals who  
10          make untrue allegations without reasonable cause now  
11          must pay the defendant's attorneys' fees. Finally,  
12          the bill gives the court the authority to consider  
13          the plaintiff's other sources of compensation in de-  
14          termining the award amount.

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