

MAINE STATE LEGISLATURE

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L.D. 1941

(Filing No. S-395)

STATE OF MAINE
SENATE
113TH LEGISLATURE
SECOND REGULAR SESSION

COMMITTEE AMENDMENT " A " to S.P. 711, L.D. 1941,
Bill, "AN ACT to Clarify the Standard of Proof in
Prelitigation Screening Panels."

Amend the bill by striking out all of the title
and inserting in its place the following:

**'AN ACT to Clarify the Law Governing
Prelitigation Screening Panels.'**

Further amend the bill by striking out everything
after the title and inserting in its place the
following:

'Emergency preamble. Whereas, Acts of the
Legislature do not become effective until 90 days
after adjournment unless enacted as emergencies; and

Whereas, a question has arisen regarding the
appropriate standard of proof to be utilized before
prelitigation screening panels created by Public Law
1985, chapter 804; and

Whereas, several other areas of ambiguity exist in
the current law governing prelitigation screening
panels; and

Whereas, these questions must be clarified in

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1 order to move ahead the numerous cases now pending
2 before the panels; and

3 Whereas, in the judgment of the Legislature, these
4 facts create an emergency within the meaning of the
5 Constitution of Maine and require the following
6 legislation as immediately necessary for the
7 preservation of the public peace, health and safety;
8 now, therefore,

9 Be it enacted by the People of the State of Maine as
10 follows:

11 Sec. 1. 5 MRSA §12004, sub-§8, ¶A, sub-¶16-A is
12 enacted to read:

13 (16-A) Judiciary Prelitigation \$75/ day 24 MRSA
14 Screening Panel §2852

15 Sec. 2. 24 MRSA §2852, sub-§2, ¶B, as enacted
16 by PL 1985, c. 804, §§12 and 22, is amended to read:

17 B. Upon notification of the Chief Justice's
18 choice of chairman, the clerk who received the
19 notice of claim under section 2853 shall notify
20 that person and provide that person with the
21 clerk's lists of health care practitioners, health
22 care providers and attorneys created under
23 subsection 1. The chairman shall choose from
24 those lists 2 or 3 additional panel members as
25 follows:

26 (1) The chairman shall choose one attorney;

27 (2) The chairman shall choose one health
28 care practitioner. If possible, the chairman
29 shall choose a practitioner who practices in
30 the specialty or profession of the person
31 accused of professional negligence; and

32 (3) Where the claim involves more than one
33 person accused of professional negligence the
34 chairman may choose a 4th panel member who is
35 a health care practitioner or health care

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1 provider. If possible, the chairman shall
2 choose a practitioner or provider in the
3 specialty or profession of a person accused.

4 The Chief Justice of the Superior Court shall
5 establish the compensation of the panel chairman.
6 Other panel members shall serve without
7 compensation or payment of expenses be
8 compensated as provided in Title 5, section 12004,
9 and shall receive such expenses as are established
10 by the Chief Justice of the Superior Court by
11 administrative order.

12 The clerk of the Superior Court in the judicial
13 region in which the notice of claim is filed under
14 section 2853 shall, with the consent of the Chief
15 Justice of the Superior Court, provide clerical
16 and other assistance to the panel chairman.

17 Sec. 3. 24 MRSA §2852, sub-§4, as enacted by PL
18 1985, c. 804, §§12 and 22, is repealed.

19 Sec. 4. 24 MRSA §2853, sub-§3, as enacted by PL
20 1985, c. 804, §§12 and 22, is repealed and the
21 following enacted in its place:

22 3. Waiver. Any party may, at the time of filing,
23 apply to the chairman of the panel for a waiver of the
24 filing fee. The chairman shall grant the waiver if:

25 A. The party is indigent.

26 (1) In determining indigency of the party,
27 the chairman shall consider the factors
28 contained in Maine Rules of Civil Procedure,
29 Rule 44(b);

30 B. The party is or was an employee of another
31 party and that other party stipulates that the
32 employee at the time of the claimed injury was
33 acting in the course and scope of employment with
34 that other party; or

35 C. The waiver is necessary to avoid requiring an

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1 individual who is a party to the case from paying
2 2 or more filing fees because a professional
3 association or other business entity of which the
4 individual is a member is also named as a party
5 and has substantially the same interests as the
6 individual in the case.

7 Sec. 5. 24 MRSA §2853, sub-§5, as enacted by PL
8 1985, c. 804, §§12 and 22, is amended to read:

9 5. Lawsuits. The pretrial screening may be
10 bypassed if all parties agree upon a resolution of the
11 claim by lawsuit. All parties to a claim may, by
12 written agreement, submit a claim to the binding
13 determination of the panel, either prior to or after
14 the commencement of a lawsuit. Both parties may agree
15 to bypass the panel and commence a lawsuit for any
16 reason, or may request that certain preliminary legal
17 affirmative defenses or issues be litigated prior to
18 submission of the case to the panel. The panel has no
19 jurisdiction to hear or decide, absent the agreement
20 of the parties, dispositive legal affirmative
21 defenses, except comparative negligence. The panel
22 chairman may require the parties to litigate, by
23 motion, dispositive legal affirmative defenses in the
24 Superior Court prior to submission of the case to the
25 panel.

26 Sec. 6. 24 MRSA §2854, sub-§3, as enacted by PL
27 1985, c. 804, §§12 and 22, is amended to read:

28 3. Failure to comply. Failure of a party,
29 without good cause, to attend a properly scheduled
30 hearing to participate in authorized discovery, or to
31 otherwise substantially comply with this subchapter,
32 shall result in a finding made by a majority of the
33 panel against that party and that finding shall have
34 the same effect as a finding against that party under
35 section 2857.

36 Sec. 7. 24 MRSA §2855, as enacted by PL 1985,
37 c. 804, §§12 and 22, is repealed and the following
38 enacted in its place:

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1 §2855. Findings by panel

2 1. Negligence and causation. At the conclusion
3 of the presentations, the panel shall make its
4 findings in writing within 30 days by answering the
5 following questions:

6 A. Whether the acts or omissions complained of or
7 found by the panel to exist, or as agreed by the
8 parties, constitute a deviation from the
9 applicable standard of care by the health care
10 practitioner or health care provider charged with
11 that care; and

12 B. Whether the acts or omissions complained of
13 proximately caused the injury complained of or as
14 found by the panel or as agreed by the parties.

15 2. Standard of proof. The standard of proof used
16 by the panel shall be:

17 A. The plaintiff must prove negligence and
18 proximate causation by a preponderance of the
19 evidence; and

20 B. The defendant must prove comparative
21 negligence by a preponderance of the evidence.

22 **Sec. 8. Application.** Notwithstanding the Maine
23 Revised Statutes, Title 1, section 302, this Act shall
24 apply to actions pending on its effective date.

25 **Emergency clause.** In view of the emergency
26 cited in the preamble, this Act shall take effect when
27 approved.'

28 STATEMENT OF FACT

29 This amendment makes the following changes to the
30 original bill.

31 Sections 1 and 2 of the amendment provide for

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1 compensation at the rate of \$75 per day to be paid to
2 members of prelitigation screening panels, except for
3 the panel chairman, whose compensation continues to be
4 established by the Chief Justice of the Superior Court.

5 Section 3 repeals the provision of current law
6 that authorizes a prelitigation screening panel to
7 hire its own experts.

8 Section 4 requires the chairman of a screening
9 panel to waive the filing fees for parties in cases
10 where double fees would be collected from essentially
11 the same party defendant, such as suits in which both
12 an employer and employee are named as defendants. The
13 new waiver provision also prevents double collection
14 in cases where a physician has formed a professional
15 association for business or tax purposes, and the
16 professional association is named as a defendant as
17 well as the individual physician.

18 Section 5 permits the panel chairman to require
19 dispositive legal affirmative defenses raised by the
20 parties to be resolved in Superior Court before
21 submitting the case to the screening panel.

22 Section 6 clarifies that if a panel makes a
23 finding against a party for failing to attend a
24 hearing, participate in discovery or otherwise comply
25 with the law, the finding must be made by a majority
26 of the panel and not just by the panel chairman.

27 Section 7 clarifies the standard of proof to be
28 used by a screening panel in reaching its findings.

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Reported by Senator Gauvreau for the Committee on Judiciary.
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