

MAINE STATE LEGISLATURE

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(Emergency)
SECOND REGULAR SESSION

ONE HUNDRED AND THIRTEENTH LEGISLATURE

Legislative Document

No. 1941

S.P. 711 In Senate, January 4, 1988
Approved for Introduction by a Majority of the Legislative
Council pursuant to Joint Rule 26.
Received by the Secretary of the Senate on December 30,
1987. Referred to the Committee on Judiciary and 1400 ordered
printed pursuant to Joint Rule 14.

JOY J. O'BRIEN, Secretary of the Senate

Presented by Senator BRANNIGAN of Cumberland

STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED AND EIGHTY-EIGHT

**AN ACT to Clarify the Standard of Proof in
Prelitigation Screening Panels.**

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

7 Whereas, a question has arisen regarding the
8 appropriate standard of proof to be utilized before
9 prelitigation screening panels created by Public Law
10 1985, chapter 804; and

1 Whereas, this question must be clarified in order
2 to move ahead the numerous cases now pending before
3 the panels; and

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

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

12 24 MRSA §2855, as enacted by PL 1985, c. 804,
13 §§12 and 22, is amended to read:

14 §2855. Findings by panel

15 At the conclusion of the presentations, the panel
16 shall make its findings in writing within 30 days by
17 answering the following questions:

18 1. Negligence. Whether there is a reasonable
19 medical or professional probability that the acts or
20 omissions complained of or found by the panel to
21 exist, or as agreed by the parties, constitute a
22 deviation from the applicable standard of care by the
23 health care practitioner or health care provider
24 charged with that care; and

25 2. Causation. Whether there is a reasonable
26 medical or professional probability that the acts or
27 omissions complained of proximately caused the injury
28 complained of or as found by the panel or as agreed by
29 the parties; and

30 3. Standard of proof. Whether the standard of
31 proof utilized by the panel is the same standard as
32 that required in a court of law.

33 Emergency clause. In view of the emergency

1 cited in the preamble, this Act shall take effect when
2 approved.

3 STATEMENT OF FACT

4 In 1986, the Legislature enacted Public Law 1985,
5 chapter 804, which contained a number of provisions
6 designed to improve and expedite the handling of
7 medical malpractice cases. Among these changes was
8 the establishment of pretrial screening panels to hear
9 and review cases prior to their being filed in court.
10 On December 18, 1985, Chief Justice Morton A. Brody of
11 the Superior Court issued an administrative order
12 which set forth procedures to implement the mandatory
13 prelitigation screening panels. In the administrative
14 order, Chief Justice Brody noted that ..."a claimant
15 can prevail with a much lesser standard than is
16 required to prevail in a negligence action in court."
17 Justice Brody based this position on the language
18 regarding "probability" found in the Maine Revised
19 Statutes, Title 24, section 2855.

20 After reviewing the order, persons and
21 organizations involved in the Maine Revised Statutes,
22 Title 24, chapter 804, conferred with Justice Brody
23 indicating that it was not the drafters' intent to
24 change the standard of proof, but rather the language
25 was selected to reflect the current practice of
26 questioning expert witnesses with regard to
27 "probability" rather than certainty. The drafters
28 believed that the 1978 Law Court decision in Michaud
29 v. Steckino supported the use of such language.
30 However, Justice Brody, after conferring with other
31 Superior Court Justices, believed that his original
32 interpretation was correct. On January 29, 1987, he
33 wrote to the drafters noting that:

34 "I do not agree, however, nor do the Justices of
35 the Superior Court with whom I have consulted,
36 with your interpretation of the burden of proof as
37 it relates to Section 21 of the Act. Our
38 interpretation is that a claimant could indeed
39 prevail with a lesser standard than is required to

1 prevail in a negligence action in court. If this
2 was not the intent, then I agree that some sort of
3 action should be taken by the drafting committee
4 to rectify this situation. If there is unanimous
5 agreement among the drafting committee that this
6 was the intent, I would be happy to issue a
7 clarifying memo pending a change in the law."

8 Allowing claimants to prevail before the panel
9 with a lesser standard of proof than will be required
10 of them if they proceed to court, after the panel's
11 decision, is inconsistent with the purpose of the
12 panels which is to expedite the settlement of
13 meritorious cases and to terminate cases without merit.

14 The bill clarifies the standard of proof as
15 suggested by the court.

16 It is important that the change be effectuated on
17 an emergency basis as over 30 cases are currently
18 pending before the panels.

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