

MAINE STATE LEGISLATURE

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114th MAINE LEGISLATURE

FIRST REGULAR SESSION - 1989

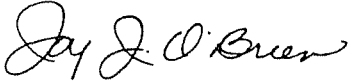
Legislative Document

No. 1042

S.P. 398

In Senate, April 5, 1989

Reference to the Committee on Judiciary suggested and ordered printed.


JOY J. O'BRIEN
Secretary of the Senate

Presented by Senator BRANNIGAN of Cumberland.

Cosponsored by Senator HOBBS of York, Representative PARADIS of Augusta and Representative MacBRIDE of Presque Isle.

STATE OF MAINE

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

An Act to Clarify the Law Governing Prelitigation Screening Panels.

(EMERGENCY)



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

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

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

9 **Whereas,** these questions must be clarified in order to move
10 ahead the numerous cases now pending before the panels; and

11 **Whereas,** in the judgment of the Legislature, these facts
12 create an emergency within the meaning of the Constitution of
13 Maine and require the following legislation as immediately
14 necessary for the preservation of the public peace, health and
15 safety; now, therefore,

16 **Be it enacted by the People of the State of Maine as follows:**

17 **Sec. 1. 24 MRSA §2852, sub-§2, ¶B,** as enacted by PL 1985, c.
18 804, §§12 and 22, is amended to read:

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

26 (1) The ~~chairman~~ chair shall choose one attorney;

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

32 (3) Where the claim involves more than one person
33 accused of professional negligence the ~~chairman~~ chair
34 may choose a 4th panel member who is a health care
35 practitioner or health care provider. If possible, the
36 ~~chairman~~ chair shall choose a practitioner or provider
37 in the specialty or profession of a person accused; and

38 (4) When agreed upon by all the parties, the list of
39 available panel members may be enlarged in order to
40 select a panel member who is agreed to by the parties
41 but who is not on the clerk's list.

1 The Chief Justice of the Superior Court shall establish the
2 compensation of the panel chairman chair. Other panel
3 members shall serve without compensation or payment of
4 expenses.

5 The clerk of the Superior Court in the judicial region in
6 which the notice of claim is filed under section 2853 shall,
7 with the consent of the Chief Justice of the Superior Court,
8 provide clerical and other assistance to the panel chairman
9 chair.

11 **Sec. 2. 24 MRSA §2852, sub-§4**, as enacted by PL 1985, c. 804,
12 §§12 and 22, is repealed.

15 **Sec. 3. 24 MRSA §2852, sub-§6**, as enacted by PL 1985, c. 804,
16 §§12 and 22, is amended to read:

17 6. Discovery. The chairman chair, upon application of a
18 party, may permit reasonable discovery. The chair may rule on
19 requests regarding discovery, or may allow the parties to seek a
20 ruling in the Superior Court under the provisions of section
21 2853, subsection 5.

23 **Sec. 4. 24 MRSA §2853, sub-§1**, as enacted by PL 1985, c. 804,
24 §§12 and 22, is amended to read:

27 1. Notice of claim; filing fee. Any person serving a
28 notice of claim of professional negligence pursuant to section
29 2903 shall also serve a copy upon the clerk of the Superior Court
30 in the ~~judicial-region~~ county where a complaint based on the
31 claim would be filed within 10 days of serving the notice of
32 claim under section 2903, with ordinary mail notice of service to
33 the person or persons accused of professional negligence in the
34 notice. The notice of claim and all other documents filed with
35 the clerk in the matter during the prelitigation screening
36 process shall be confidential. At the time of filing the notice,
37 the claimant shall also pay to the clerk a filing fee of \$200 per
38 notice filed.

39 **Sec. 5. 24 MRSA §2853, sub-§3**, as enacted by PL 1985, c. 804,
40 §§12 and 22, is repealed and the following enacted in its place:

43 **3. Waiver.** Any party may, at the time of filing, apply to
44 the chair of the panel for a waiver of the filing fee. The chair
45 shall grant the waiver if:

47 A. The party is indigent.

49 (1) In determining indigency of the party, the chair
50 shall consider the factors contained in the Maine Rules
51 of Civil Procedure, Rule 44(b);

1 B. The party is or was an employee of another party and
3 that other party stipulates that the employee at the time of
 the claimed injury was acting in the course and scope of
 employment with that other party; or

5
7 C. The waiver is necessary to avoid requiring an individual
 who is a party to the case from paying 2 or more filing fees
9 because a professional association or other business entity
 of which the individual is a member is also named as a party
11 and has substantially the same interests as the individual
 in the case.

13 **Sec. 6. 24 MRSA §2853, sub-§5,** as enacted by PL 1985, c. 804,
15 §§12 and 22, is amended to read:

17 5. Lawsuits. The pretrial screening may be bypassed if all
19 parties agree upon a resolution of the claim by lawsuit. All
21 parties to a claim may, by written agreement, submit a claim to
23 the binding determination of the panel, either prior to or after
25 the commencement of a lawsuit. Both parties may agree to bypass
27 the panel and commence a lawsuit for any reason, or may request
29 that certain preliminary legal affirmative defenses or issues be
31 litigated prior to submission of the case to the panel. The panel
33 has no jurisdiction to hear or decide, absent the agreement of
 the parties, dispositive legal affirmative defenses, except
 comparative negligence. The panel chair may require the parties
 to litigate, by motion, dispositive legal affirmative defenses in
 the Superior Court prior to submission of the case to the panel.
 Any such defense, as well as any motion relating to discovery
 that the panel chair has chosen not to rule on may be presented,
 by motion, in Superior Court without the necessity of a complaint
 having first been filed.

35 **Sec. 7. 24 MRSA §2854, sub-§3;** as enacted by PL 1985, c. 804,
 §§12 and 22, is amended to read:

37 3. **Failure to comply.** Failure of a party, without good
39 cause, to attend a properly scheduled hearing to participate in
41 authorized discovery, or to otherwise substantially comply with
43 this subchapter, shall result in a finding made by a majority of
 the panel against that party and that finding shall have the same
 effect as a finding against that party under section 2857.

45 **Sec. 8. 24 MRSA §2855,** as enacted by PL 1985, c. 804, §§12
 and 22, is repealed and the following enacted in its place:

47 **§2855. Findings by panel**

49 **1. Negligence and causation.** At the conclusion of the
51 presentations, the panel shall make its findings in writing
 within 30 days by answering the following questions:

1 confidential, along with all other documents filed with the clerk
2 during the prelitigation process. Because the process employed
3 is designated to screen out nonmeritorious cases prior to
4 initiation of a lawsuit, it is inappropriate to have the
5 preliminary notices subject to the freedom of access law. Of
6 course, if litigation ensues after the prelitigation process has
7 been completed, the court documents involved in the actual
8 litigation would be public.

9
10 Section 5 requires the chair of a screening panel to waive
11 the filing fees for parties in cases where double fees would be
12 collected from essentially the same party defendant, such as
13 suits in which both an employer and employee are named as
14 defendants. The new waiver provision also prevents double
15 collection in cases where a physician has formed a professional
16 association for business or tax purposes, and the professional
17 association is named as a defendant as well as the individual
18 physician.

19
20 Section 6 permits the panel chair to require dispositive
21 legal affirmative defenses raised by the parties to be resolved
22 in Superior Court before submitting the case to the screening
23 panel.

24
25 Section 7 clarifies that, if a panel makes a finding against
26 a party for failing to attend a hearing, participate in discovery
27 or otherwise comply with the law, the finding must be made by a
28 majority of the panel and not just by the panel chair.

29
30 Section 8 clarifies the standard of proof to be used by a
31 screening panel in reaching its findings.

32
33 Section 9 repeals a provision added to the Health Security
34 Act in 1986 requiring the plaintiff to file a list of expert
35 witnesses within 90 days after filing of the complaint and the
36 defendant to respond with a list of defense witnesses within 60
37 days of receipt of the plaintiff's list. This provision was
38 drafted prior to establishment of the prelitigation screening
39 panels and is not useful in medical malpractice cases which have
been the subject of a panel process.