

MAINE STATE LEGISLATURE

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STATE OF MAINE
HOUSE OF REPRESENTATIVES
115TH LEGISLATURE
FIRST REGULAR SESSION

COMMITTEE AMENDMENT "A" to H.P. 943, L.D. 1365, Bill, "An Act to Provide Good Cause Basis for Extending the Notice of Claim Period"

Amend the bill by striking out the title and substituting the following:

'An Act Concerning Extension of the Notice of Claim Period and Evidence of Practice Protocols and Risk Management Parameters in Medical Malpractice Proceedings'

Further amend the bill by striking out everything after the enacting clause and before the statement of fact and inserting in its place the following:

'Sec. 1. 24 MRSA §2853, sub-§1, as amended by PL 1989, c. 827, §1, is repealed and the following enacted in its place:

1. Notice of claim. A person may commence an action for professional negligence by:

A. Serving a written notice of claim, setting forth, under oath, the professional negligence alleged and the nature and circumstances of the injuries and damages alleged, on the person accused of professional negligence. The notice of claim must be filed with the Superior Court within 20 days after completion of service; or

B. Filing a written notice of claim, setting forth, under oath, the professional negligence alleged and the nature and circumstances of the injuries and damages alleged, with the Superior Court. The claimant must serve the notice of claim on the person accused of professional negligence. The return of service must be filed with the court within 90 days after filing the notice of claim.

Service must be made in accordance with the Maine Rules of Civil Procedure, Rule 4.

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2 **Sec. 2. 24 MRSA §2853, sub-§§1-A and 1-B** are enacted to read:

4 **1-A. Confidentiality.** The notice of claim and all other
6 documents filed with the court in the action for professional
 negligence during the prelitigation screening process are
 confidential.

8 **1-B. Fee.** At the time of filing notice of claim with the
10 court, the claimant shall pay to the clerk a filing fee of \$200
 per notice filed.'

12 **Sec. 3. 24 MRSA §2853, sub-§5,** as amended by PL 1989, c. 361,
14 §§6 and 10, is further amended to read:

16 **5. Lawsuits.** The pretrial screening may be bypassed if all
18 parties agree upon a resolution of the claim by lawsuit. All
20 parties to a claim may, by written agreement, submit a claim to
22 the binding determination of the panel, either prior to or after
24 the commencement of a lawsuit. Both parties may agree to bypass
26 the panel and commence a lawsuit for any reason, or may request
 that certain preliminary legal affirmative defenses or issues be
 litigated prior to submission of the case to the panel. The panel
 has no jurisdiction to hear or decide, absent the agreement of
 the parties, dispositive legal affirmative defenses, except:
 compliance with practice parameters or risk management protocols
 adopted under section 2973 if the defendant is a participant in
 the medial liability demonstration project established under
 subchapter IX; and 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.

36 **Sec. 4. 24 MRSA §2853, sub-§7,** as amended by PL 1989, c. 827,
38 §2, is further amended to read:

40 **7. Extensions of time.** All requests for extension of time
42 under this subchapter must be made to the panel chair. The chair
44 may extend any time period under this subchapter for good cause,
 except that the chair may not extend any time period that would
 result in the hearing being held more than one year from the
 service filing of notice of claim upon the clerk unless
 extraordinary good cause is shown.

46 **Sec. 5. 24 MRSA §2854, sub-§1,** as enacted by PL 1985, c. 804,
48 §§12 and 22, is amended to read:

50 **1. Procedure.** The claimant or a representative of the
 claimant shall present the case before the panel. The person

2 accused of professional negligence or his that person's
3 representative shall make a responding presentation. Wide
4 latitude shall must be afforded the parties by the panel in the
5 conduct of the hearing, including, but not limited to, the right
6 of examination and cross-examination by attorneys. The chairman
7 chair shall make all procedural rulings and his those rulings
8 shall-be are final. A tape-recorded tape-recorded record shall
9 must be maintained by the panel for its purpose only. The record
10 shall must be maintained until 30 days after its decision and
11 then destroyed pursuant to section 2856. The record shall may
12 not be made public and the hearings are not to be public without
13 the consent of both or all parties. The Maine Rules of Evidence
14 shall do not apply. Evidence shall must be admitted if it is the
15 kind of evidence upon which reasonable persons are accustomed to
16 rely in the conduct of serious affairs. If the defendant is a
17 participant in the medical liability demonstration project
18 established under subchapter IX, any party may introduce evidence
19 of the appropriate standard of care or compliance or
20 noncompliance with the practice parameters and risk management
21 protocols adopted under section 2973. The panel shall make such
22 findings upon such evidence as is presented at the hearing, the
23 records and any expert opinions provided by or sought by the
24 panel or the parties.

25 After presentation by the parties, as provided in this section,
26 the panel may request from either party additional facts, records
27 or other information to be submitted in writing or at a continued
28 hearing, which continued hearing shall must be held as soon as
29 possible. The continued hearings shall must be attended by the
30 same members of the panel who have sat on all prior hearings in
31 the same claim, unless otherwise agreed by all parties.

32 Sec. 6. 24 MRSA §2855, sub-§1, ¶A-1 is enacted to read:

33 A-1. If the defendant is a participant in the medical
34 liability demonstration project established under subchapter
35 IX and has raised as an affirmative defense compliance with
36 the practice parameters or risk management protocols adopted
37 under section 2973, whether the defendant complied with an
38 applicable parameter or protocol establishing the applicable
39 standard of care;

40 Sec. 7. 24 MRSA §2903, sub-§1, ¶A, as amended by PL 1989, c.
41 827, §5, is further amended to read:

42 A. Served and filed written notice of claim setting-forth,
43 under oath, the professional negligence alleged and the
44 nature and circumstances of the injuries and damages
45 alleged, personally or by registered or certified mail on
46 the person accused of professional negligence. Personal
47 service or service by registered or certified mail shall be
48 completed on the person accused within 30 days of filing.

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~~In the event service cannot be obtained within 30 days, the plaintiff may file a motion in Superior Court for an extension on a showing of good cause, including the efforts that have been made for service. In addition to granting the extension, the court may provide for alternate service in accordance with the Maine Rules of Civil Procedure, Rule 4- in accordance with section 2853;~~

Sec. 8. 24 MRSA §2975, sub-§§1 and 2, as enacted by PL 1989, c. 931, §4, are amended to read:

1. **Introduction into evidence.** In any claim for professional negligence against a physician or the employer of a physician participating in the project established by this subchapter in which a violation of a standard of care is alleged, ~~only the physician or the physician's employer may introduce into evidence, as an affirmative defense,~~ the existence of the practice parameters and risk management protocols developed and adopted pursuant to section 2973 for that medical specialty area may be introduced into evidence by the physician or the physician's employer, as an affirmative defense, or by the plaintiff.

2. **Burden of proof; parameters and protocols.** Any physician or physician's employer who pleads asserts compliance with the practice parameters and risk management protocols as an affirmative defense to a claim for professional negligence has the burden of proving that the physician's conduct was consistent with those parameters and protocols in order to rely upon the affirmative defense as the basis for a determination that the physician's conduct did not constitute professional negligence. ~~If the physician or the physician's employer introduces at trial evidence of compliance with the parameters and protocols, then the plaintiff may introduce evidence on the issue of compliance.~~ This subsection does not affect the plaintiff's burden to prove the plaintiff's cause of action by a preponderance of the evidence as otherwise provided by law.'

STATEMENT OF FACT

This amendment revises the procedure for commencing a medical malpractice action to more closely resemble the commencement of any other civil action as provided by the Maine Rules of Civil Procedure, Rule 3.

This amendment allows the process to be commenced by either filing the notice of claim of professional negligence with the Superior Court or by serving the notice of claim on the person accused of professional negligence. If the notice of claim is filed with the court first, the return of service, showing that

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2 the person accused of professional negligence has been served
4 with the notice of claim, must be filed with the court within 20
6 days after the notice is filed with the court. If the action is
8 commenced by the claimant serving the notice of claim on the
10 person accused of professional negligence, the notice of claim
12 must be filed with the court within 90 days. Service of process
14 is governed by the Maine Rules of Civil Procedure, Rule 4.
16 Either method of commencing the action is the first step in the
18 prelitigation screening panel process.

20 This amendment retains the confidentiality of the notice of
22 claim and all other documents filed with the court. The \$200
24 filing fee per notice of claim is also retained.

26 This amendment eliminates the confusion in the current law
28 between filing a notice of claim with the court and serving a
notice of claim on the person accused of professional
negligence. The Maine Revised Statutes, Title 24, section 2903,
subsection 1, paragraph A is amended to reference the procedures
for commencing an action as provided in Title 24, section 2853.

22 This amendment permits the introduction of practice
24 parameters and risk management protocols into evidence by the
26 plaintiff, the physician or the physician's employer in a claim
28 for professional negligence before a prelitigation screening
panel or the court. The amendment also permits consideration of
those parameters and protocols by a prelitigation screening panel
as an affirmative defense.

Reported by the Majority of the Committee on Judiciary
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