

# MAINE STATE LEGISLATURE

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# 119th MAINE LEGISLATURE

## FIRST REGULAR SESSION-1999

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Legislative Document

No. 1325

S.P. 450

In Senate, February 16, 1999

### **An Act to Provide Fairness to Victims of Medical Malpractice.**

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Reference to the Committee on Judiciary suggested and ordered printed.

A handwritten signature in cursive script that reads "Joy J. O'Brien".

JOY J. O'BRIEN  
Secretary of the Senate

Presented by President LAWRENCE of York.  
Cosponsored by Representative THOMPSON of Naples and  
Senators: FERGUSON of Oxford, MICHAUD of Penobscot, Representatives: KANE of Saco,  
TRUE of Fryeburg.

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

2           **Sec. 1. 24 MRSA §2853, sub-§4**, as amended by PL 1995, c. 571,  
4 §1, is further amended to read:

6           **4. Filing of records; time for hearing; extensions.** Within  
20 days of entry of appearance, the person or persons accused  
8 shall ~~contact the claimant's counsel and by agreement shall~~  
~~designate a timetable for filing~~ file all the relevant medical  
10 and provider records necessary to a determination of the panel  
~~and for completing discovery. If the parties are unable to agree~~  
12 ~~on a timetable within 60 days of the entry of appearance, the~~  
~~claimant shall notify the chair of the panel. The chair shall~~  
14 ~~then establish a timetable for the filing of all relevant records~~  
~~and reasonable discovery, which must be filed at least 30 days~~  
16 ~~before any hearing date. Within 40 days of filing of the medical~~  
~~and provider records, each party shall file any additional~~  
18 ~~admissible evidence, including, but not limited to, statements by~~  
~~experts without the necessity of the experts appearing at the~~  
20 ~~hearing.~~ The hearing may not be later than 6 4 months from the  
22 service of the notice of claim upon the clerk, except when the  
time period has been extended by the panel chair in accordance  
with this subchapter.

24           **Sec. 2. 24 MRSA §2853, sub-§5**, as amended by PL 1991, c. 505,  
26 §3, is further amended to read:

28           **5. Lawsuits.** The pretrial screening may be bypassed if all  
parties agree upon a resolution of the claim by lawsuit or if the  
30 hearing has not been held within 4 months from the service of the  
notice of claim and the plaintiff has not requested that the time  
32 period be extended. All parties to a claim may, by written  
34 agreement, submit a claim to the binding determination of the  
panel, either prior to or after the commencement of a lawsuit.  
36 Both parties may agree to bypass the panel and commence a lawsuit  
for any reason, or may request that certain preliminary legal  
38 affirmative defenses or issues be litigated prior to submission  
of the case to the panel. The panel has no jurisdiction to hear  
40 or decide, absent the agreement of the parties, dispositive legal  
affirmative defenses, except: compliance with practice parameters  
42 or risk management protocols adopted under section 2973 if the  
defendant is a participant in the medical liability demonstration  
44 project established under subchapter IX and intends to introduce  
evidence of compliance at trial; and comparative negligence. The  
46 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,  
48 as well as any motion relating to discovery that the panel chair  
has chosen not to rule on, may be presented, by motion, in

2 Superior Court without the necessity of a complaint having first  
been filed.

4 **Sec. 3. 24 MRSA §2853, sub-§7**, as amended by PL 1991, c. 505,  
§4, is further amended to read:

6  
8 **7. Extensions of time.** All requests for extension of time  
under this subchapter must be made to the panel chair. The chair  
may extend any time period under this subchapter for good cause,  
10 except that the chair may not extend any time period that would  
12 result in the hearing being held more than ~~one-year~~ 6 months from  
the filing of notice of claim upon the clerk unless good cause is  
shown.

14  
16 **Sec. 4. 24 MRSA §2854**, as amended by PL 1989, c. 361, §§7 and  
10, is repealed and the following enacted in its place:

18 **§2854. Hearing or presentation**

20 **1. Procedure.** The claimant or a representative of the  
22 claimant shall present the case before the panel. The person  
accused of professional negligence or that person's  
24 representative shall make a responding presentation. The chair  
shall determine whether the presentations are to be made in  
26 writing or orally in a hearing before the panel. The procedures  
are as follows.

28 A. When a hearing is held, the proceedings are informal and  
30 the Maine Rules of Evidence do not apply.

32 B. The chair may not permit discovery or perpetuation of  
testimony in the proceedings other than depositions of the  
34 parties, except upon special order of the chair for good  
cause shown demonstrating extraordinary circumstances.

36 C. The chair shall make all procedural rulings, and the  
38 rulings are final.

40 D. A tape recorded record must be maintained by the panel.  
Except as provided in section 2857, the record may not be  
42 made public and the hearings may not be public without the  
consent of all parties.

44 E. A party does not have the right to cross-examine or  
rebut or to demand that the customary formalities of civil  
46 trials and court proceedings be followed.

48 F. Evidence must be admitted if it is the kind of evidence  
upon which reasonable persons are accustomed to rely in the  
50 conduct of serious affairs. The panel shall make its

2 findings upon evidence that is presented at the hearing, the  
3 records and any expert opinions provided by or sought by the  
4 panel or the parties.

5 G. Communications between the panel and the parties, except  
6 the testimony of the parties on the merit of the dispute,  
7 must be disclosed to all other parties.

8 H. After presentation by the parties as provided in this  
9 section, the panel may request from either party additional  
10 facts, records or other information to be submitted in  
11 writing or at a continued hearing, which must be held as  
12 soon as possible. The same members of the panel who sat on  
13 all prior hearings in the same claim shall attend the  
14 continued hearings unless otherwise agreed by all parties.

15 2. Settlement; mediation. The chair of the panel shall  
16 attempt to mediate any differences of the parties before  
17 proceeding to findings.

18 3. Failure to comply. Failure of a party, without good  
19 cause, to submit written presentations, to attend a properly  
20 scheduled hearing, to participate in authorized discovery or to  
21 otherwise substantially comply with this subchapter results in a  
22 finding made by a majority of the panel against that party and  
23 that finding has the same effect as a finding against that party  
24 under section 2857.

25 **Sec. 5. 24 MRSA §2855, sub-§1, as amended by PL 1991, c. 505,**  
26 **§5, is further amended to read:**

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

30 **A. Whether the evidence presented, including any**  
31 **stipulations by the parties, permits a reasonable inference**  
32 **that the acts or omissions complained of ~~ex-found-by-the~~**  
33 **panel-to-exist,--or--as--agreed--by--the--parties,--constitute**  
34 **constitutes a deviation from the applicable standard of care**  
35 **by the health care practitioner or health care provider**  
36 **charged with that care;**

37 **A-1. If the defendant is a participant in the medical**  
38 **liability demonstration project established under subchapter**  
39 **IX and has raised as an affirmative defense compliance with**  
40 **the practice parameters or risk management protocols adopted**  
41 **under section 2973, whether the evidence presented permits a**  
42 **reasonable inference that the defendant ~~complied~~ did not**

2           comply with an applicable parameter or protocol establishing  
the applicable standard of care;

4           B.     Whether the evidence presented, including any  
6           stipulations by the parties, permits a reasonable inference  
7           that the acts or omissions complained of proximately caused  
8           the injury complained of ~~or--as--found--by--the--panel--or--as~~  
              agreed--by--the--parties; and

10          C.     If a reasonable inference of negligence on the part of  
11          the health care practitioner or health care provider is  
12          found raised, whether the evidence presented permits a  
13          reasonable inference that any negligence on the part of the  
14          patient was equal to or greater than the negligence on the  
15          part of the practitioner or provider.

16                **Sec. 6. 24 MRSA §2855, sub-§2,** as repealed and replaced by PL  
17                1989, c. 361, §§8 and 10, is repealed.

18                **Sec. 7. 24 MRSA §2855, sub-§3** is enacted to read:

19                3. Standard of proof. The standard of proof used by the  
20                panel must be whether, in viewing the evidence and all reasonable  
21                inferences from the evidence, any reasonable basis exists upon  
22                which a jury could find for the plaintiff on the issues of  
23                negligence and causation.

24                **Sec. 8. 24 MRSA §2857, sub-§1,** as enacted by PL 1985, c. 804,  
25                §§12 and 22, is repealed and the following enacted in its place:

26                1. Proceedings before panel confidential. Except as  
27                provided in this section, all proceedings before the panel,  
28                including its final determinations, must be treated in every  
29                respect as private and confidential by the panel and the parties  
30                to the claim.

31                A. The findings and other writings of the panel and any  
32                evidence and statements made by a party or a party's  
33                representative during a panel hearing are not admissible and  
34                may not otherwise be submitted or used in any way for any  
35                purpose in any subsequent court action and may not be  
36                publicly disclosed, except that:

37                        (1) Any testimony or writings made under oath may be  
38                        used in subsequent proceedings for purposes of  
39                        impeachment; and

2                   (2) The party who made the statement or presented the  
3                   evidence may agree to the submission, use or disclosure  
4                   of that statement or evidence.

5                   B. If the panel findings as to any question under section  
6                   2855 are unanimous and unfavorable to the claimant, the  
7                   findings are admissible in any subsequent court action for  
8                   professional negligence against the person accused of  
9                   professional negligence by the claimant based on the same  
10                   set of facts upon which the notice of claim was filed. The  
11                   findings are admissible only against the claimant.

12                   The confidentiality provisions of this section do not apply if  
13                   the findings were influenced by fraud.

14                   **Sec. 10. 24 MRSA §2858**, as enacted by PL 1985, c. 804, §§12  
15                   and 22, is repealed.

16                   **Sec. 11. Application.** Notwithstanding the Maine Revised  
17                   Statutes, Title 1, section 302, the following provisions of this  
18                   Act apply to pending actions for professional negligence for  
19                   which a hearing before a panel has not been held as of the  
20                   effective date of this Act:

21                   1. That section of this Act that repeals and replaces Title  
22                   24, section 2854;

23                   2. That section of this Act that amends Title 24, section  
24                   2855, subsection 1;

25                   3. That section of this Act that repeals Title 24, section  
26                   2855, subsection 2;

27                   4. That section of this Act that enacts Title 24, section  
28                   2855, subsection 3;

29                   5. That section of this Act that repeals and replaces Title  
30                   24, section 2857, subsection 1; and

31                   6. That section of this Act that repeals Title 24, section  
32                   2858.

33                   **SUMMARY**

34                   This bill expedites and reduces costs related to the  
35                   operation of prelitigation screening panels under the Maine  
36                   Health Security Act. The bill provides that, unless the  
37                   plaintiff has requested that a time period be extended, the  
38                   hearing may be bypassed completely if it has not been held within  
39                   50

2 4 months. This bill shortens certain time periods and allows  
3 experts to submit written statements rather than testify in  
4 person. It allows the panel chair to require the parties to make  
5 their presentations of the case in writing. It allows the panel  
6 chair to limit discovery. This bill also clarifies the role of  
7 the prelitigation screening panels by changing the standard of  
8 proof used by the panel. Under this bill, the panel must  
9 determine whether the evidence presented to it and the  
10 permissible inferences from the evidence raise issues of fact as  
11 to negligence and causation. This bill prohibits the  
12 presentation to the jury of a unanimous panel finding against the  
13 person accused of professional negligence. A unanimous panel  
14 finding against the claimant may be represented at trial, but the  
15 current prohibition on an accompanying explanation is deleted.  
16 This amendment allows the use of testimony made under oath in the  
17 panel proceedings to be used in subsequent proceedings for the  
18 purpose of impeachment; there is no other change to the  
19 confidentiality provisions. The current provisions concerning  
20 the effect of the findings are repealed. This bill also corrects  
21 cross-references.

22 The revisions to the panel findings, the standard of proof,  
23 the use of the findings in subsequent proceedings and the use of  
24 testimony given under oath apply to pending cases if the hearing  
25 before the panel has not been held before the effective date of  
26 this Act.