

1 S.23

2 Introduced by Senator Mullin

3 Referred to Committee on

4 Date:

5 Subject: Court procedure; medical injury claims; screening panels

6 Statement of purpose: This bill would establish screening panels for medical
7 injury claims.

8 An act relating to screening panels for medical injury claims

9 It is hereby enacted by the General Assembly of the State of Vermont:

10 Sec. 1. 12 V.S.A. chapter 219 is added to read:

11 CHAPTER 219. SCREENING PANELS FOR

12 MEDICAL INJURY CLAIMS

13 § 8101. FINDINGS, PURPOSE, AND INTENT

14 (a) Availability and affordability of insurance against liability for medical
15 injury is essential for the protection of patients as well as assuring availability
16 of and access to essential medical and hospital care. This chapter affirms the
17 intent of the general assembly to contain the costs of the medical injury
18 reparations system and to promote availability and affordability of insurance
19 against liability for medical injury. Claims for medical injury should be
20 resolved as early and inexpensively as possible to contain system costs.

1 Claims that are resolved before court determination cost less to resolve than
2 claims that must be resolved by a court. Meritorious claims should be
3 identified as quickly as possible, as should nonmeritorious claims. Defendants
4 should consider paying or compromising meritorious claims, and plaintiffs
5 should consider withdrawing or compromising on nonmeritorious claims, as
6 soon as the merits of the claims are known to the parties. Presentation of
7 claims to a medical review panel is intended to help identify both meritorious
8 and nonmeritorious claims without the delay and expense of a court trial. It is
9 essential to the effectiveness of the panel process that panel proceedings be
10 confidential unless and until a matter heard by a panel proceeds to trial. It is
11 equally essential to the effectiveness of the panel process that a panel's
12 unanimous findings be presented to the jury in any matter that is not resolved
13 prior to trial. The panel process will encourage the prompt resolution of
14 claims, because both sides will be given an objective view of the merits. If the
15 panel finds that a claim has merit, the defendant will be more likely to pay the
16 claim or negotiate a compromise that is favorable to the claimant. If the panel
17 finds that the claim lacks merit, the claimant is more likely to withdraw the
18 claim or accept a nominal settlement.

1 **(b) The purposes of pretrial screening panels are:**

2 **(1) To identify claims of professional negligence which merit**
3 **compensation and to encourage early resolution of those claims prior to**
4 **commencement of a lawsuit; and**

5 **(2) To identify claims of professional negligence and to encourage early**
6 **withdrawal or dismissal of nonmeritorious claims.**

7 **§ 8102. DEFINITIONS**

8 **As used in this chapter:**

9 **(1) “Action for medical injury” means any action against a medical care**
10 **provider, whether based in tort, contract, or otherwise, to recover damages on**
11 **account of medical injury.**

12 **(2) “Medical care provider” means a physician, physician’s assistant,**
13 **registered or licensed practical nurse, hospital, clinic, or other health care**
14 **agency licensed by the state or otherwise lawfully providing medical care or**
15 **services, or an officer, employee, or agent thereof acting in the course and**
16 **scope of employment.**

17 **(3) “Medical injury” or “injury” means any adverse, untoward, or**
18 **undesired consequences arising out of or sustained in the course of**
19 **professional services rendered by a medical care provider, whether resulting**
20 **from negligence, error, or omission in the performance of such services; from**
21 **rendition of such services without informed consent or in breach of warranty or**

1 in violation of contract; from failure to diagnose; from premature abandonment
2 of a patient or of a course of treatment; from failure properly to maintain
3 equipment or appliances necessary to the rendition of such services; or
4 otherwise arising out of or sustained in the course of such services.

5 § 8103. FORMATION AND PROCEDURE

6 (a) The chief justice of the supreme court shall maintain a list of retired
7 judges, persons with judicial experience, and other qualified persons to serve
8 on screening panels under this chapter from which he or she shall choose a
9 panel chair under subsection (b) of this section. The chief justice of the
10 supreme court shall maintain lists of health care practitioners and attorneys
11 with litigation experience, recommended by their respective professional
12 organizations to serve on screening panels under this chapter. As required by
13 the chief justice, the professional organization of each profession shall inform
14 the chief justice of the names of volunteers to serve on panels.

15 (b) Screening panel members shall be selected as follows:

16 (1) Upon the entry of a medical injury case, the clerk of the superior
17 court in which the medical injury case is filed shall notify the chief justice of
18 the supreme court.

19 (2) Within 14 days following the return date, the chief justice shall
20 choose a retired judge, a person with judicial experience, or other qualified
21 person from the list maintained by the chief justice to serve as chair of the

1 panel to screen the claim. If at any time a chair chosen under this subsection is
2 unable or unwilling to serve, the chief justice shall appoint a replacement
3 following the procedure in this subsection for the initial appointment of a chair.
4 Persons other than retired judges or those with judicial experience may be
5 appointed as chair based on appropriate trial experience. If the chief justice
6 appoints as chair a person who is not a retired judge or who does not have
7 judicial experience, each side may make one challenge to the appointment.

8 (3) The chief justice shall notify the clerk of the name of the person
9 designated to serve as chair and shall provide the clerk with the lists of health
10 care practitioners, health care providers, and attorneys maintained under this
11 section. Upon notification of the chief justice's choice of chair, the clerk shall
12 notify the chair and the parties, and provide them with the lists of health care
13 practitioners, health care providers, and attorneys. The chair shall choose two
14 or three additional panel members from the lists as follows:

15 (A) One attorney.

16 (B) One health care practitioner. If possible, the chair shall choose a
17 practitioner who practices in the same specialty or profession as the person or
18 entity accused of professional negligence.

19 (C) Where the claim involves more than one person accused of
20 professional negligence, the chair may choose a fourth panel member who is a

1 health care practitioner. If possible, the chair shall choose a practitioner or
2 provider in the specialty or profession of a person accused.

3 (D) When agreed upon by all the parties, the list of available panel
4 members may be enlarged in order to select a panel member who is agreed to
5 by the parties but who is not on the chief justice's list.

6 (4) The screening panel process is not intended to delay or postpone the
7 trial of a medical injury case. The superior court may establish a trial date at a
8 structuring conference or other scheduling conference and all interim deadlines
9 as it would in any other case.

10 (5) The chief justice of the superior court shall establish the
11 compensation of the panel chair if he or she is not otherwise compensated by
12 the state. Other panel members shall serve without compensation or payment
13 of expenses.

14 (6) The clerk of the superior court in the county in which a medical
15 injury case is filed shall, with the consent of the chief justice of the supreme
16 court, provide clerical and other assistance to the panel chair.

17 (7) Only challenges for cause shall be allowed. If a panel member other
18 than the chair is challenged for cause, the party challenging the member shall
19 notify the panel chair. If the panel chair finds cause for the challenge, he or
20 she shall replace the panel member. If the chair is challenged for cause, the
21 party challenging the chair shall notify the chief justice of the superior court.

1 If the chief justice finds cause for the challenge, he or she shall replace the
2 chair.

3 (8) The panel, through the chair, shall have the same subpoena power as
4 exists for a superior court judge. The chair shall have sole authority, without
5 requiring the agreement of other panel members, to issue subpoenas.

6 (9) The Vermont Rules of Civil Procedure shall govern discovery
7 conducted under this chapter. The parties shall attempt in good faith to resolve
8 discovery issues themselves. The chair shall rule on disputes regarding
9 discovery. Any person aggrieved by a chair's ruling regarding discovery may
10 appeal to the superior court, which shall defer to the chair's factual findings
11 unless they are clearly erroneous.

12 § 8104. PANEL PROCEDURES

13 (a) All documents filed with the court in a medical injury action that are
14 part of the screening process are confidential.

15 (b) Within 20 days of the return date, the person or persons accused shall
16 contact the claimant's counsel and by agreement shall designate a timetable for
17 filing all the relevant medical and provider records necessary to a
18 determination by the panel. If the parties are unable to agree on a timetable
19 within 60 days of the return date, the claimant shall notify the chair of the
20 panel. The chair shall then establish a timetable for the filing of all relevant
21 records and reasonable discovery, which shall be filed at least 30 days before

1 any hearing date. The hearing shall be no later than six months from the return
2 date, except when the time period has been extended by the panel chair in
3 accordance with this chapter.

4 (c) The pretrial screening may be bypassed if all parties agree upon a
5 resolution of the claim by trial.

6 (d) All parties to a claim may, by written agreement, submit a claim to the
7 binding determination of the panel. Both parties may agree to bypass the panel
8 for any reason or may request that certain preliminary legal affirmative
9 defenses or issues be litigated prior to submission of the case to the panel. The
10 panel shall have no jurisdiction to hear or decide, absent agreement of the
11 parties, dispositive legal affirmative defenses, other than comparative
12 negligence. The panel chair may require the parties to litigate, by motion, such
13 dispositive legal affirmative defenses in the superior court prior to submission
14 of the case to the panel. Any such defense, as well as any motion relating to
15 discovery that the panel chair has chosen not to rule on, may be presented, by
16 motion, in superior court.

17 (e) Except as otherwise provided in this section, there shall be one
18 combined hearing for all claims under this section arising out of the same set
19 of facts. When a medical injury case has been filed against more than one
20 person accused of medical injury based on the same facts, the parties may,

1 upon agreement of all parties, require that hearings be separated. The chair
2 may, for good cause, order separate hearings.

3 (f) All requests for extensions of time under this section shall be made to
4 the panel chair. The chair may extend any time period for good cause, except
5 that the chair may not extend any time period that would result in the hearing
6 being held more than 11 months following the return date, unless good cause is
7 shown.

8 (g)(1)(A) On failure of the plaintiff to prosecute or to comply with rules or
9 any order of the chair or if the plaintiff fails to attend a properly scheduled
10 hearing, and on motion by the chair or any party, after notice to all parties has
11 been given and the party against whom sanctions are proposed has had the
12 opportunity to be heard and show good cause, the chair may order appropriate
13 sanctions, which may include dismissal of the case. If any sanctions are
14 imposed, the chair shall state the sanctions in writing and include the grounds
15 for the sanctions.

16 (B) Unless the chair or the panel in an order for dismissal specifies
17 otherwise, a dismissal under this subdivision (1) is with prejudice for purposes
18 of proceedings before the panel. A dismissal with prejudice is the equivalent
19 of a finding for the defendant on all issues before the panel.

20 (2)(A) On failure of a defendant to comply with the rules or any order of
21 the chair, or if a defendant fails to attend a properly scheduled hearing, and on

1 motion by the chair or any party, after notice to all parties has been given and
2 the party against whom sanctions are proposed has had the opportunity to be
3 heard and show good cause, the chair may order appropriate sanctions, which
4 may include default. If any sanctions are imposed, the chair shall state the
5 sanctions in writing and include the grounds for the sanctions.

6 (B) Unless the chair or the panel in its order for default specifies
7 otherwise, a default under this subdivision (2) is the equivalent of a finding
8 against the defendant on all issues before the panel.

9 (3) Any person aggrieved by a chair's ruling regarding sanctions may
10 appeal to the superior court, which shall defer to the chair's factual findings
11 unless they are clearly erroneous.

12 § 8105. HEARING

13 (a)(1) The claimant or a representative of the claimant shall present the
14 case before the panel. The person accused of professional negligence or that
15 person's representative shall make a responding presentation. The panel shall
16 afford the parties wide latitude in the conduct of the hearing including, but not
17 limited to, the right of examination and cross-examination by attorneys.

18 Depositions are admissible whether or not the person deposed is available at
19 the hearing. The chair shall make all procedural rulings, which shall be final.
20 The Vermont Rules of Evidence shall not apply. Evidence shall be admitted if
21 it is the kind of evidence upon which reasonable persons are accustomed to

1 rely in the conduct of serious affairs. The panel shall make findings upon such
2 evidence as is presented at the hearing, the records, and any expert opinions
3 provided by or sought by the panel or the parties.

4 (2) After presentation by the parties, the panel may request additional
5 facts, records, or other information from either party to be submitted in writing
6 or at a continued hearing, which continued hearing shall be held as soon as
7 possible. The continued hearing shall be attended by the same members of the
8 panel who have sat on all prior hearings in the same claim, unless otherwise
9 agreed by all parties. Replacement panel members shall be appointed pursuant
10 to this chapter.

11 (b) The panel shall maintain an electronically-recorded record. Except as
12 provided in section 8108 of this title, the record may not be made public, and
13 the hearings may not be public without the consent of all parties.

14 (c) The chair of the panel shall attempt to mediate any differences of the
15 parties before proceeding to findings.

16 § 8106. FINDINGS BY PANEL

17 (a) At the conclusion of the presentations, the panel shall make its findings
18 regarding negligence and causation in writing within 30 days by answering the
19 following questions:

1 (1) Whether the acts or omissions complained of constitute a deviation
2 from the applicable standard of care by the medical care provider charged with
3 that care;

4 (2) Whether the acts or omissions complained of proximately caused the
5 injury complained of; and

6 (3) If fault on the part of the medical care provider is found, whether any
7 fault on the part of the patient was equal to or greater than the fault on the part
8 of the provider.

9 (b) The standard of proof used by the panel shall be as follows:

10 (1) The plaintiff shall prove negligence and proximate causation by a
11 preponderance of the evidence; and

12 (2) The defendant shall prove comparative negligence by a
13 preponderance of the evidence.

14 § 8107. NOTIFICATION OF FINDINGS

15 The panel's findings, signed by the panel members, indicating their vote,
16 shall be sent by registered or certified mail to the parties within seven days of
17 the date of the findings. The findings and record of the hearing shall be
18 preserved until 30 days after final judgment or final resolution of the case, after
19 which time it shall be destroyed. All medical and provider records shall be
20 returned to the party providing them to the panel.

1 § 8108. CONFIDENTIALITY AND ADMISSIBILITY

2 (a) Except as provided in this section, all proceedings before the panel,
3 including its final determinations, shall be treated as private and confidential
4 by the panel and the parties to the claim.

5 (1) The findings and other writings of the panel and any evidence and
6 statements made by a party or a party's representative during a panel hearing
7 are not admissible in court and shall not be submitted or used for any purpose
8 in a subsequent trial and shall not be publicly disclosed, except as follows:

9 (A) Any testimony or writings made under oath may be used in
10 subsequent proceedings for purposes of impeachment.

11 (B) The party who made a statement or presented evidence may
12 agree to the submission, use, or disclosure of that statement or evidence.

13 (2) If the panel findings as to both the questions under subdivisions
14 8106(a)(1) and (2) of this title are unanimous and unfavorable to the defendant,
15 the findings are admissible in any subsequent trial of the medical injury case.

16 (3) If the panel findings as to any question under subsection 8106(a) of
17 this title are unanimous and unfavorable to the plaintiff, the findings are
18 admissible in any subsequent trial of the medical injury case.

19 (b) The confidentiality provisions of this section shall not apply if the
20 findings were influenced by fraud.

1 (c) The deliberations and discussion of the panel and the testimony of any
2 expert, whether called by a party or the panel, shall be privileged and
3 confidential, and no such person may be asked or compelled to testify at a later
4 court proceeding concerning the deliberations, discussions, findings, or expert
5 testimony or opinions expressed during the panel hearing, unless by the party
6 who called and presented the nonparty expert, except such deliberation,
7 discussion, and testimony as may be required to prove an allegation of fraud.

8 § 8109. MANDATORY INSTRUCTIONS

9 (a) When panel findings are offered and admitted into evidence in a
10 subsequent court action in accordance with section 8108 of this title, the trial
11 court shall provide the following information to the jury to provide a basis for
12 the jury to understand the nature of the panel findings and to put the panel
13 findings in context in evaluating all of the evidence presented at the trial:

14 (1) The panel process is a preliminary procedural step through which
15 malpractice claims proceed.

16 (2) The panel in this case consisted of (insert the name and identity of
17 the members).

18 (3) The panel conducts a summary hearing and is not bound by the rules
19 of evidence.

20 (4) The hearing is not a substitute for a full trial and may or may not
21 have included all of the evidence that is presented at the trial.

1 (5) The jury is not bound by the findings of the panel, and it is the
2 jurors' duty to reach their own conclusions based on all of the evidence
3 presented to them.

4 (6) The panel proceedings are privileged and confidential.
5 Consequently, the parties may not introduce panel documents or present
6 witnesses to testify about the panel proceedings, and they may not comment on
7 the panel findings or proceedings except as provided in subdivisions (1)
8 through (5) of this subsection.

9 (b) The information specified in subsection (a) of this section shall be
10 provided to the jury when the findings are admitted into evidence and when the
11 court instructs the jury prior to submitting the case to the jury.

12 § 8110. EFFECT OF PANEL FINDINGS

13 Unanimous findings entered by the panel under subsection 8106(a) of this
14 title shall be implemented as follows:

15 (1) If findings are in the plaintiff's favor, the defendant shall promptly
16 enter into negotiations to pay the claim or admit liability. If liability is
17 admitted, the claim may be submitted to the panel, upon agreement of the
18 parties, for determination of damages. If the claim goes to a trial, the findings
19 of the panel are admissible as provided in subdivision 8108(a)(2) of this title.

1 (2) If the findings are in the defendant's favor, the plaintiff shall release
2 the claim or claims based on the findings, without payment, or be subject to the
3 admissibility of those findings under subdivision 8108(a)(3) of this title.

4 § 8111. REPORTS

5 (a) The court administrator shall collect data on medical injury claims and
6 submit a report on the screening panel process to the general assembly and to
7 the deputy commissioner of insurance on or before September 30 of each year.

8 (b) The report required by this section shall include the number of medical
9 injury cases filed, pending, and resolved; and the number of panel hearings and
10 the number of panel hearing days during the fiscal year ending on the June 30
11 preceding the report date.

12 (c) The report required by this section shall also include, for medical injury
13 cases resolved during the fiscal year:

14 (1) The mean and median lengths of time from initial filing to final
15 resolution.

16 (2) The number and average settlement amount of cases that were
17 resolved prior to the panel hearing.

18 (3) The number and average settlement amount of cases that were
19 resolved after a panel hearing but before a trial.

20 (4) The number and average settlement amount of cases that were
21 resolved by or after a jury verdict.

1 (d) The report required by this section shall also include, for medical injury
2 cases in which a panel made findings during the fiscal year, the number of
3 cases that fell into each category of possible results of a panel hearing
4 (unanimous for the plaintiff; majority for the plaintiff; unanimous for the
5 defendant; majority for the defendant), the status, and, if applicable, the results
6 of the cases in each category.

7 (e) To the extent possible, the report required by this section shall include
8 comparative data from the previous five years.

9 (f) The commissioner of banking, insurance, securities, and health care
10 administration shall report to the general assembly annually, on or before
11 November 1 of each year, on the medical malpractice market and the effects of
12 the panel process established in this chapter. Such reports shall include, but
13 not be limited to, the average rates of medical liability insurance for categories
14 of medical providers and specialties identified by the commissioner of
15 banking, insurance, securities, and health care administration, the frequency
16 and severity of medical injury claims, and the time for resolution of medical
17 injury claims from first notice to final resolution.

18 (g) The commissioner of banking, insurance, securities, and health care
19 administration may adopt rules to collect the data from insurers necessary to
20 prepare the report required by this section. To the extent the commissioner
21 collects information from insurers regarding individual claims, loss adjustment

1 and other expenses, reserves, indemnity payments, or other financial
2 information that is not otherwise reported to the commissioner and available to
3 the public, such information shall be treated as examination materials and kept
4 confidential.