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THE GENERAL ASSEMBLY OF PENNSYLVANIA

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**HOUSE BILL**

**No. 2851** Session of  
2002

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INTRODUCED BY BARD, ROSS, SCHRODER, GODSHALL, GEORGE, CAPPELLI,  
CREIGHTON, FAIRCHILD, STEELMAN AND THOMAS, NOVEMBER 4, 2002

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REFERRED TO COMMITTEE ON INSURANCE, NOVEMBER 4, 2002

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AN ACT

1 Amending the act of March 20, 2002 (P.L.154, No.13), entitled  
2 "An act reforming the law on medical professional liability;  
3 providing for patient safety and reporting; establishing the  
4 Patient Safety Authority and the Patient Safety Trust Fund;  
5 abrogating regulations; providing for medical professional  
6 liability informed consent, damages, expert qualifications,  
7 limitations of actions and medical records; establishing the  
8 Interbranch Commission on Venue; providing for medical  
9 professional liability insurance; establishing the Medical  
10 Care Availability and Reduction of Error Fund; providing for  
11 medical professional liability claims; establishing the Joint  
12 Underwriting Association; regulating medical professional  
13 liability insurance; providing for medical licensure  
14 regulation; providing for administration; imposing penalties;  
15 and making repeals," providing for the establishment and  
16 operation of medical professional liability pretrial review  
17 screening panels.

18 The General Assembly of the Commonwealth of Pennsylvania  
19 hereby enacts as follows:

20 Section 1. The act of March 20, 2002 (P.L.154, No.13), known  
21 as the Medical Care Availability and Reduction of Error (Mcare)  
22 Act, is amended by adding a chapter to read:

23 CHAPTER 11

24 MEDICAL PROFESSIONAL LIABILITY PRETRIAL

25 REVIEW SCREENING PANELS

1 Section 1101. Definitions.

2 The following words and phrases when used in this chapter  
3 shall have the meanings given to them in this section unless the  
4 context clearly indicates otherwise:

5 "Commissioner." The Insurance Commissioner of the  
6 Commonwealth.

7 "Court." The court of common pleas of the county where the  
8 action is filed.

9 "Health care." Any act or treatment performed or furnished,  
10 or which should have been performed or furnished, by any health  
11 care provider for, to or on behalf of a patient during the  
12 patient's medical care, treatment or confinement.

13 "Medical professional liability." Any tort or breach of  
14 contract based on health care or professional services rendered,  
15 or which should have been rendered, by a health care provider to  
16 a patient. The standard of skill and care required of every  
17 health care provider in rendering professional services or  
18 health care to a patient shall be that degree of skill and care  
19 ordinarily employed in the same or similar field of medicine as  
20 defendant, and the use of reasonable care and diligence.

21 "Panel." A medical professional liability pretrial review  
22 screening panel established and operated pursuant to this  
23 chapter.

24 Section 1102. Jurisdiction of courts of common pleas.

25 (a) General rule.--The courts of common pleas of the  
26 Commonwealth shall have exclusive jurisdiction of civil actions  
27 alleging medical professional liability.

28 (b) Right to convene a panel.--In any civil action alleging  
29 medical professional liability at any time after the filing of  
30 an answer or any motion filed in lieu of an answer, any party

1 shall have the right to convene a panel by filing a demand  
2 therefor with the prothonotary of the court of common pleas, all  
3 parties and the commissioner shall promptly convene such panel  
4 upon such demand, provided that the court of common pleas may  
5 postpone the convening of such panel for good cause shown by any  
6 party.

7 Section 1103. Establishment of medical professional liability  
8 pretrial review screening panels; purpose.

9 Medical professional liability pretrial review screening  
10 panels may be established by the commissioner to the extent  
11 necessary to carry out this chapter.

12 Section 1104. Membership.

13 (a) Composition.--A panel convened in an action shall be  
14 composed of five voting members and shall include two health  
15 care provider members, at least one of whom shall be a  
16 physician, and the other one of whom shall be, if available,  
17 from one of the health care disciplines involved in such action,  
18 one attorney and two lay persons who are not health care  
19 providers nor licensed to practice law nor associated with the  
20 insurance industry. The attorney member shall act as chairperson  
21 of a panel and shall preside at all meetings.

22 (b) Chairperson.--The commissioner shall also designate one  
23 member of the commissioner's staff who shall sit as a nonvoting  
24 ex officio member of a panel and who shall have custody of and  
25 responsibility for the keeping of all evidence, records and  
26 related material used by a panel.

27 Section 1105. Method of selection of panel members.

28 (a) General rule.--The members of a panel shall be selected  
29 in the following manner. The commissioner shall compile, and  
30 keep current, three separate lists as follows:

1           (1) A list of all physicians engaged for not less than  
2           three years in the active practice of medicine in this  
3           Commonwealth and who hold a license to practice medicine and  
4           surgery.

5           (2) A list of all of the attorneys engaged for not less  
6           than three years in the active practice of law in this  
7           Commonwealth and who are admitted to the Bar of the  
8           Pennsylvania Supreme Court.

9           (3) A list of 100 objective and judicious persons of  
10          appropriate education and experience residing in this  
11          Commonwealth who are neither health care providers nor  
12          licensed to practice law in this Commonwealth, nor associated  
13          with the insurance industry, who in the commissioner's  
14          opinion would be appropriate to serve as lay members of a  
15          panel. The commissioner shall compile such additional lists  
16          of other categories of health care providers as may be  
17          appropriate.

18          (b) Selection by agreement.--The parties may agree upon one  
19          or more members from each of the lists to constitute a panel.

20          (c) Lack of agreement.--In the event that the parties shall  
21          not agree upon the selection of any one or more members, those  
22          members shall be selected by the commissioner by lot from the  
23          appropriate list. As to each list from which selection is made  
24          by lot, each party shall have three preemptory challenges to  
25          such selections.

26          (d) Basis for disqualification.--Members selected by  
27          agreement or by lot shall be designated by the commissioner to  
28          serve unless disqualified by reason of close relationship with  
29          or personal bias toward any party to the action.

30          (e) Excusal by court.--A member shall serve upon a panel

1 unless for good cause shown that member is excused by the court.  
2 The court shall excuse a member from any category from serving  
3 only if it finds, on the basis of facts set forth in an  
4 affidavit submitted by such member, that such service would  
5 constitute an unreasonable burden, undue hardship or that such  
6 service would give rise to a conflict of interest.

7 (f) Cause for striking member.--A party to the proceeding  
8 before a panel may also challenge any member by submitting an  
9 affidavit to the court setting forth the facts that the party  
10 believes show cause for striking such member from the panel. The  
11 court may strike such member from the panel if it finds such  
12 cause to exist.

13 (g) Substitute member.--After the court has excused or  
14 struck a member, the parties shall select a substitute member  
15 from the same list, each party retaining any previously unused  
16 preemptory challenge.

17 Section 1106. Commissioner to administer process of selection  
18 of panel members; rules and regulations of review  
19 panels.

20 The commissioner shall:

21 (1) Promulgate, adopt and publish such regulations as  
22 may be necessary to carry out the provisions of this chapter  
23 and to establish the procedures for the selection and  
24 operation of panels.

25 (2) Administer the procedures of selection of candidates  
26 for service on panels.

27 Section 1107. Evidence; duties of chairperson.

28 The evidence to be considered by a panel shall be promptly  
29 submitted to the panel and parties in written form wherever  
30 practicable. Evidence may consist of medical charts, X-rays,

1 laboratory tests, excerpts of treatises, deposition of witnesses  
2 including parties and any other form of evidence allowable by a  
3 panel. The chairperson of a panel shall advise the panel  
4 relative to any legal questions involved in the review  
5 proceeding and shall prepare the opinion of the panel as  
6 provided in this chapter. To the extent practicable, a copy of  
7 the evidence shall be sent to each member of the panel. All  
8 evidence considered by the panel shall constitute a part of the  
9 record in the court.

10 Section 1108. Hearing and procedure.

11 (a) Right to hearing.--Any party or a panel itself, sua  
12 sponte, after submission of all evidence and upon ten days'  
13 notice to all parties, shall have the right to a hearing before  
14 the panel at a time and place agreeable to the members of the  
15 panel.

16 (b) Evidence.--At such hearing, any party may adduce  
17 evidence by the testimony of witnesses and otherwise and may  
18 address a panel concerning any matters relevant to issues to be  
19 decided by the panel before the issuance of its report.

20 (c) Powers of panel.--A panel shall have the right to  
21 subpoena witnesses, administer oaths and compel the production  
22 of documents, and all witnesses appearing before it at a hearing  
23 shall be sworn and a stenographic record of the proceedings  
24 shall be made.

25 (d) Evidentiary rules.--The rules of evidence applicable to  
26 the court shall be followed insofar as practicable; provided,  
27 however, that evidence will be considered by a panel which, in  
28 its opinion, possesses probative value commonly accepted by  
29 reasonable, prudent persons in the conduct of their affairs.

30 Section 1109. Panel's right to information.

1 A panel shall have the right to:

2 (1) Obtain any information that the panel deems  
3 reasonably necessary.

4 (2) On notice to the parties, consult experts, text or  
5 other authorities.

6 (3) Examine reports of such other health care providers  
7 necessary to inform itself regarding the issue to be decided.

8 (b) Access of parties to information.--Both parties shall  
9 have full access to any material obtained by or submitted to a  
10 panel and shall be given a reasonable opportunity to rebut any  
11 such materials submitted to a panel.

12 Section 1110. Panel's appointment and compensation of expert  
13 witness.

14 A panel may appoint persons it determines to be disinterested  
15 and qualified experts to make any necessary professional or  
16 expert mental or physical examination of the plaintiff or review  
17 of the relevant evidentiary matters, and testify or submit a  
18 report in respect thereto. A panel shall give notice, reasonable  
19 under the circumstances to all parties, of its intent to appoint  
20 such experts, and shall allow them a reasonable time within  
21 which to communicate to the panel any objections they may have  
22 to the appointment of such experts. Such expert witnesses shall  
23 be allowed reasonable and necessary expenses connected with  
24 their travel, meals and lodging in connection with their  
25 testimony and work on behalf of the panel as well as a  
26 reasonable fee to be fixed by the panel and paid pursuant to the  
27 provisions of this chapter.

28 Section 1111. Opinion of panel.

29 (a) General rule.--A majority vote of the panel shall be  
30 required to decide all matters before it.

1 (b) Nature of opinion.--A panel shall make a finding as to  
2 whether or not in its opinion the evidence supports the  
3 conclusion that the defendant or defendants acted or failed to  
4 act within the applicable standards of care.

5 (c) Time for rendering opinion.--After reviewing all  
6 evidence and after any hearing before a panel requested by any  
7 party, the panel shall, within 30 days, render to the court a  
8 written opinion, including any minority opinion or opinions,  
9 signed by the chairperson expressing one or more of the  
10 following findings:

11 (1) the evidence supports the conclusion that the  
12 defendant or defendants failed to comply with the appropriate  
13 standard of care;

14 (2) the evidence does not support the conclusion that  
15 the defendant or defendants failed to meet the applicable  
16 standard of care;

17 (3) there is a material issue of fact, not requiring  
18 expert opinion, bearing on liability for consideration by the  
19 court or jury, which issue of fact shall be identified in the  
20 opinion; or

21 (4) the conduct complained of was or was not a factor in  
22 the resultant damages, and if so, whether the plaintiff  
23 suffered:

24 (i) any disability and the extent and duration of  
25 the disability; and

26 (ii) any permanent impairment and the percentage of  
27 the impairment.

28 (d) Contents of opinion.--Any opinion rendered by a panel  
29 shall state the grounds upon which it is based and shall further  
30 identify the persons, texts or other authorities which were

1 consulted by the panel in reaching its conclusion, and shall be  
2 admissible as prima facie evidence in any proceeding before the  
3 court.

4 (e) Right of appeal.--Any party aggrieved by the opinion of  
5 a panel shall have the right to review by the court of such  
6 opinion, and the evidence considered by the panel. Application  
7 for review by the court shall be by motion with a certified copy  
8 of the opinion attached, and shall state the grounds for  
9 objection thereto. Such motion shall be served by the moving  
10 party on the commissioner and the other parties to the action,  
11 the proof of such service to be as provided by the Pennsylvania  
12 Rules of Civil Procedure. A motion for review shall be filed  
13 within 30 days after the rendering of the opinion by the panel.

14 (f) Standard of review.--Upon receipt of a motion for  
15 review, the prothonotary shall promptly schedule it for  
16 consideration by the court and the court shall review the  
17 panel's opinion on the record made before the panel and shall  
18 strike any portion of the panel's opinion which the court finds  
19 to be based on error of law or not supported by substantial  
20 evidence.

21 (g) Record of panel proceedings.--The complete record of the  
22 proceedings before the panel including all exhibits and evidence  
23 introduced before it shall be filed with the prothonotary at the  
24 time the panel renders its opinion. A transcript of such  
25 proceedings shall be required only in the event that a motion of  
26 review shall be filed.

27 Section 1112. Report of panel admissible in evidence.

28 (a) General rule.--The opinion reached by a panel shall be  
29 admissible as prima facie evidence in the pending court action  
30 brought by the claimant, but such opinion shall not be

1 conclusive and any party shall have the right to call, at said  
2 party's cost, any witness who appeared before or submitted  
3 reports to the panel as a witness. If called, the witness shall  
4 be required to appear and testify.

5 (b) Civil immunity for panel members.--Members of a panel  
6 shall have immunity from civil liability for all communications,  
7 findings, opinions and conclusions made in the course and scope  
8 of their duties prescribed by this chapter.

9 Section 1113. Compensation of panel members.

10 (a) General rule.--Each member of the panel shall be paid at  
11 the rate of \$100 per diem plus actual and necessary expenses  
12 incurred in the performance of their official duties, but not to  
13 exceed a total of \$700 for both expenses and compensation paid  
14 to any one member of the panel for one matter. The member of the  
15 commissioner's staff designated to serve as a panel's ex officio  
16 member shall receive only actual and necessary expenses incurred  
17 as compensation.

18 (b) Assessed costs.--

19 (1) A panel may assess such costs, up to a maximum  
20 amount of \$1,000, upon the party or parties against whom the  
21 majority opinion of the panel is rendered; provided, however,  
22 that this power to assess costs shall be discretionary and  
23 the panel shall assess such costs only in those cases where  
24 they deem it appropriate.

25 (2) In the event that a judgment shall be entered in any  
26 court action on the same matter, the fees and expenses of a  
27 panel may be assessed as costs to the extent allowable above  
28 and shall follow such judgment.

29 Section 1114. Medical negligence review panels in Federal court  
30 action.

1       The commissioner shall convene panels in the manner set forth  
2 in this chapter upon request of a Federal district court judge  
3 sitting in a medical professional liability civil action in this  
4 Commonwealth alleging medical professional liability in the  
5 manner instructed by the said Federal court, but also in a  
6 manner as consistent as possible with the process of selecting  
7 such panels provided for in court actions in this chapter. The  
8 selection process of any such panel in a Federal court action  
9 and its powers and duties shall be subject to the order of that  
10 said court or such rules as the Federal court system shall  
11 designate for the implementation of such panels. The  
12 commissioner shall not, however, convene any such panels at the  
13 request of any such Federal court unless provisions are made for  
14 the payment of the compensation and expenses of such panel  
15 members and the compensation and expenses of all witnesses  
16 called by such panel out of the funds other than those of the  
17 General Fund.

18       Section 2. This act shall take effect in 60 days.