

## NEW HAMPSHIRE'S MEDICAL MALPRACTICE SCREENING PANEL: UNCONSTITUTIONAL?

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Since its establishment under RSA 519-B, the constitutionality of New Hampshire's Medical Malpractice Screening Panel has come under repeated challenge in the New Hampshire Superior Courts. At least three prior court decisions concluded that the panel process does not violate a party's constitutional rights. Most recently, however, the Superior Court (Houran, J.) issued a decision in the matter of *Eaton v. Fleet*, Carroll County Superior Court Docket No. 2008-CV-074, finding certain aspects of the 519-B panel process unconstitutional.

### **Panel Process**

New Hampshire RSA 519-B requires that all medical injury actions filed after August 29, 2005, be submitted to a medical review "screening panel." Through this process, each party is given an opportunity to present their case to a three-person panel comprised of a retired judge or person with judicial experience, a healthcare practitioner, and a lawyer. The parties are given wide latitude as to what and how they present their case, and the rules of evidence (which govern court hearings and trials) do not apply during the presentation. See RSA 519-B:5.

After the presentations, the panel has 30 days to issue a decision, stating: (1) whether the medical provider's acts or omissions constituted a deviation from the applicable standard of care; (2) whether the provider's acts or omissions caused the alleged injury; and (3) whether any fault on the part of the patient was equal to or greater than the fault of the provider. See RSA 519-B:6. The plaintiff has the burden of proving the defendant's negligence and causation by a preponderance of the evidence, and the defendant has the burden of proving comparative negligence of the plaintiff by a preponderance of the evidence. See RSA 519-B:6. If the panel unanimously finds for the plaintiff on *both* questions (1) and (2), those findings are admissible at the subsequent trial in the case. If the panel unanimously finds for the medical provider on *either* questions (1) or (2), that finding is also admissible in the subsequent trial. See RSA 519-B:8.

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If the matter proceeds to trial, the jury is told of the unanimous finding by the trial judge who, under RSA 519-B:9, is required to specifically instruct them that:

- (a) the panel process is a preliminary procedural step through which malpractice claims proceed;
- (b) the panel in the case consisted of (the name and identity of the members);
- (c) the panel conducts a summary hearing and is not bound by the rules of evidence;
- (d) the hearing is not a substitute for a full trial and may or may not have included all of the evidence that is presented at the trial; and
- (e) the jury is not bound by the findings of the panel and it is the jurors' duty to reach their own conclusions based on all of the evidence presented to them.

Notably, because the panel proceedings are privileged and confidential, the parties cannot introduce documents or present witnesses to testify about the panel process, and they cannot comment on the panel findings except for the statements above. See RSA 519-B:9.

### ***Eaton Decision***

In the *Eaton* matter, the plaintiff filed suit against Dr. Stephen Fleet alleging he had breached the standard of care in his treatment of Gordon T. Eaton, which caused Mr. Eaton's death by cardiac arrest. The parties presented their case to a malpractice screening panel which found unanimously that Dr. Fleet had not deviated from the applicable standard of care.

Prior to trial, the plaintiff requested that the court exclude the panel's findings and not instruct the jury as required by the statute. The plaintiff argued that RSA 519-B unconstitutionally violated the New Hampshire Constitution's separation of powers principles and right to a jury trial, as well as the due process rights afforded an individual under both the New Hampshire and United States Constitutions.

The Court first concluded that RSA 519-B:1 through 7, which establish the medical review panel process and require that all medical injury actions proceed through the process, were constitutional. In support of his decision, the Court cited to his earlier decision in *Wilson v. Valley Regional Hospital*, Sullivan County Superior Court Docket No. 05-C-052, where the Court had previously considered these specific issues and reached the same conclusion.

The Court next considered RSA 519-B:8, 9, and 10, which govern the submission of panel findings to the jury. The Court noted that a "core judicial function" of the judiciary is the authority to establish rules of practice and rules to regulate court proceedings. The Court clarified that such authority includes applying such rules in determining whether evidence is relevant or admissible. The Court also noted that "the crafting of jury instructions is a core function in the province of the judiciary as

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directly relating to the judiciary's role of ensuring the fairness of judicial proceedings." *Eaton* at 17.

With that in mind, the Court reviewed the provisions of RSA 519-B which require the admission of the unanimous panel findings while precluding the admission of any additional evidence which may explain or place those findings in context. The Court concluded that such requirements "prevent the court from meeting its obligation to weigh the relevance and the probative and prejudicial value of evidence, a core judicial function." *Eaton* at 17. Additionally, in reviewing the specific jury instructions the trial court is required to provide regarding the panel hearing and findings, the Court concluded that the statute impermissibly stepped into the judiciary's role by mandating what a trial judge is to specifically say and not say to the jury. Based on this, the Court determined that RSA 519-B:8, 9, and 10 violated the separation of powers clause of the New Hampshire Constitution and ruled that the unanimous malpractice panel finding in Dr. Eaton's favor would not be submitted to the trial jury.

To date, the New Hampshire Supreme Court has not considered this issue.<sup>1</sup> However, given that the *Eaton* decision reaches a conclusion which is inconsistent with at least two other prior Superior Court rulings in *Phillips v. Pascal*, Coos County Superior Court Docket No. 07-C-060, and *Krakie v. Catholic Medical Center*, Hillsborough County Superior Court - North Docket No.06-C-717, it is just a matter of time before the issue is considered by the Supreme Court. Until then, the *Eaton*, *Phillips*, and *Krakie* decisions will likely be relied upon by both plaintiffs and defendants in future arguments regarding the trial admissibility of unanimous malpractice findings.

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<sup>1</sup>Notably, in the subsequent trial in the *Eaton* case, the jury entered a verdict in Dr. Eaton's favor. In light of this, no appeal on the issue of the admissibility of the panel's finding or the constitutionality of 519-B:8,9, and 10 was taken.

