

[First Reprint]

ASSEMBLY, No. 1982

STATE OF NEW JERSEY
214th LEGISLATURE

INTRODUCED FEBRUARY 8, 2010

Sponsored by:

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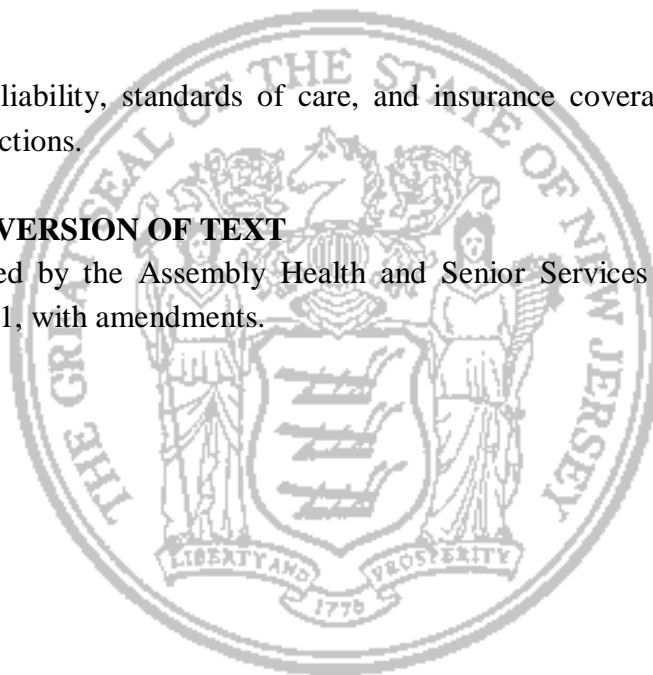
**Assemblywoman Handlin, Assemblyman Connors, Assemblywomen
McHose, Angelini, Riley, Vainieri Huttler, Voss and Assemblyman
Chiusano**

SYNOPSIS

Concerns liability, standards of care, and insurance coverage for medical malpractice actions.

CURRENT VERSION OF TEXT

As reported by the Assembly Health and Senior Services Committee on March 7, 2011, with amendments.



(Sponsorship Updated As Of: 3/8/2011)

1 AN ACT concerning medical professional liability and standards of
 2 care, and insurance coverage for medical malpractice actions,
 3 and amending and supplementing various parts of the statutory
 4 law.

5
 6 **BE IT ENACTED** by the Senate and General Assembly of the State
 7 of New Jersey:

8
 9 1. N.J.S.2A:14-2 is amended to read as follows:

10 2A:14-2. a. **[Every]** Except as provided in subsections b. and c.
 11 of this section, every action at law for an injury to the person
 12 caused by the wrongful act, neglect or default of any person within
 13 this State shall be commenced within two years next after the cause
 14 of any such action shall have accrued **;** except that an action by or
 15 on behalf of a minor that has accrued for medical malpractice for
 16 injuries sustained at birth shall be commenced prior to the minor's
 17 13th birthday].

18 b. Except as provided in subsection c. of this section, a
 19 malpractice action against a health care provider shall be
 20 commenced within two years after the plaintiff or patient discovers,
 21 or through the use of reasonable diligence should have discovered,
 22 the injury, but not more than four years after the date of the alleged
 23 act, omission, neglect or occurrence that is the basis of the action,
 24 except that in the case in which the allegation of malpractice against
 25 the health care provider is that a foreign object has been wrongfully
 26 left within a patient's body, the claim shall be barred unless
 27 commenced within one year after the plaintiff or patient discovers,
 28 or through the use of reasonable diligence should have discovered,
 29 the existence of the foreign object wrongfully left in the patient's
 30 body, whichever first occurs.

31 c. Notwithstanding subsections a. and b. of this section, an
 32 action by or on behalf of a minor that has accrued for medical
 33 malpractice for injuries sustained at birth shall be commenced prior
 34 to the minor's 11th birthday. In the event that an action by or on
 35 behalf of a minor that has accrued for medical malpractice for
 36 injuries sustained at birth is not commenced by the minor's parent
 37 or guardian prior to the minor's **[12th]** 10th birthday, the minor or a
 38 person 18 years of age or older designated by the minor to act on
 39 the minor's behalf may commence such an action. For this purpose,
 40 the minor or designated person may petition the court for the
 41 appointment of a guardian ad litem to act on the minor's behalf.

42 (cf: P.L.2004, c.17, s.3)

43
 44 2. Section 2 of P.L.1995, c.139 (C.2A:53A-27) is amended to

EXPLANATION – Matter enclosed in bold-faced brackets **[thus]** in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

Matter enclosed in superscript numerals has been adopted as follows:

¹Assembly AHE committee amendments adopted March 7, 2011.

1 read as follows:

2 2. In any action for damages for personal injuries, wrongful
3 death or property damage resulting from an alleged act of
4 malpractice or negligence by a licensed person in his profession or
5 occupation, the plaintiff shall, within 60 days following the date of
6 filing of the answer to the complaint by the defendant, provide each
7 defendant with an affidavit of an appropriate licensed person that
8 **【there exists a reasonable probability that】** the care, skill or
9 knowledge exercised or exhibited in the treatment, practice or work
10 that is the subject of the complaint, fell outside acceptable
11 professional or occupational standards or treatment practices, does
12 not meet a commonly recognized reasonable standard of care, and,
13 in the case of an action for medical malpractice, the affidavit shall
14 establish that there was a provider-patient relationship and identify
15 the specific act by the defendant which is the basis for the cause of
16 action against the defendant, or, if there was no provider-patient
17 relationship, identify the specific act by the defendant which is the
18 basis for the cause of action against the defendant. The court may
19 grant no more than one additional period, not to exceed 60 days, to
20 file the affidavit pursuant to this section, upon a finding of good
21 cause. For the purposes of this section, “commonly recognized
22 reasonable standard of care” means a standard which is in
23 accordance with a responsible body of opinion, even if others differ
24 in opinion.

25 In the case of an action for medical malpractice, the person
26 executing the affidavit shall meet the requirements of a person who
27 provides expert testimony or executes an affidavit as set forth in
28 section 7 of P.L.2004, c.17 (C.2A:53A-41). In all other cases, the
29 person executing the affidavit shall be licensed in this or any other
30 state; have particular expertise in the general area or specialty
31 involved in the action, as evidenced by board certification or by
32 devotion of the person's practice substantially to the general area or
33 specialty involved in the action for a period of at least five years.
34 The person shall have no financial interest in the outcome of the
35 case under review, but this prohibition shall not exclude the person
36 from being an expert witness in the case.

37 In the case of an action for medical malpractice, the affidavit
38 shall be based on and refer to objective scientific clinical evidence.
39 The person executing the affidavit shall include in the affidavit a
40 certification, under penalty of perjury, that the patient’s chart and
41 other pertinent information submitted has been personally reviewed.
42 A person shall be guilty of a crime of the fourth degree if the person
43 purposefully or knowingly makes, or causes to be made, a false,
44 fictitious, fraudulent, or misleading statement of material fact in, or
45 omits a material fact from, or causes a material fact to be omitted
46 from, any affidavit filed pursuant to this section. For the purposes
47 of this section “scientific clinical evidence” means evidence based
48 on a systematized application of evidence that reflects a precise

1 application of generally recognized facts or principles, using a
2 scholarly methodology regulated by or conforming to the generally
3 accepted principles of medical science.

4 (cf: P.L.2004, c.17, s.8)

5

6 3. Section 7 of P.L.2004, c.17 (C.2A:53A-41) is amended to
7 read as follows:

8 7. In an action alleging medical malpractice, a person shall not
9 give expert testimony or execute an affidavit pursuant to the
10 provisions of P.L.1995, c.139 (C.2A:53A-26 et seq.) on the
11 appropriate standard of practice or care unless the person is licensed
12 as a physician or other health care professional in **【the United**
13 **States】** New Jersey and meets the following criteria:

14 a. If the party against whom or on whose behalf the testimony
15 is offered is a specialist or subspecialist recognized by the
16 American Board of Medical Specialties or the American
17 Osteopathic Association and the care or treatment at issue involves
18 that specialty or subspecialty recognized by the American Board of
19 Medical Specialties or the American Osteopathic Association, the
20 person providing the testimony shall have specialized at the time of
21 the occurrence that is the basis for the action in the same specialty
22 or subspecialty, recognized by the American Board of Medical
23 Specialties or the American Osteopathic Association, as the party
24 against whom or on whose behalf the testimony is offered, and if
25 the person against whom or on whose behalf the testimony is being
26 offered is board certified and the care or treatment at issue involves
27 that board specialty or subspecialty recognized by the American
28 Board of Medical Specialties or the American Osteopathic
29 Association, the expert witness shall be:

30 (1) a physician credentialed by a hospital to treat patients for the
31 medical condition, or to perform the procedure, that is the basis for
32 the claim or action; or

33 (2) a specialist or subspecialist recognized by the American
34 Board of Medical Specialties or the American Osteopathic
35 Association who is board certified in the same specialty or
36 subspecialty, recognized by the American Board of Medical
37 Specialties or the American Osteopathic Association, and during the
38 year immediately preceding the date of the occurrence that is the
39 basis for the claim or action, shall have devoted a majority of his
40 professional time to either:

41 (a) the active clinical practice of the same health care profession
42 in which the defendant is licensed, and, if the defendant is a
43 specialist or subspecialist recognized by the American Board of
44 Medical Specialties or the American Osteopathic Association, the
45 active clinical practice of that specialty or subspecialty recognized
46 by the American Board of Medical Specialties or the American
47 Osteopathic Association; or

1 (b) the instruction of students in an accredited medical school,
2 other accredited health professional school or accredited residency
3 or clinical research program in the same health care profession in
4 which the defendant is licensed, and, if that party is a specialist or
5 subspecialist recognized by the American Board of Medical
6 Specialties or the American Osteopathic Association, an accredited
7 medical school, health professional school or accredited residency
8 or clinical research program in the same specialty or subspecialty
9 recognized by the American Board of Medical Specialties or the
10 American Osteopathic Association; or

11 (c) both.

12 b. If the party against whom or on whose behalf the testimony
13 is offered is a general practitioner, the expert witness, during the
14 year immediately preceding the date of the occurrence that is the
15 basis for the claim or action, shall have devoted a majority of his
16 professional time to:

17 (1) active clinical practice as a general practitioner; or active
18 clinical practice that encompasses the medical condition, or that
19 includes performance of the procedure, that is the basis of the claim
20 or action; or

21 (2) the instruction of students in an accredited medical school,
22 health professional school, or accredited residency or clinical
23 research program in the same health care profession in which the
24 party against whom or on whose behalf the testimony is licensed; or

25 (3) both.

26 c. (1) A court may waive the same specialty or subspecialty
27 recognized by the American Board of Medical Specialties or the
28 American Osteopathic Association and board certification
29 requirements of this section, upon motion by the party seeking a
30 waiver, if, after the moving party has demonstrated to the
31 satisfaction of the court that a good faith effort has been made to
32 identify an expert in the same specialty or subspecialty, 'and the
33 court has been presented with the reasons for any person declining
34 to give expert testimony or execute an affidavit in the case,' the
35 court determines that the expert possesses sufficient training,
36 experience and knowledge to provide the testimony as a result of
37 active involvement in, or full-time teaching of, medicine in the
38 applicable area of practice or a related field of medicine 'during the
39 year immediately preceding the date of the occurrence that is the
40 basis for the claim or action. The good faith requirement for a
41 waiver by the court pursuant to this paragraph shall not be met by a
42 showing that reviewing or potentially reviewing experts declined to
43 give testimony or execute an affidavit based upon a lack of merit'.

44 (2) A court may waive the requirement that a person providing
45 testimony as an expert witness be licensed in New Jersey upon
46 sufficient evidence that no person licensed in New Jersey meets the
47 qualifications set forth in this section.

1 d. Nothing in this section shall limit the power of the trial court
2 to disqualify an expert witness on grounds other than the
3 qualifications set forth in this section.

4 e. In an action alleging medical malpractice, an expert witness
5 shall not testify on a contingency fee basis.

6 f. An individual or entity who threatens to take or takes
7 adverse action against a person in retaliation for that person
8 providing or agreeing to provide expert testimony, or for that
9 person executing an affidavit pursuant to the provisions of
10 P.L.1995, c.139 (C.2A:53A-26 et seq.), which adverse action relates
11 to that person's employment, accreditation, certification,
12 credentialing or licensure, shall be liable to a civil penalty not to
13 exceed \$10,000 and other damages incurred by the person and the
14 party for whom the person was testifying as an expert.

15 g. Expert testimony shall be based on and refer to objective
16 scientific clinical evidence. A person testifying as an expert witness
17 pursuant to this section shall be guilty of a crime of the fourth
18 degree if the person purposefully or knowingly makes, or causes to
19 be made, a false, fictitious, fraudulent, or misleading statement of
20 material fact in, or omits a material fact from, or causes a material
21 fact to be omitted from, any expert testimony provided pursuant to
22 this section. For the purposes of this section, "scientific clinical
23 evidence" means evidence based on a systematized application of
24 evidence that reflects a precise application of generally recognized
25 facts or principles, using a scholarly methodology regulated by or
26 conforming to the generally accepted principles of medical science.
27 Any person violating the provisions of this subsection shall be
28 forever barred from presenting expert testimony in this State.

29 (cf: P.L.2004, c.17, s.7)

30

31 4. Section 10 of P.L.2004, c.17 (C.2A:62A-1.3) is amended to
32 read as follows:

33 10. a. If an individual's actual health care facility duty, including
34 on-call duty, does not require a response to a patient emergency
35 situation, a health care professional who, in good faith, responds to
36 a life-threatening emergency or responds to a request for emergency
37 assistance in a life-threatening emergency within a hospital or other
38 health care facility, is not liable for civil damages as a result of an
39 act or omission in the rendering of emergency care. The immunity
40 granted pursuant to this section shall not apply to acts or omissions
41 constituting gross negligence, recklessness or willful misconduct.

42 b. The provisions of subsection a. of this section shall **[not]**
43 apply to a health care professional if **[a]** there is no current and
44 active provider-patient relationship [existed before] with the
45 patient who is the subject of the emergency assistance at the time of
46 the emergency [, or if consideration in any form is provided to the
47 health care professional for the service rendered].

1 c. The provisions of subsection a. of this section do not
2 diminish a general hospital's responsibility to comply with all
3 Department of Health and Senior Services licensure requirements
4 concerning medical staff availability at the hospital.

5 d. A health care professional shall not be liable for civil
6 damages for injury or death caused in an emergency situation
7 occurring in the health care professional's private practice or in a
8 health care facility on account of a failure to inform a patient of the
9 possible consequences of a medical procedure when the failure to
10 inform is caused by any of the following:

11 (1) the patient was unconscious;

12 (2) the medical procedure was undertaken without the consent
13 of the patient because the health care professional reasonably
14 believed that the medical procedure should be undertaken
15 immediately and that there was insufficient time to fully inform the
16 patient; or

17 (3) the medical procedure was performed on a person legally
18 incapable of giving informed consent, and the health care
19 professional reasonably believed that the medical procedure should
20 be undertaken immediately and that there was insufficient time to
21 obtain the informed consent of the person authorized to give such
22 consent for the patient.

23 The provisions of this subsection shall apply only to actions for
24 damages for an injury or death arising as a result of a health care
25 professional's failure to inform, and not to actions for damages
26 arising as a result of a health care professional's negligence in
27 rendering or failing to render treatment.

28 e. As used in this section:

29 (1) "Health care professional" means a physician, dentist, nurse
30 or other health care professional whose professional practice is
31 regulated pursuant to Title 45 of the Revised Statutes and an
32 emergency medical technician or mobile intensive care paramedic
33 certified by the Commissioner of Health and Senior Services
34 pursuant to Title 26 of the Revised Statutes; and

35 (2) "Health care facility" means a health care facility licensed by
36 the Department of Health and Senior Services pursuant to P.L.1971,
37 c.136 (C.26:2H-1 **[et seq.] et al.**) and a psychiatric hospital
38 operated by the Department of Human Services and listed in
39 R.S.30:1-7.

40 (cf: P.L.2004, c.17, s.10)

41

42 5. Section 17 of P.L.2004, c.17 (C.17:30D-22) is amended to
43 read as follows:

44 17. a. An insurer shall not increase the premium of any medical
45 malpractice liability insurance policy based on a claim of medical
46 negligence or malpractice against an insured unless the claim
47 results in a medical malpractice claim settlement, judgment or
48 arbitration award against the insured. For the purposes of this

1 subsection, "claim" means any demand received by an insured
2 seeking damages that results from a medical incident, or an
3 insured's notice to the insurer of a specific professional services act
4 or omission that the insured reasonably believes may result in a
5 demand for damages.

6 b. Notwithstanding any other law or regulation to the contrary,
7 an insurer authorized to transact medical malpractice liability
8 insurance in this State shall not increase the premium of any
9 medical malpractice liability insurance policy: (1) based on a claim
10 of medical negligence or malpractice against the insured if the
11 insured is dismissed from an action alleging medical malpractice
12 【within 180 days of the filing of the last responsive pleading】; or
13 (2) based on a claim of medical negligence or malpractice against
14 the insured if the alleged medical malpractice occurred in any case
15 in which the insured performed any treatment or procedure on a
16 charitable basis, without consideration; or (3) based on a claim of
17 medical negligence or malpractice against the insured if the alleged
18 medical malpractice occurred in any case in which the insured
19 provided emergency assistance pursuant to section 10 of P.L.2004,
20 c.17 (C.2A:62A-1.3), whether or not for consideration.
21 (cf: P.L.2004, c.17, s.17)

22
23 6. Section 24 of P.L.2004, c.17 (C.17:30D-27) is amended to
24 read as follows:

25 24. a. As used in this section:

26 "Annuity" means an annuity issued by an insurer licensed or
27 authorized to do business in this State which is a qualified
28 assignment under section 130 of the federal Internal Revenue Code
29 of 1986, 26 U.S.C. s.130.

30 "Judgment creditor" means a claimant who is the recipient of an
31 award for economic or noneconomic damages, or both, that is the
32 result of an action filed against a health care provider for medical
33 malpractice, which award is subject to the provisions of subsection
34 b. of this section.

35 "Judgment debtor" means a health care provider who, as a
36 defendant in an action brought for medical malpractice, is required
37 to pay the claimant an award that is subject to the provisions of this
38 section.

39 "Noneconomic damages" means damages for physical and
40 emotional pain, suffering, inconvenience, physical impairment,
41 mental anguish, disfigurement, loss of enjoyment of life, loss of
42 society and companionship, loss of consortium, hedonic damages,
43 injury to reputation, and all other nonpecuniary losses of any kind
44 or nature.

45 "Structured payment agreement" means an agreement made to
46 settle a claim or lawsuit or respond to a judgment in an action
47 brought for medical malpractice by an injured person whereby a
48 series of periodic payments, rather than a lump sum payment, is

1 made over time to a claimant, in accordance with the needs of the
2 claimant or the claimant's family, either through the purchase of an
3 annuity or the establishment of a trust fund, or by another means
4 approved by the court.

5 b. [(1) Unless otherwise agreed to by the parties, in any
6 judgment resulting from a medical malpractice action brought by a
7 claimant for medical malpractice in which the noneconomic
8 damages are less than or equal to \$1,000,000, the court shall enter a
9 judgment ordering that all of the money damages, both economic
10 and noneconomic, be paid immediately.

11 (2) Unless otherwise agreed to by the parties, in] In any
12 judgment resulting from a medical malpractice action brought by a
13 claimant for medical malpractice [in which the noneconomic
14 damages exceed \$1,000,000], if agreed to by the parties, the court
15 [shall enter a judgment ordering that 50% of the noneconomic
16 damages be paid immediately, with the costs and attorney's fees to
17 be paid from that amount. The remaining 50% of the judgment
18 shall be paid over 60 months] may approve payment of a judgment
19 or settlement in the form of a structured payment agreement by any
20 person, organization, group, or insurer that is contractually liable to
21 pay the judgment.

22 c. The structured payment agreement shall specify: the
23 recipient of the payments; the dollar amount of the payments; the
24 interval between payments; the number of payments or the period of
25 time over which payments are to be made; and the persons to whom
26 money damages are owed, if any, in the event of the judgment
27 creditor's death.

28 d. In the event of the judgment creditor's death, any amounts
29 due and owing pursuant to subsection b. of this section shall be paid
30 to the judgment creditor's estate.

31 e. The judgment debtor or the judgment debtor's insurer shall
32 be required to: post a bond or security; or, as otherwise provided by
33 regulation of the Department of Banking and Insurance, assure full
34 payment of the noneconomic damages awarded. A bond shall not
35 be deemed adequate unless it is written by a company authorized to
36 do business in this State and is rated A-, or better, by A.M. Best
37 Company or such other company as is approved by the Department
38 of Banking and Insurance. If the judgment debtor is unable to
39 adequately assure full payment of the judgment, the judgment,
40 reduced to present value, shall be paid to the claimant in a lump
41 sum. No bond may be canceled or be subject to cancellation unless
42 at least 60 days' advance written notice is filed with the court and
43 the claimant. Upon termination of periodic payments, the security,
44 or so much as remains, shall be returned to the judgment debtor.

45 f. Upon the purchase of an annuity, establishment of a trust, or
46 approval of another arrangement for periodic payments by a court,

1 any obligation of the judgment debtor with respect to the judgment
2 shall cease.

3 (cf: P.L.2004, c.17, s.24)

4

5 7. (New section) a. Every claim or demand filed against an
6 insured for damages in excess of \$100,000 per occurrence for
7 economic loss and non-economic loss shall document the economic
8 loss for which relief is sought and shall set forth in detail the
9 economic loss incurred at the time the case is subject to a
10 complementary dispute resolution proceeding, at the time settlement
11 negotiations are entered into, or at the time a case is tried, as well as
12 a detailed statement of claimed prospective economic loss resulting
13 from the allegation of medical malpractice, which documentation
14 shall be updated from time to time as necessary and shall be
15 provided to the court, the complementary dispute resolution agent
16 or, in the case of settlement, the defendant, as applicable.

17 b. In every trial in which damages are awarded in an action
18 alleging medical malpractice, the trier of fact shall separately
19 itemize damages awarded for economic loss and damages awarded
20 for non-economic loss and the judge presiding over the proceeding
21 shall review each verdict to determine pursuant to section 9 of
22 P.L.2004, c.17 (C.2A:53A-42), whether the award is clearly
23 inadequate, excessive, or disproportionate in view of the nature of
24 the medical condition or injury that is the cause of action or because
25 of passion or prejudice by the jury.

26

27 8. (New section) It shall be presumed that a person who signs
28 an informed consent form or document for a medical procedure or
29 other form of health care has read that form or document.

30

31 9. (New section) If an attorney representing a plaintiff in a
32 medical malpractice action files the complaint using fictitious
33 names for one or more persons who may be determined to be parties
34 to the action but whose role is unknown at the time of the filing of
35 the complaint, there shall be no time limitation within which the
36 attorney may substitute the name of any person or persons for a
37 fictitious name nor any other bar to such substitution if the person
38 or persons are subsequently determined to be joined as a party to
39 the action.

40

41 10. (New section) A physician licensed to practice medicine in
42 this State shall not be liable for civil damages as a result of any act
43 or omission in connection with the rendering of any treatment or
44 procedure for illness or injury if the treatment or procedure is
45 rendered while the physician is performing the treatment or
46 procedure as a volunteer, in good faith and without consideration, at
47 a clinic, other health care facility, or any other location where the
48 treatment or procedure is being rendered.

1 11. This act shall take effect immediately and shall apply to
2 actions for damages that accrue on or after the effective date of the
3 act.