

## BILL TEXT:

## STATE OF NEW YORK

5674

2005-2006 Regular Sessions

## IN ASSEMBLY

February 25, 2005

Introduced by M. of A. SCHIMMINGER, MAGEE, EDDINGTON -- Multi-Sponsored  
by -- M. of A. GALEF, TOWNS -- read once and referred to the Committee  
on Judiciary

AN ACT to amend the civil practice law and rules, in relation to enact-  
ing the "medical liability reform act"; and to repeal subparagraph  
(ii) of paragraph 1 of subdivision (d) of section 3101 of such law and  
rules relating to disclosure of expert witnesses in medical, dental  
and podiatric medical malpractice actions

The People of the State of New York, represented in Senate and Assem-  
bly, do enact as follows:

1 Section 1. Short title. This act shall be known and may be cited as  
2 the "medical liability reform act".

3 § 2. Section 3012-a of the civil practice law and rules, as amended by  
4 chapter 507 of the laws of 1987, is amended to read as follows:

5 § 3012-a. Certificate of merit in medical, dental and podiatric malp-  
6 ractice actions. (a) In any action for medical, dental or podiatric  
7 malpractice, the complaint shall be accompanied by a certificate,  
8 executed by the attorney for the plaintiff, declaring that:

9 (1) the attorney has reviewed the facts of the case and has consulted  
10 with at least one physician in medical malpractice actions, at least one  
11 dentist in dental malpractice actions or at least one podiatrist in  
12 podiatric malpractice actions who is licensed to practice in this state  
13 [~~or any other state~~] and who the attorney reasonably believes is know-  
14 ledgeable in the relevant issues involved in the particular action, and  
15 who has signed an affidavit concluding that there is a reasonable basis  
16 for the commencement of an action, with such affidavit to accompany the  
17 certificate required by this section, and that the attorney has  
18 concluded on the basis of such review [~~and~~], consultation and affidavit  
19 that there is a reasonable basis for the commencement of such action; or

20 (2) the attorney was unable to obtain the consultation and affidavit  
21 required by paragraph one of this subdivision because a limitation of

EXPLANATION--Matter in italics (underscored) is new; matter in brackets  
[-] is old law to be omitted.

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1 time, established by article two of this chapter, would bar the action  
2 and that the certificate required by paragraph one of this subdivision  
3 could not reasonably be obtained before such time expired. If a certifi-  
4 cate is executed pursuant to this subdivision, the certificate required  
5 by this section shall be filed within ninety days after service of the  
6 complaint; or

7 (3) the attorney was unable to obtain the consultation and affidavit  
8 required by paragraph one of this subdivision because the attorney had  
9 made three separate good faith attempts with three separate physicians,  
10 dentists or podiatrists, in accordance with the provisions of paragraph  
11 one of this subdivision to obtain such consultation and none of those  
12 contacted would agree to such a consultation.

13 (b) Where a certificate is required pursuant to this section, a single  
14 certificate shall be filed for each action, even if more than one  
15 defendant has been named in the complaint or is subsequently named.

16 (c) Where the attorney intends to rely solely on the doctrine of "res  
17 ipsa loquitur", this section shall be inapplicable. In such cases, the  
18 complaint shall be accompanied by a certificate, executed by the attor-  
19 ney, declaring that the attorney is solely relying on such doctrine and,  
20 for that reason, is not filing a certificate required by this section.

21 (d) If a request by the plaintiff for the records of the plaintiff's  
22 medical or dental treatment by the defendants has been made and such  
23 records have not been produced, the plaintiff shall not be required to  
24 serve the certificate required by this section until ninety days after  
25 such records have been produced.

26 (e) [~~For purposes of this section, and subject to the provisions of~~  
27 ~~section thirty one hundred one of this chapter, an attorney who submits~~  
28 ~~a certificate as required by paragraph one or two of subdivision (a) of~~  
29 ~~this section and the physician, dentist or podiatrist with whom the~~  
30 ~~attorney consulted shall not be required to disclose the identity of the~~  
31 ~~physician, dentist or podiatrist consulted and the contents of such~~  
32 ~~consultation; provided, however, that when the~~] When an attorney makes a  
33 claim under paragraph three of subdivision (a) of this section that he  
34 or she was unable to obtain the required consultation and affidavit with  
35 the physician, dentist or podiatrist, the court may, upon the request of  
36 a defendant made prior to compliance by the plaintiff with the  
37 provisions of [~~section thirty one hundred one~~] article thirty-one of this  
38 chapter, require the attorney to divulge to the court the names of  
39 physicians, dentists or podiatrists refusing such consultation.

40 (f) The provisions of this section shall not be applicable to a plain-  
41 tiff who is not represented by an attorney.

42 (g) The plaintiff may, in lieu of serving the certificate and affida-  
43 vit required by this section, provide the defendant or defendants with  
44 the information required by paragraph one of subdivision (d) of section  
45 thirty-one hundred one of this chapter within the period of time  
46 prescribed by this section.

47 (h) Where a certificate and affidavit is required pursuant to this  
48 section, the failure to timely file such certificate and affidavit shall  
49 require that the action be deemed a dismissal of the complaint for  
50 neglect to file the action for the purposes of section two hundred five  
51 of this chapter.

52 § 3. Section 1600 of the civil practice law and rules, as added by  
53 chapter 682 of the laws of 1986, is amended to read as follows:

54 § 1600. Definitions. As used in this article [~~the term "non-economic~~  
55 ~~loss" includes but is not limited to pain and suffering, mental anguish,~~  
56 ~~loss of consortium or other damages for non economic loss~~]:

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1 1. "Noneconomic damages" means nonpecuniary damages arising from pain,  
2 suffering, inconvenience, physical impairment or disfigurement, mental  
3 anguish, emotional distress, loss of society and companionship, loss of  
4 consortium, injury to reputation, humiliation and all other nonpecuniary  
5 damages.

6 2. "Actual economic damages" means objectively verifiable pecuniary  
7 damages arising from medical expenses and medical care, loss of earnings  
8 and earning capacity, burial costs, loss of use of property, loss of  
9 guidance, costs of repair or replacement of property, costs of obtaining  
10 substitute domestic services, loss of employment, loss of business or  
11 employment opportunities, rehabilitation services, custodial care and  
12 all other pecuniary damages.

13 § 4. Section 1601 of the civil practice law and rules, as added by  
14 chapter 682 of the laws of 1986 and subdivision 1 as amended by chapter  
15 635 of the laws of 1996, is amended to read as follows:

16 § 1601. Limited liability of persons jointly liable. 1. Notwith-  
17 standing any other provision of law, when a verdict or decision in an  
18 action or claim for personal injury is determined in favor of a claimant  
19 in an action involving two or more tortfeasors jointly liable or in a  
20 claim against the state [~~and the liability of a defendant is found to be~~  
21 ~~fifty percent or less of the total liability assigned to all persons~~  
22 ~~liable~~], the liability of [~~such~~] a defendant to the claimant for [~~non-e-~~  
23 ~~conomic loss~~] the claimant's actual economic damages and noneconomic  
24 damages shall not exceed that defendant's equitable share determined in  
25 accordance with the relative culpability of each person causing or  
26 contributing to the total liability for [~~non-economic loss~~] the claim-  
27 ant's actual economic damages and noneconomic damages; provided, however  
28 that the culpable conduct of any person not a party to the action shall  
29 not be considered in determining any equitable share herein if the  
30 claimant proves that with due diligence he or she was unable to obtain  
31 jurisdiction over such person in said action (or in a claim against the  
32 state, in a court of this state); and further provided that the culpable  
33 conduct of any person shall not be considered in determining any equita-  
34 ble share herein to the extent that action against such person is barred  
35 because the claimant has not sustained a "grave injury" as defined in  
36 section eleven of the workers' compensation law.

37 2. Nothing in this section shall be construed to affect or impair any  
38 right of a tortfeasor under section 15-108 of the general obligations  
39 law.

40 § 5. The civil practice law and rules is amended by adding a new arti-  
41 cle 50-C to read as follows:

42 ARTICLE 50-C

43 LIMITATION ON NONECONOMIC  
44 DAMAGES

45 Section 5051. Definitions.

46 5052. Damage awards.

47 § 5051. Definitions. As used in this article:

48 1. "Noneconomic damages" means nonpecuniary damages arising from pain,  
49 suffering, inconvenience, physical impairment or disfigurement, mental  
50 anguish, emotional distress, loss of society and companionship, loss of  
51 consortium, injury to reputation, humiliation and all other nonpecuniary  
52 damages.

53 2. "Actual economic damages" means objectively verifiable pecuniary  
54 damages arising from medical expenses and medical care, loss of earnings  
55 and earning capacity, burial costs, loss of use of property, loss of  
56 guidance, costs of repair or replacement of property, costs of obtaining

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1 substitute domestic services, loss of employment, loss of business or  
2 employment opportunities, rehabilitation services, custodial care and  
3 all other pecuniary damages.

4 3. "Personal injury action" means any action, including but in no  
5 manner limited to medical, dental and podiatric malpractice actions,  
6 whether in tort, contract or otherwise, in which the plaintiff seeks  
7 damages for injury to the person or wrongful death.

8 4. "Compensation" means monetary awards.

9 § 5052. Damage awards. 1. In any personal injury action, the prevail-  
10 ing plaintiff or person who claims injury by or through such injured  
11 plaintiff may be awarded:

12 (a) compensation for actual economic damages suffered by the injured  
13 plaintiff or other person who claims injury by or through such injured  
14 plaintiff; and

15 (b) compensation for noneconomic damages suffered by the injured  
16 plaintiff or other person who claims injury through such injured plain-  
17 tiff, or as a consequence of injury to such injured plaintiff, not to  
18 exceed two hundred fifty thousand dollars.

19 2. The damage award recoverable for a personal injury action shall not  
20 exceed the amount permitted to be awarded pursuant to subdivision one of  
21 this section regardless of the number of defendants to such action. If a  
22 jury awards an amount for noneconomic damages that exceeds the limita-  
23 tion under subdivision one of this section, the court shall reduce the  
24 amount to conform to the limitation.

25 3. No other personal injury action may be brought by the prevailing  
26 plaintiff or other person who claims injury through such injured plain-  
27 tiff, or as a consequence of injury to such injured plaintiff, to  
28 recover amounts for the injury or occurrence that gives rise to such  
29 personal injury action.

30 4. Where a defendant has successfully pleaded and proved contributory  
31 negligence on the part of the prevailing plaintiff pursuant to article  
32 fourteen-A of this chapter, the damage award to the prevailing plaintiff  
33 shall be diminished from the amounts awarded pursuant to subdivision one  
34 of this section by the proportion which the culpable conduct attribut-  
35 able to the prevailing plaintiff bears to the culpable conduct which  
36 caused the damages.

37 5. Nothing in this section shall be construed to prevent the applica-  
38 tion of section forty-five hundred forty-five of this chapter to a  
39 damage award for a personal injury action made pursuant to subdivision  
40 one of this section.

41 6. Notwithstanding any other provision of law, the jury shall not be  
42 instructed of the limitation on noneconomic damages as set forth in this  
43 article.

44 § 6. Subparagraph (i) of paragraph 1 of subdivision (d) of section  
45 3101 of the civil practice law and rules, as amended by chapter 184 of  
46 the laws of 1988, is amended to read as follows:

47 (i) Upon request, each party shall identify each person whom the party  
48 expects to call as an expert witness at trial and shall disclose in  
49 reasonable detail the subject matter on which each expert is expected to  
50 testify, the substance of the facts and opinions on which each expert is  
51 expected to testify, the qualifications of each expert witness and a  
52 summary of the grounds for each expert's opinion. However, where a party  
53 for good cause shown retains an expert an insufficient period of time  
54 before the commencement of trial to give appropriate notice thereof, the  
55 party shall not thereupon be precluded from introducing the expert's  
56 testimony at the trial solely on grounds of noncompliance with this

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1 paragraph. In that instance, upon motion of any party, made before or at  
2 trial, or on its own initiative, the court may make whatever order may  
3 be just. [~~In an action for medical, dental or podiatric malpractice, a  
4 party, in responding to a request, may omit the names of medical, dental  
5 or podiatric experts but shall be required to disclose all other infor-  
6 mation concerning such experts otherwise required by this paragraph.~~]

7 § 7. Subparagraph (ii) of paragraph 1 of subdivision (d) of section  
8 3101 of the civil practice law and rules is REPEALED and a new subpara-  
9 graph (ii) is added to read as follows:

10 (ii) Notwithstanding any other provision of this article or of article  
11 thirty-two of this chapter, in an action for medical, dental or podia-  
12 tric malpractice, at the times and in the sequence directed by the  
13 court, such times to be prior to the service and filing of a note of  
14 issue unless the court directs otherwise and preserves the right of  
15 every party to depose a person whose disclosure occurs subsequent to the  
16 filing of a note of issue, each party shall disclose to the other  
17 parties the identity of any person who may be used at trial to provide  
18 expert testimony in the case and each such disclosure shall be accompa-  
19 nyed by a written report prepared and signed by such person. The report  
20 shall contain a complete statement of all opinions to be expressed and  
21 the basis and reasons therefor; the data or other information considered  
22 by such person in forming the opinions; any exhibits to be used as a  
23 summary of or support for the opinions; the qualifications of the  
24 person, including a list of all publications authored by the person  
25 during the preceding ten years; the compensation to be paid for the  
26 person's consideration of data or other information and for his or her  
27 testimony; and a listing of any other cases in which the person has  
28 testified as an expert at trial or by oral deposition within the preced-  
29 ing four years. Each party shall be required to produce each person so  
30 identified by such party as an expert witness, for examination upon oral  
31 deposition upon receipt of a notice to take oral deposition in accord-  
32 ance with rule thirty-one hundred seven of this article. Unless manifest  
33 injustice would result, the court shall require that the party noticing  
34 an oral deposition of such an expert witness pay such witness a reason-  
35 able fee for time spent in attending such oral deposition. If any party  
36 fails to identify a person as an expert witness in accordance with the  
37 provisions of this clause, or if any party fails to make any person  
38 identified by the party as an expert witness available for oral deposi-  
39 tion in accordance with the provisions of this clause, that party shall  
40 be precluded from offering such expert's testimony at the trial of the  
41 action.

42 § 8. This act shall take effect immediately; except that sections two,  
43 three, six and seven of this act shall take effect on the ninetieth day  
44 after this act shall have become a law and shall apply to actions  
45 commenced and claims filed on or after the effective date of such  
46 sections. The provisions of sections four and five of this act shall  
47 apply to causes of action and claims accruing on or after the effective  
48 date of this act.

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**SPONSORS MEMO:**

**NEW YORK STATE ASSEMBLY  
MEMORANDUM IN SUPPORT OF LEGISLATION  
submitted in accordance with Assembly Rule III, Sec 1(e)**

**BILL NUMBER:** A5674

**SPONSOR:** Schimminger (MS)

**RETRIEVE BILL**

**TITLE OF BILL:** An act to amend the civil practice law and rules, in relation to enacting the "medical liability reform act"; and to repeal subparagraph (ii) of paragraph 1 of subdivision (d) of section 3101 of such law and rules relating to disclosure of expert witnesses in medical, dental and podiatric medical malpractice actions

**PURPOSE:** The purpose of this legislation is to reform the Civil Practice Law and Rules in regards to medical liability.

**SUMMARY OF PROVISIONS:** Section 1 - title, "Medical Liability Reform Act."

Section 2 - adds the requirement of an affidavit from a physician concluding that there is a reasonable basis for the commencement of an action, with such affidavit to accompany the certificate required by this section, with caveats.

Section 3 - repeals the definition of "non-economic loss" and replaces it with definitions for "noneconomic damages" and "actual economic damages."

Section 4 - amends section 1601 of the CPLR to make equitable share regardless of whether a defendant was less than fifty percent liable, as determined in accordance with the relative culpability of each defendant.

Section 5 - adds Article 50-C, limitation on non-economic damages to the CPLR.

Section 6 - amends section 3101 of the CPLR removes the exception that allows the omission of the names of medical, dental or podiatric experts from production materials concerning experts testifying at trial.

Section 7 - replaces clause (ii) of paragraph 1 of subdivision (d) of section 3101 of the CPLR to require that, in an action for medical, dental or podiatric malpractice, the report shall contain a complete statement of all opinions to be expressed, the basis and reasons therefor; the data or other information considered by such person in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the person, including a list of all publications authored by the person during the preceding ten years; the compensation to be paid for the person's consideration of data or other information and for his or her testimony; and a listing of any other cases in which the person has testified as an expert at trial or by oral deposition within the preceding four years. Additionally, this bill requires a party to produce such expert for an EBT, in accordance with rule 3107 of the CPLR. Unless manifest injustice would result, the court shall require that the party noticing an oral deposition of such an expert witness pay such witness a reasonable fee for time spent in attending such oral deposition. Violation of these provisions shall preclude a party from offering such expert's testimony at the trial of the action.

**EXISTING LAW:** Amends sections 3012-a, 1600, 1601 and adds a new article 50-C to the CPLR.

**JUSTIFICATION:** The cost of medical malpractice lawsuits in the state of New York have increased steadily for several years. Such cost has driven malpractice insurance premiums up for health care professionals and driven up the cost of health care for the public. This bill makes medical malpractice liability reform in several important ways.

**RETRIEVE BILL**

The bill provides a true mechanism for removing frivolous claims from the dockets of New York's court rooms. Fewer non-meritorious claims will be advanced in the state, by adding the requirement of an affidavit of merit, signed by a physician, and providing a judge the tools to remove a malpractice claim for failure to comply with the provisions of this amended section.

To bring down the amount of judgments in medical malpractice claims, the bill necessarily establishes statutory language for "noneconomic damages" and "actual economic damages" in order to facilitate the \$250,000 cap on noneconomic damages for which this bill provides. Additionally, the bill links a defendant's monetary liability to their equitable share in accordance with the relative culpability.

This bill expands the scope of production in regards to expert witnesses and their testimony, including identity, which a party must disclose upon request by its opposition. This bill is necessary to facilitate meaningful reform of medical malpractice liability.

**LEGISLATIVE HISTORY:** 2003-2004: A9599/S469A

**FISCAL IMPLICATIONS:** None.

**EFFECTIVE DATE:** This act shall take effect immediately, except that sections two, three, six and seven of this act shall take effect 90 days after this act shall have become a law and shall be applicable to actions commenced and claims filed on and after such date. Sections four and five of this act shall be applicable to causes of action and claims on and after this effective date.

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