

MEDICAL MALPRACTICE: *WHERE, WHEN, AND HOW TO BRING A CLAIM*

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Agenda

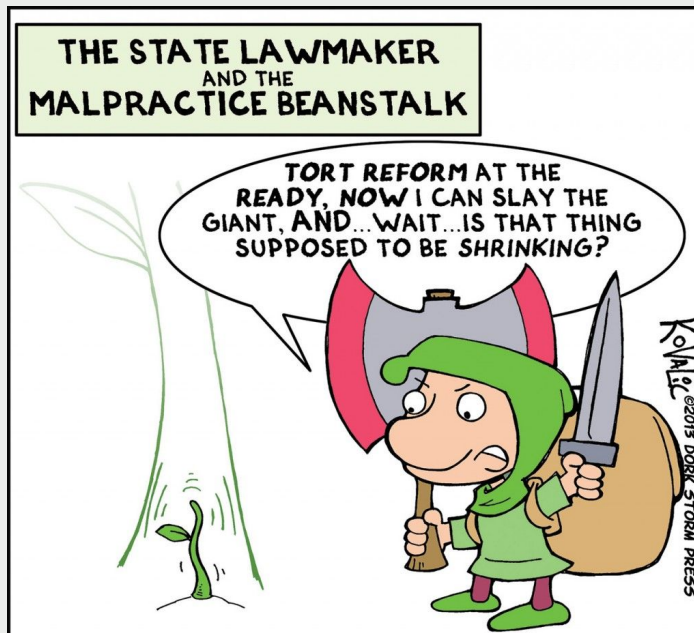
- I. The Where – Brief Overview of the LMMA
- II. The When – Prescription Generally
- III. The How – Burden of Proof
- IV. The Implications of COVID-19
- V. Questions





Introduction

As part of a larger tort reform initiative, the Louisiana Legislature in 1975 created the Louisiana Medical Malpractice Act (LMMA) (La. R.S. 40:1231.1) as a way to reduce frivolous suits against private healthcare providers thereby reducing costs. Similarly, the legislature enacted the Medical Liability for State Services Act (La. R.S. 40:1237.1) (State Act).





Three Key Components of Medical Malpractice Acts

1. Provides for a “Screening Process”

- *Claim must be presented to a Medical Review Panel before any suit can move forward.*

2. Provides for a cap/limitation on “recoverable damages”:

- *\$100K/\$500K limit, plus future medicals. **Limitation amounts have not increased since 1975.***
- *“recoverable damages” include general damages and lost wages. Past and future medical expenses are not subject to the cap.*

3. Provides for the creation of a “Fund”



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The Where

Filing a Claim

Where to File

La. Stat. Ann. § 40:1231.8

- Division of Administration, not the Patient's Compensation Fund.
- “Qualified Healthcare Providers” – Procure Insurance or Self-Insure for \$100K
 - <http://204.196.210.34/certificates/certificates.aspx/>
- Postal Mail (certified mail is in the best interest of the claimant as it sets the filing date), send to:
Division of Administration Medical Review Panel Office P. O. Box 44336 Baton Rouge, LA
70804-4336.
- Requests can be sent via fax, but if received after 5:00 p.m. will be date stamped the next business day. Fax: (225) 342-1057.
- Filing Fee is \$100 per healthcare provider.

Recent “Filing Fee” Case

In Re Medical Review Panel Proceedings For the Claim of David Parker v. UMC–NO, 2022–0608 (La. App. 4 Cir. 1/23/23), 2023 WL 355184.

- Plaintiff alleged he was misdiagnosed with gout, which resulted in the amputation of plaintiff’s toes. The court of appeal found that plaintiff’s failure to timely pay the filing fee as to one defendant rendered that initial request invalid and without effect as to that defendant. The claimant either timely pays the filing fee and preserves the claim against that defendant, or the claimant fails to timely pay the filing fee, rendering the request for review of a malpractice claim against that defendant invalid and without effect. **Both the filing of the request for review and the payment of the filing fee required by La. Rev. Stat. 40:1231.8(A)(1)(c) are “inexorably joined”;** hence, the request for review is not considered to be filed until the claimant pays the filing fee. The amended claim against that same defendant (for which a timely fee was paid) was prescribed on its face and cannot be “revived” by relying on the claim made against another defendant (for whom a timely fee was paid) to interrupt prescription under La. Rev. Stat. 40:1231.8(A)(2)(a). Further, the trial court erred in finding that circumstances relating to the impact of Hurricane Ida or Covid–19 excused plaintiff’s late payment of the filing fee.

See also *Kirt v. Metzinger*, 2019–1162 (La. 4/3/20), 341 So.3d 1211; *In re Medical Review Panel for Crane*, 2020–259 (La. App. 5 Cir. 4/22/21), 347 So.3d 979, writ denied sub nom, *In re Med. Rev. Panel for Crane*, 2021–00707 (La. 9/27/21), 324 So.3d 95.

Form of Complaint

La. Stat. Ann. § 40:1231.8(A)(1)(b)(i-vii)

- Complaint does not have to be in any particular form; it is a request to convene a medical review panel to review the facts of the claim.
- The LMMA states that, at a minimum, the following must be included in your complaint:
 - A Statement that it is a request for formation of a MRP;
 - The Full Names of the Patient, all claimants, and all defendant HCP (\$100/def);
 - The date(s) of the alleged malpractice;
 - A brief description of the alleged malpractice specific to each named defendant; and
 - A brief, specific description of the alleged injuries.

Medical Liability for State Services Act Notables

- State Employee Health Care Providers – don't pay first \$100k or any PCF surcharge.
- State is responsible for the entire \$500k damage amount.
- Separate pool of funds, Future Medical Care Fund (FMCf) (La. R.S. § 39:1533.2).
- State medical review panel process (La. R.S. 40:1237.2).
- Medical review panel process for claims with both private and state defendants (La. R.S. 40:1237.3 and 40:1231.10).
- Same filing procedure and filing fee as Private Act.
- Even if claim concerns a private defendant AND a state defendant, the claim is still subject to one \$500K “cap”. See *Batson v. S. La. Med. Ctr.*, 750 So.2d 949 (La. 1999).



The When

Prescription Generally

Prescription

La. Stat. Ann. § 9:5628(A)

- **Claim must be filed within 1–year of the date of the alleged malpractice; or**
- **Claim can be filed within 1–year of the date of discovery of the alleged malpractice; BUT**
- **In no event can the date of discovery be greater than 3–years from the date of the alleged malpractice.**
- La. R.S. 40:1231.8(2)(c) and 40:1231.8(B)(3) provides that once a timely request for a medical review panel has been made, the 1–year prescription period of § 9:5628(A) is suspended.
- Suspension period is lifted 90–days after notification by certified mail to the Claimant of the issuance of the medical review panel opinion.
- Prescription is suspended during the panel period as to all joint tortfeasors (qualified or unqualified).
See LeBreton v. Rabito, 714 So. 2d 1226, 1232–33 (La. 1988).



The How

Burden of Proof and Panel Process

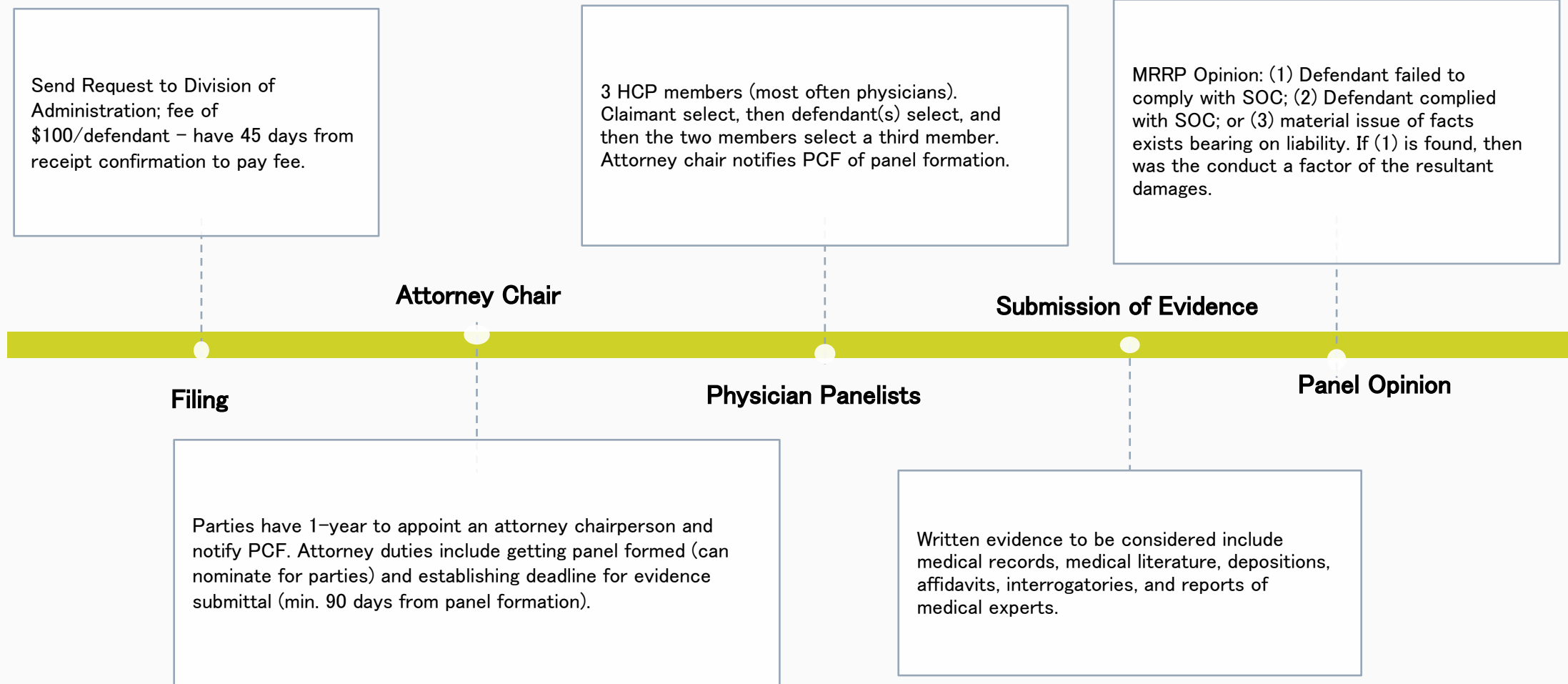
Burden of Proof

La. Rev. Stat. Ann. § 9:2794

- Claimant has NO burden of proof in the MRP proceedings; it is a screening process, and the panel opinion is evidence at trial.
- Claimant has burden of proof at trial:
 1. The applicable standard of care;
 2. That the defendant(s) breached the applicable standard of care; AND
 3. That the breach caused the plaintiff to suffer injuries that he would not have otherwise incurred.

La. Rev. Stat. Ann. § 40:1299.42

- Limitation on Recovery of Damages is \$500K (plus interest and cost), with the “qualified” HCP paying \$100K.
- “Cap” does not apply to future medical treatment (malpractice forward), nor does it apply to past medical expenses (those that flow because of the malpractice).
- PCF reserves the right to disburse future medical funds as they are incurred or as a lump sum.



Medical Review Panel Timeline

Medical Review Panel Opinion – Exclusive List

La. R.S. § 40:1231.8(G)(1–4)

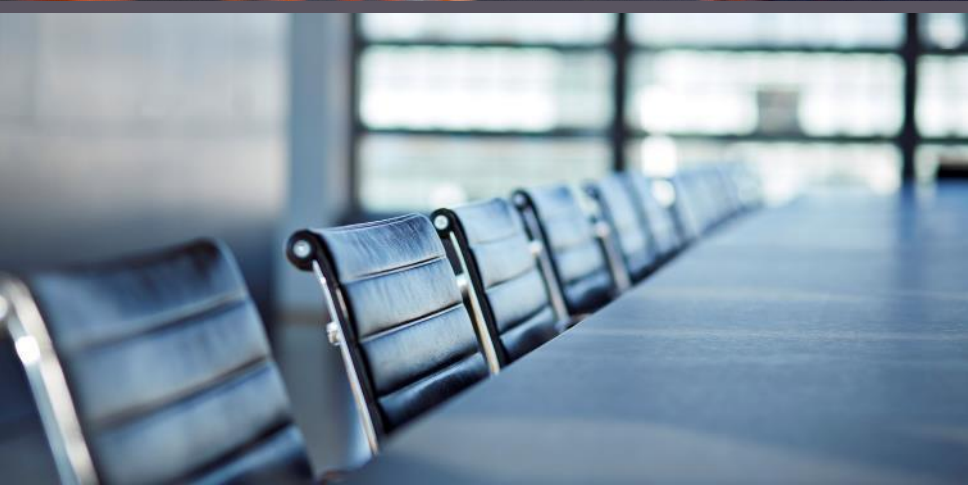
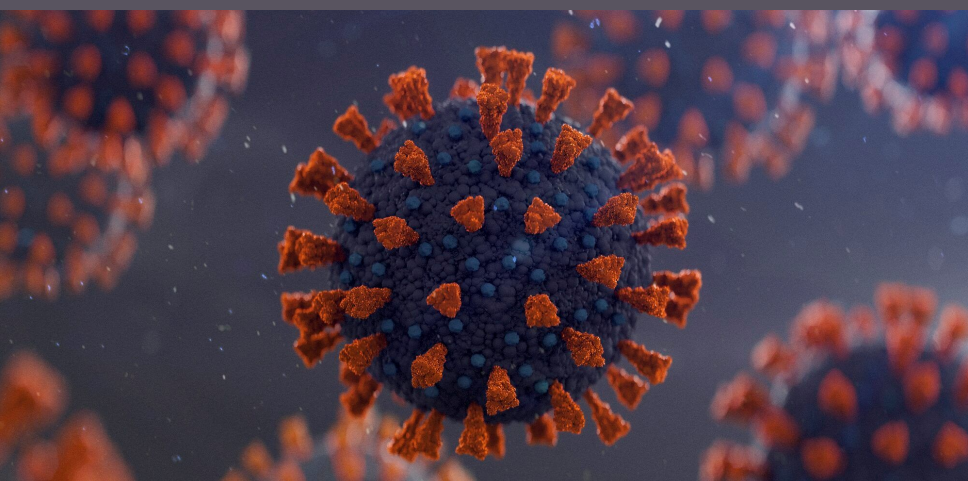
- Evidence supports the conclusion that defendant(s) failed to comply with std. of care.
- Evidence does not support the conclusion that defendant(s) failed to comply with std. of care.
- There is a material issue of fact bearing on liability that does not require expert testimony.

Medical Causation

- If panel finds that a breach in the std. of care occurred, then it must opine as to whether the conduct was or was not a factor of the resultant damages.
- If conduct was a factor, then whether the plaintiff suffered (a) any disability, including the extent and duration, and (b) any permanent impairment and the % of the impairment.

Panel Opinion As Evidence

- The sole duty of the MRP is to render an expert opinion.
- Opinion shall be admissible in any subsequent action.
- Opinion is not dispositive of the case and is not binding on the parties.
- Panel Opinion may not resolve matters of disputed facts, which are outside the scope and can be stricken from evidence.



The Implications of COVID-19

- Since the enactment of the LMMA, the prevailing burden of proof has always been a general negligence standard.
- Proclamation Number 25 JBE 2020, Governor Edwards exercised the right to declare a public health emergency pursuant to the Louisiana health Emergency Powers Act, La. R.S. 29:760, et seq.
- Pursuant to La. R.S. 29:771, healthcare providers are provided a further limitation of liability during the public health emergency shielding them for any actions that do not rise to the level of gross negligence (March 11, 2020 to March 16, 2022).
- A few cases have now been reported to address the reach of 29:773.

Louisiana Health Emergency Powers Act

Recent Notable Appellate Cases

In re MRP Proceedings of Welch

- Came to the 5th Circuit by way of a Writ from a ruling on a Motion for Declaratory Judgment.
- The Atty. Chair notified counsel that he did not believe he was allowed any latitude to deviate from the standard of care provisions of the LMMA.
- The oral reasons of the trial court made it clear that “it is not this Court’s job to pronounce the std. of care...that is the duty of the panel.
- The 5th Circuit denied the writ but found that the trial court’s order to the Atty. Chair to perform his statutory duty to advise the panel regarding what std. of care may be applied to the Welch’s claim included considering the application of the LHEPA.

Estate of Brown v. St. Luke’s #2

- Came to the 4th Circuit on appeal from a summary judgment (cross MSJ’s filed).
- Trial court granted SJ in favor of plaintiff finding the LHEPA shall not be considered or applied at the panel stage.
- 4th Circuit held: “we conclude that formulating and interpreting the standards for gross negligence or willful misconduct are endeavors which belong to the judge or jury...tasking medical experts with utilizing legal concepts that entail an inquiry into subjective intent or credibility would be impermissible... Would exceed the statutory authority given under the LMMA.”
- 4th Circuit further held: “La. R.S. 29:771 is an immunity statute that may only be raised as an affirmative defense in an answer to a petition.

QUESTIONS



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THANK YOU

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