Boston Bar Association
Professional Liability Committee
Brown Bag Lunch

Provisions of the *Health Payment Reform Act* Affecting Medical Malpractice Litigation

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Rule	Summary	Full Text	Notes
c. 231 § 60K. Actions against health care providers; rate of interest; damages			
231 §60K	**Prejudgment interest reduced** – rate is equal to the weekly average 1-year constant maturity Treasury yield plus 2 per cent. Does not apply to death cases.	In any action for malpractice, negligence, error, omission, mistake or unauthorized rendering of professional services, other than actions brought under section 2 of chapter 229, against a provider of health care, in which a verdict is rendered or a finding made or an order for judgment made for pecuniary damages for personal injuries to the plaintiff or for consequential damages, there shall be added by the clerk of the court to the amount of damages interest thereon, at a rate to be determined as set forth below rather than the rate specified in section 6B of chapter 231, from the date of the commencement of the action even though such interest brings the amount of the verdict or finding beyond the maximum liability imposed by law. For all actions commenced after the effective date of this act, the rate of interest to be applied by the clerk shall be at a rate equal to the weekly average 1-year constant maturity Treasury yield plus 2 per cent, as published by the Board of Governors of the Federal Reserve System for the calendar week preceding the date of judgment. At no point shall the rate of interest established by this section exceed the rate of interest set forth in said section 6B of chapter 231.	Currently, the weekly average 1-year constant maturity Treasury yield equals 0.14. Thus, prejudgment interest equals 2.14% running from the date of filing of the Complaint. Pre-judgment interest in wrongful death cases remains at 12%.

c. 231 § 60L. Notice requirement for actions against health care providers; time for filing; exceptions; contents; providers' access to medical records; response			
231 § 60L (a)	**182 day "Cooling off period"**-claimant must give a health care provider 182 days notice before filing suit.	Except as otherwise provided in this section, a person shall not commence an action against a provider of health care as defined in the seventh paragraph of section 60B unless the person has given the health care provider 182 days written notice before the action is commenced.	This provision is new. Time will tell whether it fosters some claimants to think twice before bringing a case or increases the number of early settlements. However, there did not appear to be impediments to early settlement before this statue was enacted.
231 § 60L (b)	**Mailed to home or work** - 182 day notice must be mailed to respondent's home or work.	The notice of intent to file a claim required under subsection (a) shall be mailed to the last known professional business address or residential address of the health care provider who is the subject of the claim.	
231 § 60L (c)	**Only 90 notice under certain circumstances** - notice reduced to 90 days if claimant already served 182 days notice or already sued a health provider.	The 182-day notice period in subsection (a) shall be shortened to 90 days if: 1) the claimant has previously filed the 182-day notice required against another health care provider involved in the claim; or 2) the claimant has filed a complaint and commenced an action alleging medical malpractice against any health care provider involved in the claim.	
231 § 60L (d)	**Health provider not identifiable** - 182 day notice not required if claimant reasonably could not recognize identify health care provider before filing.	The 182 day notice of intent required in subsection (a) shall not be required if the claimant did not identify and could not reasonably have identified a health care provider to which notice shall be sent as a potential party to the action before filing the complaint.	

231 § 60L (e)	**182 notice must contain:** 1) Factual basis; 2) SOC; 3) how SOC was breached; 4) what respondent should have done; 5) proximate cause and 6) identity of other notice recipients.	The notice given to a health care provider under this section shall contain, but shall not be limited to, a statement including: 1) the factual basis for the claim 2) the applicable standard of care alleged by the claimant; 3) the manner in which it is claimed that the applicable standard of care was breached by the health care provider; 4) the alleged action that should have been taken to achieve compliance with the alleged standard of care; 5) the manner in which it is alleged the breach of the standard of care was the proximate cause of the injury claimed in the notice; and 6) the names of all health care providers that the claimant intends to notify under this section in relation to a claim.	
231 § 60L (f)	**Records required** – claimant must provide relevant records or a release for them within 56 days.	Not later than 56 days after giving notice under this section, the claimant shall allow the health care provider receiving the notice access to all of the medical records related to the claim that are in the claimant's control and shall furnish a release for any medical records related to the claim that are not in the claimant's control, but of which the claimant has knowledge. This subsection shall not restrict a patient's right of access to the patient's medical records under any other law.	

231 § 60L (g)	**Respondent must respond within 150 days with:** 1) factual basis of defense 2) SOC; 3) how respondent complaint with SOC; 4) why respondent was not proximate cause.	Within 150 days after receipt of notice under this section, the health care provider or authorized representative against whom the claim is made shall furnish to the claimant or the claimant's authorized representative a written response that contains a statement including the following: 1. the factual basis for the defense, if any, to the claim; 2) the standard of care that the health care provider claims to be applicable to the action; 3) the manner in which it is claimed by the health care provider that there was or was not compliance with the applicable standard of care; and 4) the manner in which the health care provider contends that the alleged negligence of the health care provider was or was not a proximate cause of the claimant's alleged injury or alleged damage.	
231 § 60L (h)	**Failure to respond penalties –** if respondent does not respond within 150 days, claimant may file suit and interest runs from the date of the notice.	If the claimant does not receive the written response required under subsection (g) within the required 150-day time period, the claimant may commence an action alleging medical malpractice upon the expiration of the 150-day time period. If a provider fails to respond within 150 days and that fact is made known to the court in the plaintiffs' complaint or by any other means then interest on any judgment against that provider shall	

		accrue and be calculated from the date that the notice was filed rather than the date that the suit is filed. At any time before the expiration of the 150-day period, the claimant and the provider may agree to an extension of the 150-day period.	
231 § 60L (i)	**No settlement -** If respondent says no settlement, claimant can file the case.	If at any time during the applicable notice period under this section a health care provider receiving notice under this section informs the claimant in writing that the health care provider does not intend to settle the claim within the applicable notice period, the claimant may commence an action alleging medical malpractice against the health care provider, so long as the claim is not barred by the statutes of limitations or repose.	
231 § 60L (j)	**Early filing** – claimant may file case without 182 day notice letter if SOL will run within 6 months or SOR will run within 1 year.	A lawsuit against a health care provider filed within 6 months of the statute of limitations expiring as to any claimant, or within 1 year of the statute of repose expiring as to any claimant, shall be exempt from compliance with this section.	
231 § 60L (k)	**Actions for discovery** – actions for discovery are exempt from the 182 day notice.	Nothing in this section shall prohibit the filing of suit at any time in order to seek court orders to preserve and permit inspection of tangible evidence.	

c. 231 § 85K. Limitation of tort liability of certain charitable organizations; liability of directors, officers or trustees of educational institutions			
231 § 85K	**Charitable Immunity –** for health care providers, the charitable immunity cap is raised to $100,000.	It shall not constitute a defense to any cause of action based on tort brought against a corporation, trustees of a trust, or members of an association that said corporation, trust, or, association is or at the time the cause of action arose was a charity; provided, that if the tort was committed in the course of any activity carried on to accomplish directly the charitable purposes of such corporation, trust, or association, liability in any such cause of action shall not exceed the sum of twenty thousand dollars exclusive of interest and costs; and provided further, that in the context of medical malpractice claims against a nonprofit organization providing health care, such cause of action shall not exceed the sum of $100,000, exclusive of interest and costs. Notwithstanding any other provision of this section, the liability of charitable corporations, the trustees of charitable trusts, and the members of charitable associations shall not be subject to the limitations set forth in this section if the tort was committed in the course of activities primarily commercial in character even though carried on to obtain revenue to be used for	The charitable immunity cap was formerly $20,000. This might increase the amount of claims against hospitals. Given the cost of these actions, claimants will have a more difficult time deciding whether to proceed against a not for profit hospital.

		charitable purposes. No person who serves as a director, officer or trustee of an educational institution which is, or at the time the cause of action arose was, a charitable organization, qualified as a tax-exempt organization under 26 USC 501(c)(3) and who is not compensated for such services, except for reimbursement of out of pocket expenses, shall be liable solely by reason of such services as a director, officer or trustee for any act or omission resulting in damage or injury to another, if such person was acting in good faith and within the scope of his official functions and duties, unless such damage or injury was caused by willful or wanton misconduct. The limitations on liability provided by this section shall not apply to any cause or action arising out of said person's operation of a motor vehicle.	

c.233 § 79L. Inadmissibility of statements of benevolence, regret, sympathy, etc., made by health care providers as evidence in claim, complaint or civil action			
233 §79L(a)	**Definitions –** "facility," "healthcare provider" and "unanticipated outcome" are defined.	As used in this section, the following words shall, unless the context clearly requires otherwise, have the following meanings: "Facility", a hospital, clinic, or nursing home licensed under chapter 111, a psychiatric facility licensed under chapter 19 or a home health agency; provided, however, that "facility" shall also include any corporation, professional corporation, partnership, limited liability company, limited liability partnership, authority or other entity comprised of such facilities. "Health care provider", any of the following health care professionals licensed under chapter 112: a physician, podiatrist, physical therapist, occupational therapist, dentist, dental hygienist, optometrist, nurse, nurse practitioner, physician assistant, chiropractor, psychologist, independent clinical social worker, speech-language pathologist, audiologist, marriage and family therapist or mental health counselor; provided, however, that "health care provider" shall also include any corporation, professional corporation, partnership, limited liability company, limited liability partnership, authority, or other entity comprised of	The desire to apologize has arisen as a mechanism to try to reduce the number of medical malpractice lawsuits. Interestingly §233:23D has for decades provided that "statements, writings or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering or death of a person involved in an accident and made to such person or to the family of such person shall be inadmissible as evidence of an admission of liability in a civil action." Time will tell whether the medical malpractice framework of § 233:79L will increase the number of apologies, reduce the number of

		such health care providers. "Unanticipated outcome", the outcome of a medical treatment or procedure, whether or not resulting from an intentional act, that differs from an intended result of such medical treatment or procedure.	lawsuits or increase the number of lawsuit.
233 §79L(b)	**Apology generally inadmissible –** the apology is inadmissible unless make or expert contradict it. Unanticipated outcomes are to be communicated to the patient.	In any claim, complaint or civil action brought by or on behalf of a patient allegedly experiencing an unanticipated outcome of medical care, all statements, affirmations, gestures, activities or conduct expressing benevolence, regret, apology, sympathy, commiseration, condolence, compassion, mistake, error or a general sense of concern which are made by a health care provider, facility or an employee or agent of a health care provider or facility, to the patient, a relative of the patient or a representative of the patient and which relate to the unanticipated outcome shall be inadmissible as evidence in any judicial or administrative proceeding, unless the maker of the statement, or a defense expert witness, when questioned under oath during the litigation about facts and opinions regarding any mistakes or errors that occurred, makes a contradictory or inconsistent statement as to material facts or opinions, in which case the statements and opinions made about the	

		mistake or error shall be admissible for all purposes. In situations where a patient suffers an unanticipated outcome with significant medical complication resulting from the provider's mistake, the health care provider, facility or an employee or agent of a health care provider or facility shall fully inform the patient and, when appropriate, the patient's family, about said unanticipated outcome.	