THE STATE OF NEW HAMPSHIRE

CARROLL, SS. SUPERIOR COURT

Paula Eaton, Individually and as Administratrix of the Estate of Gordon T. Eaton
v.
Stephen Fleet, MD
d/b/a Internal Medicine of Wolfeboro

Docket No. 2008-CV-074

ORDER ON MOTION TO EXCLUDE SCREENING PANEL FINDING

In this medical malpractice and loss of consortium action the plaintiff alleges that the defendant Dr. Stephen Fleet breached the applicable standard of care in his care of Gordon T. Eaton and that Dr. Fleet's breach of the standard of care was a proximate cause of Mr. Eaton's death by cardiac arrest. The defendant asserts that his care of Mr. Eaton did not breach the applicable standard of care.

As with all medical injury actions filed after August 29, 2005, this case was required to proceed pursuant to RSA 519-B, which establishes a comprehensive screening panel process for medical injury actions. Pursuant to RSA 519-B:5, a hearing was held before a medical review panel, which found unanimously that the defendant did not deviate from the applicable standard of care, RSA 519-B:6, I(a).

Pending before the court is the plaintiff's motion in limine requesting that the court exclude from trial the medical review panel's finding. In support of that request the plaintiff asks the court to declare that RSA 519-B unconstitutionally violates: Part I, Article 37 of the New Hampshire Constitution, as it pertains to separation of powers principles; Part I, Article 20 of the New Hampshire Constitution as it pertains to the right to a jury trial; and Part I, Article 14 of the New Hampshire Constitution and the Fourteenth Amendment to the United States Constitution as they pertain to due process rights.[1] The defendant objects, asserting that RSA 519-B sets out a comprehensive and constitutional process carefully crafted to avoid constitutional infirmities.

The hearing on this motion and objection was held on November 2, 2009. Upon review of

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[1] The plaintiff has withdrawn her assertion that RSA 519-B also unconstitutionally violates equal protection principles.

the pleadings and arguments of the parties through counsel, and of the applicable law, for the reasons which follow the court finds that the provisions of RSA 519-B:8, 9 and 10 mandating admission of unanimous findings of the medical review panel and mandating instructions the court is to give the jury upon admission of those findings violates separation of powers principles, and accordingly grants the plaintiff's motion to exclude the medical review panel's findings.

Scope of Plaintiff's Challenge to RSA 519-B

The plaintiff primarily focuses her arguments on asserted constitutional violations arising from the portion of RSA 519-B compelling the admission of the medical review panel's results, RSA 519-B:8, 9 and 10. Her argument can, however, reasonably be construed as more broadly challenging the entirety of the screening panel process, not just the admission at trial of the panel's results. Her motion requests, for example, that the court not only exclude the panel findings from admission before the jury but also that the court declare RSA 519-B unconstitutional. Likewise, her memorandum in support of her motion asserts that both the mandate of RSA 519-B that parties present their cases first to the medical review panel and the mandate of admission of an adverse unanimous review panel finding in a subsequent trial violate separation of powers, the right to a jury trial, and due process rights.

The court concludes that the plaintiff intends her constitutional challenge to apply to both RSA 519-B:1 through 7, which establish the medical review panel process and require that all actions for medical injury proceed through the panel process, and RSA 519-B: 8, 9 and 10, which mandate admission of unanimous panel results and mandate the instructions to be given with such admission. After outlining the statutory framework and the principles applicable to challenges to the constitutionality of statutes, the court takes up the plaintiff's challenge to each portion of RSA 519-B in turn.

Statutory Framework

RSA 519-B sets forth a comprehensive procedure requiring all medical injury actions to be submitted to a medical review "screening panel." RSA 519-B:1. Medical review screening panels were designed, among other things, "to help identify both meritorious and non-meritorious claims

without the delay and expense of a court trial." *Id.*

Generally, each panel is comprised of: 1) a retired judge or person with judicial experience, who serves as the chairperson of the panel (and who, in turn, chooses the other panel members);[2] 2) a health care practitioner or provider; and 3) an attorney. RSA 519-B:3, II.

Once duly constituted, the screening panel may resolve certain discovery disputes, RSA 519-B:3, VIII, and handle other preliminary issues, *see* RSA 519-B:4, before holding a hearing. At the hearing, the panel receives a presentation from both sides. RSA 519-B:5. The panel is to give the parties "wide latitude" in the conduct of the hearing. RSA 519-B:5, I. To that end, the rules of evidence do not apply, each side has a right to cross examine witnesses, and depositions are admissible regardless of whether or not the deponent is available to testify in person. *Id.*

Within thirty days of the hearing, the panel must issue written findings, answering the following questions:

> (a.) Whether the acts or omissions complained of constitute a deviation from the applicable standard of care by the medical care provider charged with that care;
> (b.) Whether the acts or omissions complained of proximately caused the injury complained of; and
> (c.) If fault on the part of the medical care provider is found, whether any fault on the part of the patient was equal to or greater than the fault on the part of the provider.

RSA 519-B:6, I. The plaintiff bears the burden of proof on negligence and proximate cause by a preponderance of the evidence, RSA 519-B:6, II(a), and the defendant bears the burden of proof on comparative negligence by a preponderance of the evidence, RSA 519-B:6, II(b).

If the panel findings as to both of the first two questions are unanimous and unfavorable to the defendant, the findings are admissible in any subsequent trial of the medical injury case. RSA 519-B:8, I(b). If the panel findings as to any of the three questions are unanimous and unfavorable to the plaintiff, the findings are admissible in any subsequent trial of the medical injury case. RSA 519-B:8, I(c). When any such findings are admitted into evidence, the trial court must provide the instruction to the jury set forth in RSA 519-B:9.

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[2] The chairperson is selected by the Chief Justice of the Superior Court. RSA 519-B:3, I.

In addition, "[i]f findings are in the plaintiff's favor, the defendant shall promptly enter into negotiations to pay the claim or admit liability," or be subject to the trial admissibility provisions discussed above. RSA 519-B:10, I. If liability is admitted, the parties may agree to submit the issue of damages to the panel. *Id.* Similarly, where, as here, "the findings are in the defendant's favor, the plaintiff shall release the claim or claims based on the findings, without payment," or be subject to the trial admissibility provisions discussed above. RSA 519-B:10, II..

Presumption of Constitutionality

A legislative enactment is "presume[d] . . . to be constitutional and [the court] will not declare it invalid except under inescapable grounds." *Petition of the Judicial Conduct Committee*, 151 N.H. 123, 125 (2004) (quotations and citation omitted); *accord, Gonya v. Commissioner*, 153 N.H. 521, 524 (2006). The court "will not hold a statute to be unconstitutional unless a clear and substantial conflict exists between it and the constitution." *Judicial Conduct Committee*, 151 N.H. at 125 (citation omitted). "Because the judiciary is but one of the three equal branches of government, 'rigorous adherence to the narrow scope of the judicial function is especially demanded in controversies that arouse appeals to the Constitution.'" *In re New Hampshire Bar Association*, 151 N.H. 112, 121-22 (2004) (Duggan, J., dissenting) (quoting *Youngstown Co. v. Sawyer*, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring)).

Part I: Arguments Pertaining to RSA 519-B: 1, 2, 3, 4, 5, 6 and 7

RSA 519-B:1, 2, 3, 4, 5, 6 and 7 address the activities of a screening panel from the initial selection of its members to its issuance of findings to the parties. RSA 519-B:8, 9 and 10 concern admission of the panel's findings at trial. In Part I of this order, I address the plaintiff's challenges to these pre-trial portions of the statute. In Part II, I address the plaintiff's challenges to RSA 519-B:8, 9 and 10.

I have previously had the opportunity to consider and rule on the constitutionality of the medical review panel screening process set out at RSA 519-B:1 through 7. *Wilson v. Valley Regional Hospital,* Sullivan County Superior Court Docket No. 05-C-052, Order on Plaintiffs'

Motion to Declare RSA 519-B Unconstitutional (June 19, 2006) (in the record of the present case, the *Wilson* order is attached in full as Attachment A to the defendant's memorandum in objection). In that order, I concluded that the provisions of RSA 519-B:1 through 7 do not violate Part I, Article 37, Part I, Article 20, or Part I, Article 14 of the New Hampshire Constitution. *Wilson* at 28.[3]

Because nothing in the arguments of the parties presently before the court or in the circumstances of the present case cause me to believe that the provisions of RSA 519-B:1 through 7 are unconstitutional,[4] I repeat here in its entirety (excepting the equal protection analysis, as that issue is not raised in the present case) the analysis I set out in *Wilson* at 6 through 28 leading me to conclude that those provisions are constitutional:

> Separation of Powers:
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> The plaintiffs contend that RSA 519-B impermissibly "invade[s] the very core of the judiciary's sole power to regulate procedures in its tribunals," by "providing detailed instructions to the superior court that seek to orchestrate the way in which medical malpractice cases will be processed." Pl. Memo. at 9. The defendant counters that ". . . the new process does not, in any way, reduce the power of the courts over [medical injury] . . . disputes. . . ." Def. Memo. at 15.
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> The New Hampshire Constitution provides, in part:
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>> In the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.
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> N.H. CONST., Pt. I, Art. 37. This clause embodies what has come to be known as the separation of powers doctrine.
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> The separation of powers doctrine has deep historical roots in our State. *See, e.g., Merrill v. Sherburne*. 1 N.H. 199 (1818). In *Merrill,* Dorothy Merrill, acting as administratrix of Benjamin Merrill, successfully petitioned the legislature to order a new trial after the superior court, sitting as an appellate court, reversed a probate decision in favor of Benjamin Merrill. *Id.* at 199. In response to the legislature's decision to order a new trial, the parties reappeared in court and the defendant filed a motion to quash the act of the legislature. *Id.* The *Merrill* court noted that the legislature's grant of a new trial worked to "materially alter the effect of the final judgment of the court." *Id.* at 205. The Supreme Court then held that such action constituted an unconstitutional exercise of designated judicial powers by the legislature. *Id.* at 217.
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> From that early case to the present, our Supreme Court has on a number of occasions reviewed the constitutional parameters within which each branch of government must remain. To that end, our Supreme Court has held generally that "[t]he separation of powers directive is violated by an

[3] I also determined that challenges to the constitutionality of RSA 519-B:8, 9 and 10 were not ripe for consideration, and so declined to reach or decide those challenges. *Wilson* at 31.

[4] And in the interest of judicial economy, as the last pleading on this issue was received (by agreement) on October 28, 2009, hearing on this motion occurred yesterday, November 2, 2009, and trial starts tomorrow, November 4, 2009.

improper imposition upon one branch of constitutional duties belonging to another, or, an encroachment by one branch on a constitutional function of another branch of government." *Judicial Conduct Committee*, 151 N.H. at 125. That is, action by one branch of the government contravenes the separation of powers doctrine if that action "defeat[s] or materially impair[s] the inherent functions of another branch." *Id.* However, "[d]espite the explicit constitutional language concerning the separation of powers in our State, . . . the doctrine does not require an absolute division of powers, but a cooperative accommodation among the three branches of government." *Opinion of the Justices (Prior Sexual Assault Evidence),* 141 N.H. 562, 569 (1997) (hereinafter referenced as "*Opinion of the Justices (PSAE)*").

With respect to the legislative and judicial branches particularly, the New Hampshire Supreme Court has stated that the legislature may not overrule the judiciary in matters concerning core judicial functions. *Id.* A separation of powers analysis concerning core judicial functions is guided, at least in part, by the broad principle that the legislature may enact substantive laws, but generally the regulation of procedural aspects of core judicial functions is within the province of the judiciary. *See Opinion of the Justices (PSAE)*, 141 N.H. at 572-73; *see also* N.H. CONST., Pt. II, Art. 73-a (setting forth rulemaking authority). "Substantive laws are those laws which have for their purpose to determine the rights and duties of the individual and to regulate his conduct and relation with the government and other individuals." *Opinion of the Justices (PSAE),* 141 N.H. at 572 (quotations and citation omitted). In contrast, "[p]rocedural laws are those laws which have for their purpose . . . to prescribe machinery and methods to be employed in enforcing these positive provisions." *Id.* (quotations and citation omitted). "There is a critical difference between the rights of an individual and the *method* by which an individual's right will be presented in a court of law." *Id.* (quotations and citation omitted) (emphasis in original).

In the past quarter century, the New Hampshire Supreme Court has several times had before it cases in which core judicial functions or the power to control judicial proceedings have been at issue. In *Opinion of the Justices (PSAE),* the Court addressed the constitutionality of proposed legislation creating a rebuttable presumption in favor of admitting evidence of a defendant's prior sexual assaults in certain sexual assault cases. 141 N.H. at 566. The Supreme Court held that "the bill before us usurps the judicial function of making relevancy determinations by creating a rebuttable presumption in favor of admissibility without regard for the particular facts or circumstances of a case." *Id.* at 578. That is, the bill at issue in *Opinion of the Justices (PSAE)* impaired the courts' power to make relevancy determinations as part of its proper exercise of control over core judicial functions or procedures.

Similarly, in *State v. LaFrance*, our Supreme Court held unconstitutional a statute that permitted law enforcement officers to carry firearms in the courthouses of New Hampshire. 124 N.H. 171, 182 (1983). There, the Supreme Court examined the traditional judicial authority over activities within the courtroom, determined that the statute encroached upon that authority, and held that it thereby violated the separation of powers doctrine. *Id.*; *see also Judicial Conduct Committee*, 151 N.H. at 126-27 (stating that the legislature's creation of a commission to regulate the conduct of judges violates separation of powers because such a commission usurped the essential power of the judiciary to regulate its own conduct).

However, our Supreme Court does not rigidly adhere to the notion that all procedural enactments of the legislature are unconstitutional on separation of powers grounds. For example, the New Hampshire Supreme Court recently upheld the constitutionality of legislation regulating access to court documents. *Associated Press,* 152 N.H. at ___ (slip op. at 17). In *Associated Press*, the Supreme Court examined the constitutionality of RSA 458:15-b, which generally provides for

the confidentiality of financial affidavits filed in connection with divorce actions. *Id.* The statute provides that all such affidavits are confidential and accessible only to certain individuals, subject to court order. *Id.* at 1-2. At the time, Superior Court Rule 197 provided that, upon written request of any party, the clerk was required to seal a party's affidavit and that the affidavit could only be opened by the parties, the Office of Child Support, or with leave of court. *Id.* at 17. The Associated Press and other plaintiffs argued, among other things, that: 1) the statute violated the separation of powers doctrine by controlling access to court documents; and 2) the statute interfered with the judiciary's rulemaking authority, under N.H. Const. Pt. II, Art. 73-a, by supplanting Superior Court Rule 197. *Id.* at 16-17.

The New Hampshire Supreme Court held that the statute did not violate the doctrine of separation of powers because, as the statute was construed, "the court retain[ed] the ultimate authority over access to court records." *Id.* at 17. That is, the core judicial function of having the power to control court proceedings was not violated by legislative action. *See id.* at 16. The *Associated Press* Court also found that the statute did not impermissibly infringe upon the rulemaking authority of the courts under Part II, Article 73-a of the State Constitution because the court retained ultimate authority concerning access to records. *Id.* The Court also noted that "the coexistence of the statute and the rule does not create a conflict." *Id.*

Bearing in mind the separation of powers analysis employed by our Supreme Court and its application in other contexts, the court turns to the present case. In this regard, the reasons the plaintiffs contend that RSA 519-B is unconstitutional, Pl. Memo. at 8 *et seq.*, essentially concern or arise from the claimed overlap or interference that the legislature is alleged to have created between the screening panels and the courts. Although there is some overlap between the panel and court processes, the court does not agree that the statutory provisions for the panel selection process, the panel activities, or the appeal of some panel decisions to the superior court rise to the level of unconstitutional interference with core judicial functions.

As to the selection process, the court does not find the statutory designation of the Chief Justice of the Superior Court to appoint the chairperson of the panel to unconstitutionally infringe upon "the power of the judiciary to control its own proceedings, the conduct of participants, the actions of officers of the court, and the environment of the court. . .." *Judicial Conduct Committee*, 151 N.H. at 126. As indicated above, core judicial functions relating to "procedural" matters involve things such as in-court witness conduct (*LaFrance*), a particular modification of a rule of evidence (*Opinion of the Justices (PSAE)*), or superintending the conduct of judges (*Judicial Conduct Committee*), *see also Petition of Mone*, 143 N.H. 128 (1998) (supervising courtroom security).

Here, however, the appointment of the panel chair takes place after the civil action has been initiated, and is done outside the trial or courtroom process, does not involve a monitoring or supervising of judges, and does not impact court proceedings. Thus, although the statute concerning selection of the panel is "procedural" in the sense that it sets forth a process for constituting the panel, it does not impermissibly hinder or interfere with the procedural aspects of in-court proceedings or core judicial functions. Neither *Opinion of the Justices (PSAE)*, 141 N.H. 562, nor any other cases brought to the court's attention by the parties or of which the court is aware establishes, without more, that the legislature may not constitutionally enact statutes not interfering with in-court procedures or core judicial functions but nonetheless having to do with judicial processes which may be characterized as procedural. *See* R. MCNAMERA, THE SEPARATION OF POWERS PRINCIPLE AND THE ROLE OF THE COURTS IN NEW HAMPSHIRE, 42 N.H.B.J. 66, 81-83 (June 2001); *see also* L. FRIEDMAN, ON THE JUSTIFICATIONS FOR CONSTITUTIONAL AMENDMENT CONCURRENT RESOLUTION 5, 43 N.H.B.J. 46, 47 (Sept. 2002).

As with the appointment of the panel chairperson, the activities of the panel and the presentations made to it by the parties occur outside the trial and do not transgress separation of powers bounds. The panel's decision is nonbinding and unenforceable, with neither side compelled to accept as final the panel's findings. *See Eastin v. Broomfield*, 570 P.2d 744, 750 (Ariz. 1977) (holding medical malpractice panel statute did not violate provisions of the Arizona Constitution concerning separation of powers, in part because panel findings are not final and are more advisory in nature); *accord, Linder v. Smith*, 629 P.2d 1187, 1194 (Mont. 1981). Indeed, the statute explicitly provides that, notwithstanding a given panel's findings, a medical malpractice action may proceed to trial where a jury will resolve ultimate fact issues (subject, of course, to the admission of panel findings during the trial as outlined in the statute, a matter which the court addresses later in this order). RSA 519-B:10 (Supp. 2005). Further, the statute does not give panels the authority to handle motions of a dispositive nature.

Thus, because the RSA 519-B panels are not finally adjudicating a private dispute, this case is readily distinguishable from *Opinion of the Justices*, 87 N.H. 492 (1935). At issue in *Opinion of the Justices* was proposed legislation that would have created a commission to adjudicate motor vehicle accident disputes. 87 N.H. at 492-93. The New Hampshire Supreme Court determined that the proposed bill was invalid because it authorized an executive agency to adjudicate private litigation unrelated to protection of a public interest. *Id.* at 495-96. The Court noted that "when an executive board has regulatory functions, it may hear and determine controversies which are incidental thereto, but if the duty is primarily to decide questions of legal right between private parties, the function belongs to the judiciary." *Id.* at 493. Here, at least insofar as RSA 519-B:1, 2, 3, 4, 5, 6 and 7 are concerned, the panels are preliminary and advisory. As stated above, the panels do not finally adjudicate claims; that function remains with the court and the jury.

The statute also provides that some aspects of the panel process may be appealed to the superior court. *See, e.g.,* RSA 519-B:3, VI(c) & VIII (Supp. 2005). The court remains unconvinced that the mere existence of this appeal mechanism, as part of a preliminary screening process, unconstitutionally impairs or implicates the judiciary's constitutional prerogative to control procedural aspects of core judicial functions. *See Judicial Conduct Committee,* 151 N.H. at 126; *LaFrance*, 124 N.H. at 179. Again, putting aside for now the provisions of RSA 519-B that relate to submitting the panel's findings to the jury, RSA 519-B:8, 9 and 10, such appeals would occur as part of a preliminary process taking place outside the trial itself. Giving the superior court authority to hear certain matters arising in a newly created process is more akin to conferring jurisdiction, a legislative activity which does not run afoul of separation of powers. *See, e.g., Opinion of the Justices (PSAE)*, 141 N.H. at 573; *see also Merrill*, 1 N.H. at 207.

Additionally, the acts of hearing a presentation of facts and applying legal principles to those facts cannot, alone or without more, suffice to support a conclusion that the separation of powers doctrine has been violated. To conclude the contrary would, for example, imperil long-standing principles underlying the interplay between administrative and constitutional law. *See Opinion of the Justices*, 87 N.H. at 493-94; *McKay v. New Hampshire Compensation Appeals Board*, 143 N.H. 722, 726-27 (1999).

In sum, the medical malpractice panels and procedures established under RSA 519-B:1, 2, 3, 4, 5, 6 and 7 do not replace the court, juries or trials in medical injury actions. They do not create a scheme of procedural rules that impermissibly intrudes upon the trial or usurps the proper competence of the judiciary. *See Linder*, 629 P.2d at 1194 (noting that "most states considering this question have upheld [medical malpractice] panel acts in the face of this [separation of powers] challenge"). Neither do they impede upon core judicial functions by, for example, frustrating

discretionary determinations concerning legal or factual issues that arise in, or concern the conduct or fairness of, particular adjudications. *See* FRIEDMAN, *supra* at 48.

For the foregoing reasons, the court determines that RSA 519-B: 1, 2, 3, 4, 5, 6 and 7 do not violate the guarantees under the New Hampshire Constitution concerning separation of powers.

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Right to Trial By Jury:

The plaintiffs also challenge RSA 519-B by contending that the legislature impermissibly inserted itself into both the jury process and the resolution of civil actions by enacting RSA 519-B.

Part 1, Article 20 of the State Constitution provides:

> In all controversies concerning property, and in all suits between 2 or more persons except those in which another practice is and has been customary and except those in which the value in controversy does not exceed $1,500 and no title to real estate is involved, the parties have a right to a trial by jury. This method of procedure shall be held sacred unless, in cases arising on the high seas and in cases relating to mariners' wages, the legislature shall think it necessary to alter it.

"This constitutional provision extends the right to trial by jury to all cases for which the right existed when the constitution was adopted in 1784, but not to special statutory or summary proceedings unknown to the common law." *SNCR Corp. v. Greene*, 152 N.H. 223, 224 (2005) (citing *Opinion of the Justices (SLAPP Suit Procedure),* 138 N.H 445, 450 (1994)). See *also Franklin Lodge of Elks v. Marcoux*, 149 N.H. 581, 591 (2003) (describing analysis for determining if there is a right to a jury trial for a particular cause of action).

In the present case, the parties do not dispute that medical malpractice injury litigants have a right to a jury trial. The court therefor turns to an inquiry as to whether the provisions of RSA 519-B:1, 2, 3, 4, 5, 6 and 7 unconstitutionally impede that right. *See ICS Communications, Inc. v. Fitch*, 145 N.H. 433, 434-35 (2000) (assuming that a right to a jury trial exists, and then concluding that nothing in the New Hampshire Constitution prohibits an administrative agency from first adjudicating a claim).

The plaintiffs contend, in essence, that the medical malpractice panels constitute "tribunals," and largely focus their arguments concerning the right to a jury trial on issues pertaining to the panel's findings, the submission of those findings to the jury, and whether the jury will be improperly influenced or unable to fairly evaluate the evidence presented at trial.

At the outset, the court notes that none of the provisions of RSA 519-B:1, 2, 3, 4, 5, 6 or 7 alone has any direct effect on a jury trial in a medical malpractice injury action, because each of the steps outlined in these statutory provisions takes place outside the conduct of the trial. If there were not a mechanism for submitting panel findings to the jury, *see* RSA 519-B: 8, 9 and 10, there would be no argument that the panel, through the activities set forth in RSA 519-B: 1, 2, 3, 4, 5, 6 and 7, supplants or affects the jury. Rather, at least with respect to RSA 519-B: 1, 2, 3, 4, 5, 6 and 7 and the right to a jury trial, the panel's effect is a preliminary, pretrial, and pre-jury screening process. *See ICS Communications,* 145 N.H. 434-35.

Moreover, panel findings made pretrial are unenforceable and do not have the effect of findings rendered by a jury. Even with all of the activities in RSA 519-B:1, 2, 3, 4, 5, 6 and 7 taking place, the jury remains the ultimate arbiter of issues raised and facts presented. In other words, the statute, at least insofar as RSA 519-B: 1, 2, 3, 4, 5, 6 and 7 are concerned, does not remove the right of a

[5] The analysis in *Wilson* leading me to conclude that the provisions of RSA 519-B:1 through 7 do not violate equal protection principles is omitted here, as not in issue in the present case.

party to have the case fully and finally determined by a jury.

Opinion of the Justices, 113 N.H. 205 (1973), does not mandate a different conclusion. That case held that the right to a jury trial would be infringed if the legislature required prepayment of arbitration fees in certain cases as a condition precedent to appealing from the arbitration judgment and seeking a jury trial in superior court. *Id.* at 214. Unlike the scheme found unconstitutional in *Opinion of the Justices,* RSA 519-B does not set any conditions precedent to filing suit in superior court, and in fact explicitly provides that the screening panel process is not intended to delay or postpone the trial, RSA 519-B:3, III (Supp. 2005), nor does it require the parties to pay a screening panel fee or to pay fees to panel members.

Thus, the effect of RSA 519-B: 1, 2, 3, 4, 5, 6 and 7 on a jury trial comes only through the submission of the panel findings to the jury and through the required jury instruction that must accompany the findings, RSA 519-B:8, 9, and 10, which the court addresses in Part II of this order.

For the foregoing reasons, the court determines that RSA 519-B: 1, 2, 3, 4, 5, 6 and 7 do not violate the guarantees under the New Hampshire Constitution concerning the right to a jury trial.

Constitutional Right for Remedies to be Free, Complete, and Prompt:

The plaintiffs argue that RSA 519-B "violates [Part I,] Article 14 because it eliminates a remedy for all but the most wealthy or seriously injured from the courthouse[,]" requires a party to prove his case twice, and "increases the out of pocket cost of litigation for the plaintiff . . .." Pl. Memo. at 37. The defendant counters that "[s]ave for the plaintiffs' unsubstantiated assertions, there is no evidence that panels substantially hinder access to courts with regards to plaintiffs with less serious injuries or of lesser economic means." Def. Memo. at 33.

Part I, Article 14 of the New Hampshire Constitution provides:

> Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

"The purpose of this provision 'is to make civil remedies readily available, and to guard against arbitrary and discriminatory infringements on access to courts.'" *In re Goffstown Education Support Staff, NEA-New Hampshire*, 150 N.H. 795, 803 (2004) (quoting *Minuteman, LLC v. Microsoft Corp.*, 147 N.H. 634, 640 (2002)).

"Part I, Article 14 of our State Constitution 'is basically an equal protection clause in that it implies that all litigants similarly situated may appeal to the courts both for relief and for defense under like conditions and with like protection and without discrimination.'" *Follansbee v. Plymouth District Court*, 151 N.H. 365, 367 (2004) (quoting *State v. Basinow*, 117 N.H. 176, 177 (1977)). The court has addressed earlier in this order issues concerning RSA 519-B:1, 2, 3, 4, 5, 6 and 7 under the equal protection guarantees of the New Hampshire Constitution. Thus, to the extent that the plaintiffs' arguments under Part I, Article 14 may be understood to be equal protection arguments, they have been addressed and resolved.

Further, regardless of what a panel does pursuant to its duties under RSA 519-B:1, 2, 3, 4, 5, 6 or 7, nothing in these provisions prevents any plaintiff, regardless of financial or other status, from obtaining a jury trial. As discussed earlier in this order, short of a settlement agreement, the structure of RSA 519-B:1, 2, 3, 4, 5, 6 and 7 preserves the right to a jury trial as the only forum empowered to finally resolve plaintiffs' medical injury claims.

In addition, RSA 519-B does not impose a condition precedent or other hurdle for a plaintiff to overcome before filing a medical injury action. To the contrary, filing the writ in Superior Court is

a prerequisite to the initiation of the RSA 519-B:1, 2, 3, 4, 5, 6 and 7 mechanisms. Thus, RSA 519-B stands in sharp contrast to statutes addressed in cases where completion of the panel process was a prerequisite to filing a medical injury action. Under such circumstances, at least one court has agreed that such a hurdle "abridged the right to file suit and have summons issued promptly." *State ex rel. Cardinal Glennon Memorial Hospital V. Gaertner*, 583 S.W.2d 107, 110 (Mo. 1979) (citation omitted). *Cf. Carson,* 120 N.H. at 937-38 (statute requiring prior service of notice of claim on defendants as condition precedent to commencement of medical injury action is unreasonable and denies plaintiffs equal protection of the laws, and thus unconstitutional).

To the extent Part I, Article 14 implicates due process type concerns, such concerns are satisfied if there is a meaningful opportunity to be heard in court in a meaningful manner. *In re Morrill*, 147 N.H. 116, 119 (2001) (holding issued in the context of an appeal from a decision of superior court not to permit children to testify at restraining order proceeding). Nothing in the language or structure of RSA 519-B:1, 2, 3, 4, 5, 6 or 7 forecloses the plaintiffs from having the opportunity to be heard in court. Moreover, RSA 519-B:1, 2, 3, 4, 5, 6 and 7 require the screening process to be speedy, in that there are time requirements concerning the convening of the panel and to which the panel must adhere in completing its tasks. *E.g.* RSA 519-B: 3, I (b), 4 and 7 (Supp. 2005). Further, RSA 519-B contemplates that the screening panels are "not intended to delay or postpone the trial" and that the "superior court may establish a trial date at a structuring conference, or other scheduling conference, and all interim deadlines as it would in any other case." RSA 519-B:3, III (Supp. 2005). In addition, given the current posture of this case and the time at which the plaintiffs filed their request for a stay and the present motion, there are no facts developed which may demonstrate an unconstitutional delay caused by the statute as applied to them. *Cf. Jiron v. Mahlab*, 659 P.2d 311, 313 (N.M. 1983) (holding that "[b]ecause the Medical Malpractice Act requires speed and no undue delay, it does not violate a plaintiff's right of access to the courts without undue delay in most circumstances. But where the requirement of first going before the Medical Review Commission causes undue delay prejudicing a particular plaintiff by the loss of witnesses or parties, the plaintiff is unconstitutionally deprived of his right of access to the courts").

The plaintiffs also assert that the medical malpractice screening practice process impermissibly increases the out of pocket costs of litigation for plaintiffs, in violation of Part I, Article 14. The plaintiffs addressed this issue at the hearing through both testimony and argument. *See also* Affidavit of Gary B. Richardson, Esq., Pl. Memo. Exh. 5. As noted earlier in this order, the plaintiffs' belief or expectation that their litigation costs will be increased because they believe they will have to participate in both the screening panel hearing process and a jury trial is speculative at this point in this litigation. It would be premature, and inappropriate, for the court to take up an issue at this point which may not arise in this litigation, and the court declines to do so. *See, e.g., Copp,* 55 N.H. at 203. Further, to the extent the plaintiffs' concerns in this regard may be viewed as ripe for consideration, they are insufficient to set aside legislative determinations, made on the significant amount evidence considered, including evidence on the issue of costs versus benefits for litigants, to the effect that RSA 519-B would overall reduce the cost of litigation by providing an objective pre-trial evaluation of claims. *See Carson*, 120 N.H. at 933.

For the foregoing reasons, the court determines that RSA 519-B: 1, 2, 3, 4, 5, 6 and 7 do not violate the guarantees under the New Hampshire Constitution of the right for remedies to be free, complete, and prompt.

For the reasons set out above, the court determines that the provisions of RSA 519-B:1

through 7 concerning the medical review panel screening process are constitutional.

Part II: Arguments Pertaining to RSA 519-B:8, 9 and 10

RSA 519-B:8, 9, and 10 govern the submission of panel findings to the jury. If the panel findings as to both of the first two questions before the panel, RSA 519-B:6, I (a) and (b), concerning deviation from standard of care and causation, are unanimous and unfavorable to the defendant, they are admissible in any subsequent trial of the medical injury case. RSA 519-B:8, I(b). If the panel findings as to any of the three questions, RSA 519-B:6, I (a), (b) or (c), concerning deviation from standard of care, causation, and comparative fault, are unanimous and unfavorable to the plaintiff, they are admissible in any subsequent trial of the medical injury case. RSA 519-B:8, I(c).

When any panel findings are admitted into evidence, the trial court is mandated to provide ("the trial court shall provide") a specific set of instructions to the jury "to provide a basis for the jury to understand the nature of the panel findings and to put the panel findings in context in evaluating all of the evidence presented at the trial." RSA 519-B:9, I. The instructions the court is required to give state that:

(a) The panel process is a preliminary procedural step through which malpractice claims proceed.
(b) The panel in this case consisted of (insert 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.
(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.

RSA 519-B:9, I(a) through (e).

In addition, because RSA 519-B:8 makes the panel proceedings privileged and confidential, "the parties may not introduce panel documents or present witnesses to testify about the panel proceedings, and they may not comment on the panel findings or proceedings except as provided in [RSA 519-B:9, I] subparagraphs (a) through (e)." RSA 519-B:9, I(f).

Finally, the court is required to provide these instructions ("shall be provided") to the jury "when the findings are admitted into evidence and when the court instructs the jury prior to submitting the case to the jury."

Separation of Powers:

The plaintiff first challenges RSA 519-B:8, 9, and 10 on separation of powers grounds. The New Hampshire Constitution provides for separation of powers as follows:

> In the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.

N.H. CONST., Pt. I, Art. 37. The first portion of the *Wilson* order set out above explains at some length New Hampshire law concerning separation of powers in the context of RSA 519-B. Although there is no need to repeat that explanation in full here, for the sake of continuity and ease of reference, before analyzing the provisions of RSA 519-B:8, 9 and 10 under Part I, Article 37, I set out some of the core principles which have developed concerning the New Hampshire separation of powers clause.

"The separation of powers directive is violated by an improper imposition upon one branch of constitutional duties belonging to another, or, an encroachment by one branch on a constitutional function of another branch of government." *Judicial Conduct Committee*, 151 N.H. at 125. That is, action by one branch of the government contravenes the separation of powers doctrine if that action "defeat[s] or materially impair[s] the inherent functions of another branch." *Id.* However, "[d]espite the explicit constitutional language concerning the separation of powers in our State, . . . the doctrine does not require an absolute division of powers, but a cooperative accommodation among the three branches of government." *Opinion of the Justices (Prior Sexual Assault Evidence),* 141 N.H. 562, 569 (1997) (hereinafter *Opinion of the Justices (PSAE)*).

Although separation of powers envisions cooperative accommodation, the legislature may not command the judiciary in matters concerning core judicial functions. *See id.* A separation of

powers analysis concerning core judicial functions is guided, at least in part, by the broad principle that the legislature may enact substantive laws, but generally the regulation of procedural aspects of core judicial functions is within the province of the judiciary. *See id.* at 572-73; *see also* N.H. CONST., Pt. II, Art. 73-a (judicial rulemaking authority).

The Supreme Court's analysis in *Opinion of the Justices (PSAE),* 141 N.H. 562, considered together with the larger body of Supreme Court jurisprudence concerning the separation of legislative and judicial powers, persuades me that the mandatory provisions of RSA 519-B:8, 9 and 10 impermissibly intrude into core judicial functions.

Opinion of the Justices (PSAE) concerned the constitutionality of a proposed bill which would have created a rebuttable presumption in favor of admitting evidence of a defendant's prior sexual assaults in certain sexual assault cases. 141 N.H. at 566.

> The bill . . . would affect the function of New Hampshire Rule of Evidence 404(b), a rule adopted by this court to 'govern proceedings in the courts of the State of New Hampshire.' N.H. R. Ev. 101.

Id. at 569.

> This court has consistently recognized that "as a separate and coequal branch of government, the judiciary is constitutionally authorized to promulgate its own rules." *Petition of Burling*, 139 N.H. 266, 271, 651 A.2d 940, 943 (1994); see N.H. CONST. pt. I, art. 37; N.H. CONST. pt. II, art. 73-a; *In re Proposed Rules of Civil Procedure*, 139 N.H. 512, 513, 659 A.2d 420, 420 (1995) (supreme court's supervisory and rulemaking authority over courts in State derives primarily from State Constitution and from common law); *LaFrance*, 124 N.H. at 180, 471 A.2d at 345 (court's authority to adopt rules of practice and procedure is of ancient origin); *Nassif Realty Corp. v. National Fire Ins. Co.*, 107 N.H. 267, 268, 220 A.2d 748, 749 (1966) (rulemaking power of supreme court as court of general jurisdiction is broad and comprehensive). The inherent rule-making authority of courts of general jurisdiction in this state to prescribe rules of practice and rules to regulate their proceedings "as justice may require" has an ancient lineage supported by consistent custom, recognized by statute and enforced by numerous judicial precedents.

Id. at 569-70.

> The rule-making process is an inherent judicial power existing independently of legislative authority. In addition, part II, article 73-a of the New Hampshire Constitution, which granted to the supreme court the power to make rules regulating the administration of all courts of the State, makes clear that the judiciary has the

> authority to promulgate and administer rules concerning practice and procedure in the courtroom. *LaFrance*, 124 N.H. at 180, 471 A.2d at 345.

Id. at 570.

"Rules of evidence, in most instances, relate only to practice and procedure. To say, however, that a rule exists and that conflicting legislation would violate the separation of powers doctrine is not a sufficient analysis." *Id.* "Under the separation of powers doctrine, the legislature has a limited appropriate role to act on court rules; the basic analysis applied to determine whether legislative action is appropriate on judicial rules involves the distinction between substance and procedure." *Id.* (citations omitted).

"Substantive laws are those laws which have for their purpose to determine the rights and duties of the individual and to regulate his conduct and relation with the government and other individuals." *Opinion of the Justices (PSAE),* 141 N.H. at 572 (quotations and citation omitted). In contrast, "[p]rocedural laws are those laws which have for their purpose . . . to prescribe machinery and methods to be employed in enforcing these positive provisions." *Id.* (quotations and citation omitted). "There is a critical difference between the rights of an individual and the *method* by which an individual's right will be presented in a court of law." *Id.* (quotations and citation omitted) (emphasis in original).

This test "defines the rights and duties which people live by as substantive, whereas procedure defines the method by which those rights are enforced." *Id.* at 572 (citation and internal quotation omitted). Rules of evidence "designed to accomplish a just determination of rights and duties granted and imposed by the substantive law are traditionally considered to be . . . procedural law." *Ammerman v. Hubbard Broadcasting, Inc*., 89 N.M. 307, 551 P.2d 1354, 1357 (N.M. 1976) (as cited and quoted in *Opinion of the Justices (PSAE),* 141 N.H. at 571).

> A definition which distinguishes substantive from procedural law on the basis that the former relates to rights and duties, while the latter refers to the means and methods by which those rights and duties are to be protected and enforced through the courts would appear to be both a liberal and practical criterion, and one which lends to a conclusion that rules of evidence are included within 'procedure.'

Stein, TO WHAT EXTENT MAY COURTS UNDER THE RULE-MAKING POWER PRESCRIBE RULES OF EVIDENCE?, 26 A.B.A.J. 639, 644 (1940) (as cited and quoted in *Opinion of the Justices (PSAE),*

141 N.H. at 572).

> The legislature has acted in some instances where, it could be argued, it has gone beyond its legislative function and crossed into areas that remain the exclusive domain of the judiciary. *See* RSA 382-A:2-202 (1994) (limitation of parol evidence); RSA 356:4-e (1995) (application of preclusive effect in anti-trust proceedings); RSA 632-A:6, III-a (Supp. 1996) (manner of dress of victim inadmissible to show consent). Although these enactments arguably may interfere with the judiciary's authority over procedural matters, we may apply them as a matter of comity when they are consistent with judicial functions and policies and when no constitutional challenge is made to them.

Opinion of the Justices (PSAE), 141 N.H. at 573-74.

Applying these analyses to the proposed bill creating a rebuttable presumption for admission of evidence of a defendant's prior sexual assaults, the *Opinion of the Justices (PSAE)* Court concluded that "the bill before us usurps the judicial function of making relevancy determinations by creating a rebuttable presumption in favor of admissibility without regard for the particular facts or circumstances of a case." *Id.* at 578. That is, the bill at issue in *Opinion of the Justices (PSAE)* impaired the courts' power to make relevancy determinations as part of its proper exercise of control over core judicial functions or procedures. I conclude that the legislation at issue here, which mandates the introduction of certain evidence and prohibits the introduction of additional evidence which may place the mandated evidence in context, likewise usurps the judicial function of making evidentiary admissibility determinations. This legislation further intrudes on a core judicial function by additionally mandating exactly what the court must say upon admission of this evidence .

Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. N.H. Rule of Evid. 401. Relevant evidence is generally admissible; irrelevant evidence is not admissible. N.H. Rule of Evid. 402. Even though relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, among other things. N.H. Rule of Evid. 403. Determination concerning whether evidence is relevant and thus admissible rests in the sound discretion of the trial court. *E.g. State v. Smith*, 135 N.H. 524, 525 (1992). As with Rule of

Evidence 404(b), Rules 401, 402, and 403 are rules adopted by the Supreme Court to "govern proceedings in the courts of the State of New Hampshire." N.H. Rule of Evid. 101.

The provisions of RSA 519-B:8, 9 and 10 mandating the admission of unanimous panel findings and mandating that additional evidence which may explain or place in context those findings[6] may not be admitted prevent the court from meeting its obligation to weigh the relevance and the probative and prejudicial value of evidence, a core judicial function. RSA 519-B:8, 9 and 10 impermissibly intrude upon and deprive the judiciary of its right and obligation to decide the means and methods through which the rights and duties of medical injury litigants' claims or defenses will be protected, enforced, or prosecuted. *See Opinion of the Justices (PSAE),* 141 N.H. at 573-73.

RSA 519-B:9, the provision mandating what and when specific jury instructions must be given, also impermissibly usurps a core judicial function relating to the means and methods by which medical injury litigants' claim or defenses will be protected and enforced through the courts. Crafting jury instructions involves an evaluation of applicable law in light of the particular circumstances of the case. The court's obligation is to instruct the jury as to the appropriate legal standards under which the jury is to engage in its fact-finding function. The purpose of jury instructions "is to identify issues of material fact, and to inform the jury of the appropriate standards of law by which it is to resolve them." *O'Donnell v. HCA Health Servs. of N.H., Inc.*, 152 N.H. 608, 614-15 (2005). The crafting of jury instructions is a core function in the province of the judiciary as directly relating to the judiciary's role of ensuring the fairness of judicial proceedings. While the boundary line between the legislature and the judiciary is unfixed and cooperatively flexible, when a statute reaches into the courtroom and mandates what a trial judge must say, and mandates that the trial judge may not permit any more to be said, the boundary has by any reasonable definition been crossed.

That the jury instruction set out in RSA 519-B:9 is patterned on and very nearly identical to

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[6] As one example of the later type of evidence, in the present case if the court permitted the defendant to admit the panel's finding unfavorable to the plaintiff, the plaintiff would seek to admit evidence explaining that her expert before the jury was not her expert before the panel. RSA 519-B:9, I(f) mandates that such evidence may not be admitted, precluding the court from determining its relevance and from weighing its potential probative or prejudicial effect.

the one adopted by the Maine Supreme Judicial Court in *Irish v. Gimbel (Irish I)*, 691 A.2d 664, 671 (Me. 1997), does not help the defendant's argument that it is not an impermissible intrusion into core judicial functions. In Maine, it was the Supreme Judicial Court which initially adopted these instructions as mandatory instructions in medical review panel findings cases. *See id.* Here, and notwithstanding New Hampshire's Part I, Article 73-a, it is the legislature, not the courts, which mandated these instructions.

In reaching the conclusion that the mandatory provisions of RSA 519-B:8, 9 and 10 violate the New Hampshire Constitution's separation of powers clause, I have carefully considered orders of two of my colleagues which reach the contrary conclusion. *Phillips v. Pascal,* Coos County Superior Court Docket No. 07-C-060, Order on Motions in Limine (Vaughan, J.); *Krakie v. Catholic Medical Center,* Hillsborough County Superior Court, Northern District, Docket No. 06-C-717, Order (O'Neill, J.). I have the deepest respect for Judge Vaughan and Judge O'Neill, but on this issue I respectfully disagree with them. For me, notwithstanding the presumption of constitutionality to which legislative actions are entitled, *e.g. Gonya*, 153 N.H. at 524, a presumption to which I adhere and in which I believe, whether RSA 519-B:8, 9 and 10 are unconstitutional under our separation of powers clause, Part I, Article 37, is not a close call. The statute's mandates that unanimous medical panel results must be admitted, that the court must provide a specific set of instructions to the jury, and that the court may not permit any additional information or further explanation to the jury, separately and together "usurp[] the judicial function" of making determinations concerning the admissibility of evidence "without regard for the particular facts or circumstances of a case." *Opinion of the Justices (PSAE),* 141 N.H. at 578.

For the foregoing reasons, I conclude that RSA 519-B:8, 9, and 10 violate the separation of powers doctrine embodied in Part I, Article 37 of the New Hampshire Constitution.

Remaining Constitutional Arguments:

Because I have found that RSA 519-B:8, 9, and 10 are unconstitutional under Part I, Article 37 concerning separation of powers, and because that determination is dispositive, I decline to reach or decide the plaintiff's assertions that RSA 519-B:8, 9 and 10 also violate Part I, Article 20

concerning the right to a jury trial and Part I, Article 14 and the Fourteenth Amendment to the United States Constitution concerning due process.

Severability

Because I have determined certain provisions of RSA 519-B, sections 1 through 7, to be constitutional and others, sections 8 through 10, to be unconstitutional, so as to avoid any potential for misunderstanding I make clear that the unconstitutional provisions are severable from the constitutional provisions.

"In determining whether the valid provisions of a statute are severable from the invalid ones, [the court is] . . . to presume that the legislature intended 'that the invalid part shall not produce entire invalidity if the valid part may reasonably be saved.'" *Carson v. Maurer*, 120 N.H. 925, 946 (1980) (quoting *Rosenblum v. Griffin*, 89 N.H. 314, 320 (1938)). *See also Claremont Sch. Dist. v. Governor*, 144 N.H. 210, 218 (1999) (noting presumption in favor of severability). The court must also consider whether the unconstitutional provisions of the statute are so integral and essential in the general structure of the act that they may not be rejected without the result of an entire collapse and destruction of the structure. *Carson*, 120 N.H. at 925.

In the present case, the legislature did not include a severability clause in RSA 519-B. The court is also mindful that the statute explicitly states that it is ". . . essential to the effectiveness of the panel process that a panel's unanimous findings be presented to the jury in any matter that is not resolved prior to trial." RSA 519-B:1, I.

Nevertheless, while the prospect of having unanimous findings used against them at trial, RSA 519-A:8, 9 and 10, undoubtedly encourages parties to treat the medical panel process seriously, I do not consider those provisions so integral and essential to the general structure of the statute that their invalidity results in the collapse of the statutory framework. The stated goal of the RSA 519-B medical panel screening process is to help identify both meritorious and nonmeritorious claims without the delay and expense of a court trial. RSA 519-B:1, I. While the unconstitutionality of RSA 519-B:8, 9 and 10 removes a provision the legislature determined to be

"equally essential to the effectiveness of the panel process," RSA 519-B:1, I, it does not prevent the remaining statutory provisions from being a self-effecting and cohesive whole.

Conclusion

For the foregoing reasons, I find the provisions of RSA 519-B:1 through 7 to be constitutional, find the provisions of RSA 519-B:8, 9 and 10 to be unconstitutional under Part I, Article 37, the New Hampshire Constitution's separation of powers clause, and find the unconstitutional portions of RSA 519-B to be severable from the constitutional portions. Accordingly, the plaintiff's motion to exclude the findings of the medical review panel from the jury trial is granted.

So ordered.

November 3, 2009

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Steven M. Houran
Presiding Justice