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## Unconstitutional Asymmetry or a Rational Basis for Inconsistency? The Admissibility of Medical Malpractice Prelitigation Screening Panel Findings Before and After *Smith v. Hawthorne I and II*

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RATIONAL BASIS FOR INCONSISTENCY? THE  
ADMISSIBILITY OF MEDICAL MALPRACTICE  
PRELITIGATION SCREENING PANEL FINDINGS  
BEFORE AND AFTER *SMITH v. HAWTHORNE I AND II*

*Matthew Asnault Morris*

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I. INTRODUCTION

Prelitigation screening panels have been instrumental in streamlining medical malpractice litigation in the State of Maine by culling claims from superior court dockets, encouraging settlements, and providing findings of fact that could prove useful for a jury if the case proceeds to trial. In enacting one particular provision governing the confidentiality and the admissibility of the screening panel process,<sup>1</sup> however, the legislature may have sacrificed the constitutional rights of medical malpractice claimants in favor of a lighter docket. Two recent cases before the Law Court, *Smith I* and *II*,<sup>2</sup> have challenged the constitutionality of Maine's unique statutory approach to the admissibility of screening panel findings at a subsequent trial.

The legislature created a system of mandatory prelitigation screening panels in sections 2851 through 2859 of the Maine Health Security Act (MHSA) with the express purpose of identifying those "claims of professional negligence which merit compensation" prior to the commencement of a lawsuit, and "encourag[ing] early withdrawal or dismissal of nonmeritorious claims."<sup>3</sup> Sections 2852 through 2854 outline the composition of the panel and the mandatory procedures that a claimant must follow to commence an action for professional negligence.<sup>4</sup> Section 2855 provides that this panel shall hear evidence from both the claimant and the doctor accused of professional negligence in order to make three separate findings as to the doctor's deviation from the standard of care, causation, and the claimant's comparative negligence.<sup>5</sup> Although plaintiffs have challenged the constitutionality of the screening

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1. ME. REV. STAT. ANN. tit. 24, § 2857 (West 2000).

2. *Smith v. Hawthorne (Smith I)*, 2006 ME 19, 892 A.2d 433; *Smith v. Hawthorne (Smith II)*, 2007 ME 72, 924 A.2d 1051.

3. ME. REV. STAT. ANN. tit. 24, § 2851(1)(A) & (B) (West 2000) (identifying the purpose of mandatory pre-litigation screening panels); *see also* Sullivan v. Johnson, 628 A.2d 653, 656 (Me. 1993).

4. ME. REV. STAT. ANN. tit. 24, § 2852 (West 2000).

5. Section 2855 specifies that the screening panel shall make the following findings in writing within 30 days of the hearing:

A. Whether the acts or omissions complained of constitute a deviation from the applicable standard of care by the health care practitioner or health care provider charged with that care;

panel process as outlined in these sections, the Law Court has repeatedly upheld the constitutionality of the process as a whole and deferred to the legislative purpose to promote pretrial resolution explicated in section 2851.<sup>6</sup>

Deference to legislative policy, however, has not been sufficient to curtail the various constitutional challenges that malpractice claimants have raised against section 2857. This section—which addresses the admissibility of unanimous panel findings at a subsequent trial—has been successfully challenged on various bases, and has been subsequently amended on numerous occasions in order to strike a balance between the constitutional rights of malpractice claimants and the legislative intent to generate disincentives for the pursuit of non-meritorious claims. The latest successful constitutional challenge to section 2857 in *Smith I* significantly limited the constitutional scope of these admissibility-oriented disincentives.

Paragraph B of section 2857(1) essentially states that the screening panel’s findings are admissible against the doctor at a later trial if the panel finds that the doctor deviated from the applicable standard of care, and this deviation was the proximate cause of the claimant’s injury.<sup>7</sup> The rationale behind this rule is clear: if a doctor unanimously loses at the screening panel stage on both the issues of breach of duty and causation that would be required to prove malpractice at a subsequent trial, the doctor should not be permitted to prevent the admission of all of those findings unfavorable to his case.

Paragraph C of this statute provides that if the screening panel answers either the question of breach of duty or causation unanimously in the doctor’s favor, then the “findings are admissible in any subsequent court action.”<sup>8</sup> This language is particularly problematic because it refers to the panel findings as to “any question” (*i.e.* either

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B. Whether the acts or omissions complained of proximately caused the injury complained of; and

C. If negligence on the part of the health care practitioner or health care provider is found, whether any negligence on the part of the patient was equal to or greater than the negligence on the part of the practitioner or provider.

*Id.* § 2855 (West 2000 & Supp. 2006).

6. See *Irish v. Gimbel (Irish I)*, 1997 ME 50, ¶¶ 14, 18, 691 A.2d 664, 672-73 (rejecting plaintiff’s argument that the panel process denies access to the courts and causes unconscionable delay, and holding that the screening panel statute “establishes reasonable procedural requirements that do not violate the open courts provision of the Maine Constitution”); see also *Sullivan*, 628 A.2d at 656 (upholding the constitutionality of the legislative intent to encourage the pre-trial resolution of meritorious claims and to encourage the withdrawal of non-meritorious claims).

7. Section 2857(1)(B) provides:

B. If the panel findings as to both the questions under section 2855, subsection 1, paragraphs A and B are unanimous and unfavorable to the person accused of professional negligence, the findings are admissible in any subsequent court action for professional negligence against that person by the claimant based on the same set of facts upon which the notice of claim was filed.

ME. REV. STAT. ANN. tit. 24, § 2857(1)(B) (West 2000).

8. Section 2857(1)(C) provides:

C. If the panel findings as to any question under section 2855 are unanimous and unfavorable to the claimant, the findings are admissible in any subsequent court action for professional negligence against the person accused of professional negligence by the claimant based on the same set of facts upon which the notice of claim was filed.

*Id.* § 2857(1)(C).

breach of duty or causation), but then states that the *findings* (rather than the *finding* related to either of those questions) are admissible in a subsequent trial.<sup>9</sup> This provision formed the basis of the constitutional challenge in *Smith I*.<sup>10</sup> In the Smiths' case, the superior court interpreted "the findings" to mean only those findings that were favorable to the doctor at the screening panel stage; therefore, the court allowed Dr. Hawthorne to inform the jury that the panel found no proximate causation, but the Smiths were not permitted to inform the jury that the panel found (1) that Dr. Hawthorne deviated from the standard of care and (2) that there was no comparative negligence.<sup>11</sup>

The Smiths argued that section 2857 violated their fundamental right to a jury trial by "requiring that the jury be told a half-truth."<sup>12</sup> The Law Court in *Smith I* did not go so far as to say that section 2857 is unconstitutional as written, but did hold that the application of the statute, which allows admission of only those findings favorable to the doctor, deprives the jury of the meaningful information required to render a fair verdict, and thus, deprives a malpractice claimant of his right to a jury trial guaranteed by the Maine Constitution.<sup>13</sup>

Whereas *Smith I* addressed a malpractice claimant's constitutional challenge to section 2857's substantive asymmetry, *Smith II* addresses whether the statute gives the party who prevailed at the panel stage the right to refuse to submit all unanimous findings.<sup>14</sup> In a 4-2 majority opinion authored by Justice Calkins, the Law Court held that a doctor who has prevailed at the screening panel stage with respect to either the question of breach of duty or causation should be permitted to refuse to submit all of the panel's findings to the jury.<sup>15</sup>

Both *Smith I* and *II* illustrate an urgent need for the Maine Legislature to fundamentally reevaluate the structure, constitutionality, and effectiveness of the admissibility-oriented statutory disincentives in sections 2857 and 2858 of the MHSA. The Maine Legislature could avoid further constitutional challenges to section 2857 without sacrificing its interest in promoting pretrial settlements by amending the MHSA to provide (1) that all screening panel findings—unanimous and non-unanimous alike—shall be admissible at a subsequent trial, and (2) that reasonable attorneys' fees shall be assessed against the party who unanimously loses at the panel stage, refuses to abandon or settle the claim, and then loses again at a subsequent trial.

Part II of this Note will outline the statutory scheme, legislative history, and case law surrounding the screening panel process in Maine. Part III will discuss the constitutionality of asymmetric admissibility as addressed in *Smith I*. Part IV will focus on the evidentiary and constitutional questions surrounding procedural asymmetry in *Smith II*. Part V will address how the Law Court should have decided *Smith II*. Part VI will consider the various possibilities for legislative amendments to

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9. The same ambiguity does not arise in subsection B because "the findings" clearly refers to "both" of the unanimous panel findings unfavorable to the doctor. *Id.* § 2857(1)(B).

10. See generally *Smith I*, 2006 ME 19, 892 A.2d 433.

11. See *id.* ¶ 5, 892 A.2d at 435.

12. Brief of Appellant at 4, *Smith I*, 2006 ME 19, 892 A.2d 433 (Han-04-292).

13. *Smith I*, 2006 ME 19, ¶ 25, 892 A.2d at 439-40.

14. *Smith II*, 2007 ME 72, 924 A.2d 1051.

15. See *id.* ¶ 13, 924 A.2d at 1055.

sections 2857 and 2858, and proposes amendments to these sections that are designed to avoid future constitutional challenges and preserve the legislature's intent to generate incentives for settlements and the abandonment of non-meritorious claims.

## II. THE MEDICAL MALPRACTICE PRELITIGATION SCREENING PANEL PROCESS IN MAINE

### A. *Previous Statutory Guidance as to the Admissibility of Screening Panel Findings*

In the 1970s, the United States was in the midst of a medical malpractice crisis.<sup>16</sup> Throughout the country, the number of malpractice claims and the size of jury awards for claimants skyrocketed, leading to a dramatic increase in doctors' insurance premiums.<sup>17</sup> In response to this crisis, the American Medical Association persuaded state legislatures to change their laws governing malpractice litigation.<sup>18</sup> The Maine Legislature responded in 1975 with An Act to Create a Commission to Revise the Laws Relating to Medical and Hospital Malpractice Insurance.<sup>19</sup> This commission was created in order to "insure the availability of medical and hospital malpractice insurance to physicians and hospitals throughout the State and to develop a more equitable system of relief for malpractice claims."<sup>20</sup> The commission—chaired by Justice Charles A. Pomeroy of the Supreme Judicial Court of Maine—submitted the information it collected from various hearings to the legislature in the 1977 Pomeroy Commission Report.<sup>21</sup> This report proposed several major changes to existing law governing malpractice insurance and the statute of limitations for claims, and also recommended a system of voluntary binding arbitration for malpractice claims.<sup>22</sup> The Pomeroy Commission's recommendations were ultimately enacted by the legislature as the original MHSA.<sup>23</sup>

In the mid-1980s, the United States experienced another wave of surging malpractice awards,<sup>24</sup> and Maine responded with a corresponding wave of legislative

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16. See Randall R. Bovbjerg, *Legislation on Medical Malpractice: Further Developments and a Preliminary Report Card*, 22 U.C. DAVIS L. REV. 499, 502 (1989) ("For poorly understood reasons, the frequency of malpractice claims, which had risen moderately through the 1960s, turned sharply upward in the early 1970s."); see also P. & S.L. 1975, ch. 73 (stating that the "national crisis . . . developing with regard to the availability and cost of hospital and medical malpractice insurance" has created "an emergency within the meaning of the Constitution of Maine").

17. See Kathy Kendall, Comment, *Latent Medical Errors and Maine's Statute of Limitations for Medical Malpractice: A Discussion of the Issues*, 53 ME. L. REV. 589, 602 (2001); see also THE COMMISSION TO REVISE THE LAWS RELATING TO MEDICAL AND HOSPITAL MALPRACTICE INSURANCE, REP. TO THE 108TH LEGIS. xvi (Jan. 22, 1977) [hereinafter *Pomeroy Report*] (reporting that most malpractice premiums in Maine "have at least doubled," and that "some physicians in high-risk classification" have reported 400% increases in their premiums).

18. See Kendall, *supra* note 17, at 602.

19. P. & S.L. 1975, ch. 73.

20. *Id.* § 1.

21. *Pomeroy Report*, *supra* note 17, at i.

22. *Id.*

23. P.L. 1977, ch. 492, §§ 1-3.

24. See Bovbjerg, *supra* note 16, at 503 (attributing the re-emergence of medical malpractice problems in the 1980s to the fact that medical providers had "banded together" in order to make coverage more available).

reform to the MHSA. In 1985, the Maine Legislature enacted An Act Relating to Medical and Legal Professional Liability, which introduced several significant changes to the MHSA with respect to medical malpractice screening panels.<sup>25</sup> One of the most significant changes was the adoption of a mandatory prelitigation screening panel process in place of the voluntary arbitration outlined in the original MHSA.

Sections 2852 through 2856 of the 1985 Act outlined the basic structure of the mandatory screening panel process.<sup>26</sup> According to section 2852, the Chief Justice of the Superior Court—after receiving a notice of claim—was to select a retired judge or a person with judicial experience to serve as chair of the screening panel.<sup>27</sup> Then, the chair of the panel was instructed to choose two to three additional panel members from a list of approved health care practitioners and attorneys.<sup>28</sup> The panel was to consist of one health care attorney and one or two health care practitioners who practice, preferably, in the same field as the allegedly negligent doctor.<sup>29</sup> Section 2853 governed the claimant's filing requirements and specified that the screening panel could be bypassed if both parties agreed to resolve the claim through a lawsuit.<sup>30</sup> Section 2854 mandated the basic terms of the hearing before the screening panel,<sup>31</sup> and section 2855 directed the screening panel to make findings, after both sides have presented their case, on deviation from the applicable standard of care and proximate causation.<sup>32</sup> Section 2856 specified that the panel findings had to be served on both parties within seven days of the date of the findings.<sup>33</sup> These basic parameters of the screening process, as provided in sections 2852 through 2856, have not been amended significantly since the 1985 Act.<sup>34</sup>

The 1985 Act also introduced section 2858, which has not once been amended and is identical to the current version of the statute.<sup>35</sup> Subsection 1 of section 2858 essentially provides that if the panel findings as to breach of duty and causation are unanimous and unfavorable to the doctor, the doctor “must promptly enter into negotiations to pay the claim or admit liability”; if a suit is brought against the doctor under these circumstances, “the findings of the panel are admissible as provided in section 2857.”<sup>36</sup> If, however, either of the unanimous findings of the panel as to breach of duty or causation is unfavorable to the claimant, subsection 2 states that “the claimant must release the claim or claims based on the findings without payment or be subject to the admissibility of those findings.”<sup>37</sup>

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25. P.L. 1985, ch. 804, § 12 (effective Jan. 1, 1987).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* Here, section 2854 provides that the claimant shall present the case before the panel and the person accused of professional negligence shall make a responding presentation. It also specifies that the Maine Rules of Evidence do not apply. *Id.*

32. *Id.*

33. *Id.*

34. Compare P.L. 1985, ch. 804, § 12 with ME. REV. STAT. ANN. tit. 24, §§ 2851- 2856 (West 2000 & Supp. 2006).

35. Compare P.L. 1985, ch. 804, § 12 with ME. REV. STAT. ANN. tit. 24, § 2858 (West 2000).

36. ME. REV. STAT. ANN. tit. 24, § 2858 (West 2000).

37. *Id.* As plaintiff's counsel Gilbert Greif noted during oral argument in *Smith II*, section 2858 “no

Not all of the provisions in the 1985 Act remain unchanged or substantively similar to their current statutory equivalents. Section 2857 of the 1985 Act specified that screening panel findings are admissible—either against the doctor or the claimant—“without explanation” at a subsequent trial:

If the findings of the panel are:

A. As to both questions under section 2855, unanimous and unfavorable to the person accused of professional negligence, the findings, without explanation, shall be admissible in any subsequent court action for professional negligence against that person by the claimant based on the same set of facts upon which the notice of claim was filed; and

B. As to either question under section 2855, unanimous and unfavorable to the claimant, the findings, without explanation, shall be admissible in any subsequent court action for professional negligence against the person accused of professional negligence by the claimant based on the same set of facts upon which the notice of claim was filed.

Under paragraphs A and B, the findings shall be admissible only against the party against whom they were made.<sup>38</sup>

The claimants in *Irish v. Gimbel I* raised the first constitutional challenge to section 2857, arguing that the mandatory admissibility of the panel findings “without explanation” violated their right to a jury trial guaranteed by the Maine Constitution.<sup>39</sup>

#### B. Previous Constitutional Challenges to Section 2857: *Irish v. Gimbel I and II*

In 1989, Russell and Laurie Irish filed a medical malpractice claim against Dr. Gregory Gimbel on behalf of their minor child.<sup>40</sup> The Irishes alleged that Dr. Gimbel deviated from the applicable standard of care in his delivery of their child, and that

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longer even makes sense as it’s drafted.” Audio Recording of Oral Arguments, *Smith II*, 2007 ME 72, 924 A.2d 1051 (Han-06-356) (on file with the Clerk of the Supreme Judicial Court) [hereinafter Oral Arguments, *Smith II*]. When section 2857 was amended in 1999 after the *Irish I* decision, the legislature overlooked the need to make corresponding changes in section 2858. Section 2858, subsection 2, states that if the panel findings as to either breach of duty or causation are unanimous and unfavorable to the claimant, the claimant must “release the claim or claims . . . or be subject to the admissibility of those findings under section 2857, subsection 1, paragraph B.” ME. REV. STAT. ANN. tit. 24, § 2858 (West 2000). As this statute was first introduced in the 1985 Act, section 2857, subsection 1, paragraph B referred to the panel findings unfavorable to the claimant. See *infra* text accompanying note 43. The 1999 amendments moved the provision relating to unfavorable findings to paragraph C, but section 2858 was never amended to reflect this change. See *infra* note 45; see also ME. REV. STAT. ANN. tit. 24, § 2858 (West 2000). The result of this legislative oversight is that the plain language of section 2858 inevitably results in the following incoherent interpretation of the statute: if the findings of the panel are *unanimous and unfavorable to the claimant*, the claimant will be subject to the admissibility of those findings that are *favorable to the claimant*.

38. P.L. 1985, ch. 804, § 12 (effective Jan. 1, 1987). The Statement of Fact accompanying the original bill reveals that these changes were intended to “[i]ncreas[e] the incentive not to proceed to trial after screening, thus encouraging defendants to settle in cases where negligence and causation is found and by encouraging plaintiffs not to proceed where the panel makes a finding against negligence *and* causation.” L.D. 2400, Statement of Fact (112th Legis. 1986) (emphasis added).

39. *Irish I*, 1997 ME 50, ¶ 7, 691 A.2d 664, 669; see also ME. CONST. art. I, § 20 (“In all civil suits, and in all controversies concerning property, the parties shall have a right to a trial by jury, except in cases where it has heretofore been otherwise practiced . . .”).

40. *Id.* ¶ 1, 691 A.2d at 667.

their child suffered brachial plexus palsy and audiological difficulties as a result.<sup>41</sup> A prelitigation screening panel was appointed, and unanimously found that Dr. Gimbel did not deviate from the applicable standard of care.<sup>42</sup> The Irishes then filed a notice of claim in superior court, followed by several motions *in limine* challenging the constitutionality of the screening process and seeking to either exclude the screening panel findings or afford them less weight than other evidence.<sup>43</sup> After these motions were denied and the jury returned a verdict for Dr. Gimbel, the Irishes appealed to the Law Court, contending that the “mandatory admission of unanimous findings ‘without explanation’ prevents effective impeachment of the findings and results in juror deception, thereby hindering the jurors’ ability to properly weigh the evidentiary significance of the findings.”<sup>44</sup>

In assessing the constitutionality of the screening panel process, the Law Court found that the mandatory admission of unanimous findings “without explanation”<sup>45</sup> withheld “information that is essential to the jury’s fact-finding role”; “[t]he total absence of information and the unexplained silence of plaintiffs’ counsel in the face of the highly prejudicial findings invite unprincipled evaluation and can only result in juror confusion.”<sup>46</sup> The court explained that a jury must be given six points of information regarding the context of the screening panel process as a whole,<sup>47</sup> including the

41. *Id.* ¶ 2, 691 A.2d at 667.

42. *Id.*

43. *Id.* ¶ 5, 691 A.2d at 668.

44. *Id.* ¶ 7, 691 A.2d at 669.

45. The original language of section 2857, applicable at the time, was similar to the current version of the statute, but with three significant differences. First, the statute in subsections A and B provided that the panel’s findings “shall be” admissible in any subsequent court action. P.L. 1985, ch. 804, § 12 (enacting ME. REV. STAT. ANN. tit. 24, § 2857, effective Jan. 1, 1987). The current statute simply provides that these findings “are” admissible. ME. REV. STAT. ANN. tit. 24, § 2857(1)(B)-(C) (West 2000); *see also* L.D. 1325, § 8 (119th Legis. 1999) (repealing section 2857 from the 1985 act). Second, the original statute provided that the findings shall be admissible in both subsection A and B “without explanation.” P.L. 1985, ch. 804, § 12(A)-(B). This language was removed in the wake of the *Irish I* decision. *See* L.D. 1325, § 8 (119th Legis. 1999); *see also Irish I*, 1997 ME 50, ¶ 11, 691 A.2d at 670. Finally, the original statute provided that the findings in paragraphs A and B shall be admissible “only against the party against whom they were made,” whereas the 1999 act (passed after the *Irish I* decision) eliminated this language entirely, and moved paragraphs A and B to paragraphs B and C. *See* P.L. 1985, ch. 804, § 12; *see also* L.D. 1325, § 8 (119th Legis. 1999); P.L. 1999, ch. 523, § 4 (effective Sept. 18, 1999).

46. *Irish I*, 1997 ME 50, ¶ 11, 691 A.2d at 670.

47. This part of the *Irish I* holding identified six points that should be included in both the court’s preliminary comments and final instructions to the jury:

- (1) the panel process is merely a preliminary procedural step through which malpractice claims proceed;
- (2) the panel in this case consisted of (the name and identity of the members);
- (3) the panel conducts a summary hearing and is not bound by the Rules of Evidence;
- (4) the hearing is not a substitute for a full trial and may or may not have included all of the same evidence that is presented at the trial;
- (5) the jury is not bound by the finding(s) and it is the jurors’ duty to reach their own conclusions based on all of the evidence presented to them; and
- (6) the panel proceedings are privileged and confidential. Consequently, the parties may not introduce panel documents or present witnesses to testify about the panel proceedings, and they may not comment on the panel finding(s) or proceedings except to reiterate the information in 1 through 6.

*Id.* ¶ 12, 691 A.2d at 671.

explicit instructions that the panel's findings are not conclusive and cannot be commented on by either party.<sup>48</sup> However, the court refused to hold that section 2857 precludes the disclosure of constitutionally required information. The court found that the "admission of panel findings is mandated only when the panel unanimously determines that a plaintiff or defendant possesses a meritless claim or defense," and that "[p]retrial resolution is encouraged by the specter of mandatory admission of the findings free from attack by the opposing party."<sup>49</sup>

The Law Court remanded the case to the superior court, and the plaintiffs appealed again, this time asserting that the admission of unanimous panel findings violated their right to a jury trial, "to procedural and substantive due process, to equal protection of the law, and resulted in a violation of constitutional separation of powers."<sup>50</sup> The Law Court in *Irish II* refused to address the due process and equal protection arguments that had already been litigated in *Irish I*, and dismissed the "one new issue" concerning the separation of powers violation by finding that the six-point instruction "was necessary not to explain or litigate the panel findings, but to prevent a jury from drawing improper inferences."<sup>51</sup>

### C. Post-Irish I Amendments to Section 2857

In 1999—after *Irish I* was decided in March of 1997, but before the *Irish II* decision was announced in 2000—the Maine Legislature repealed section 2857 as enacted in 1985 and introduced a new statutory scheme that abandoned the "without explanation" language of the previous statute:

B. If the panel findings as to both the questions under section 2855, subsection 1, paragraphs A and B are unanimous and unfavorable to the person accused of professional negligence, the findings are admissible in any subsequent court action for professional negligence against that person by the claimant based on the same set of facts upon which the notice of claim was filed.

C. If the panel findings as to any question under section 2855 are unanimous and unfavorable to the claimant, the findings are admissible in any subsequent court action for professional negligence against the person accused of professional negligence by the claimant based on the same set of facts upon which the notice of claim was filed. The findings are admissible only against the claimant.<sup>52</sup>

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48. *Id.*

49. *Id.* ¶ 13, 691 A.2d at 671.

50. *Irish v. Gimbel (Irish II)*, 2000 ME 2, ¶ 5, 743 A.2d 736, 737.

51. *Id.* ¶¶ 7-8, 743 A.2d at 737-38.

52. ME. REV. STAT. ANN. tit. 24, § 2857 (1)(A)(B) (West 2000); *see also* L.D. 1325, § 8 (119th Legis. 1999). This bill, as it was first introduced in February 1999, included a paragraph which provided for the admissibility of unanimous panel findings against the claimant, but contained nothing related to the admissibility of panel findings against the person accused of professional negligence. *Id.* The summary accompanying the bill made it clear that this section "prohibits the presentation to the jury of a unanimous panel finding against the person accused of professional negligence." *Id.*, Summary (119th Legis. 1999). The Judiciary Committee amendment left section 2857 unchanged. Comm. Amend. A to L.D. 1325, No. S-352 (119th Legis. 1999). The legislative intent of this early draft is clear, but perhaps too conspicuously one-sided. This omission of any provision for the admissibility of panel findings against the doctor continued until the Senate submitted an amended version of the bill on June 2, 1999. *See* Sen. Amend. A to Comm. Amend. A to L.D. 1325, No. S-381 (119th Legis. 1999). The Senate amendment's new paragraph B provided for the admissibility of "the findings" against the person accused of professional negligence;

The current version of section 2857 and the version of the statute at issue in *Smith I* and *II* reflect no substantive changes from the 1999 act.<sup>53</sup>

### III. *SMITH V. HAWTHORNE I*: THE CONSTITUTIONALITY OF ASYMMETRIC ADMISSIBILITY

#### A. *Factual Background and Procedural History*

James Edward Smith fractured his left tibia and fibula after falling in August of 1997, and orthopedic surgeon Dr. Catherine Hawthorne treated him for the next several months after the injury.<sup>54</sup> On October 21, 1999, James and his wife Sheryl Smith filed a sworn notice of claim under the MHSA<sup>55</sup> against Dr. Hawthorne.<sup>56</sup> They alleged four deviations from the appropriate standard of care with respect to her treatment of Mr. Smith: (a) an “inadequate internal fixation of the original fracture,” (b) a premature allowance of “weight bearing on this unstable construct,” (c) inadequate treatment of osteomyelitis<sup>57</sup> at the fracture site, and (d) improper use of ultrasound bone stimulation.<sup>58</sup> Mr. Smith claimed that as a result of these deviations he was forced to undergo a series of unnecessary operations and was “significantly delayed” in his return to work as a truck driver.<sup>59</sup> Mr. Smith also claimed to have experienced great pain and suffering, a permanent impairment of his foot and ankle, and a “limitation in his ability to work and play” as a result of these deviations.<sup>60</sup> Sheryl Smith also alleged a loss of consortium as a result of Dr. Hawthorne’s negligent treatment of her husband.<sup>61</sup>

Pursuant to the MHSA, a pre-litigation screening panel was formed, discovery began for both parties, and a panel hearing took place on November 30, 2000.<sup>62</sup> The three-member panel made a unanimous finding that the only deviation from the

however, these amendments allowed for admissibility when the panel findings “as to any question under section 2855” are unanimous and unfavorable to the doctor, not when the panel answers both questions of breach of duty and causation in favor of the claimant as is currently required. *Id.* The summary accompanying the Senate amendments states that it “adds language to retain the admissibility of all unanimous panel findings,” but provides no further explanation for the addition of paragraph B. *Id.*, Summary (119th Legis. 1999). The Senate quickly submitted a newly amended version of paragraph B on June 4, 1999 to allow the admissibility of the panel findings only if the findings as to “both” the questions of breach of duty and causation are unanimous and unfavorable to the person accused of professional negligence. Sen. Amend. B to Comm. Amend. A. to L.D. 1325, No. S-436 (119th Legis. 1999). The summary accompanying these final amendments to the 1999 act provides no guidance as to why this change was made. *Id.*, Summary (119th Legis. 1999).

53. Compare ME. REV. STAT. ANN. tit. 24, § 2857 (West 2000) with P.L. 1999, ch. 523, § 4.

54. Brief of Appellant, *supra* note 12, at 1.

55. See ME. REV. STAT. ANN. tit. 24, § 2853 (West 2000) (specifying that a person may commence an action for professional negligence by serving a written notice of claim on the person accused or filing a notice of claim with the superior court).

56. Appendix at 9, *Smith I*, 2006 ME 19, 892 A.2d 433 (Han-04-292).

57. Osteomyelitis is defined as an “[i]nflammation of bone caused by pyogenic (pus-producing) organisms.” ROBERT K. AUSMAN & DEAN E. SNYDER, 3 AUSMAN & SNYDER’S MEDICAL LIBRARY § 4.92 (Lawyers ed. 1992).

58. Appendix at 10, *Smith I*, 2006 ME 19, 892 A.2d 433 (Han-04-292).

59. *Id.*

60. *Id.* at 11.

61. *Id.*

62. *Id.* at 13.

applicable standard of care was Dr. Hawthorne's treatment of the wound at the fracture site.<sup>63</sup> After hearing evidence presented by both Mr. Smith and Dr. Hawthorne, the screening panel was asked to answer "yes" or "no" to the three questions mandated by section 2855(1)(A)-(C) in its final malpractice decree.<sup>64</sup> The panel answered "yes" to question 1—relating to a deviation from the applicable standard of care—and "no" to questions 2 and 3—relating to the existence of proximate causation and comparative negligence.<sup>65</sup>

After the panel hearing, the Smiths filed suit against Dr. Hawthorne for professional negligence in the Maine Superior Court in Hancock County.<sup>66</sup> Prior to trial, the Smiths filed motions *in limine* to (1) admit the entirety of the panel's findings rather than just the one finding that was favorable to Dr. Hawthorne, and (2) challenge the constitutionality of section 2857 as violative of the plaintiffs' rights to trial by jury, equal protection, and due process.<sup>67</sup> On September 6, 2002, Justice Jabar denied these motions, ordering that the constitutional challenge must fail "because there is a rational basis for the inconsistency" inherent in section 2857:

Very simply put, in any trial a Plaintiff must prevail on both issues, negligence and proximate cause; whereas, the Defendant need only prevail on one of those issues. Therefore, the Legislature's requirement that the Plaintiff prevail on both issues before the findings are admissible; whereas, the Defendant need only prevail on one of the issues before the findings are admissible is rationally based on the basic requirements of the parties in any negligence action.<sup>68</sup>

The first trial ended in a hung jury and a mistrial.<sup>69</sup> Prior to the second trial, the Smiths once again objected to the "partial instruction and partial admission of the pre-litigation screening panel findings."<sup>70</sup> Justice Hjelm affirmed Justice Jabar's order on the first motion *in limine*, instructed the jury as to the screening panel process pursuant

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63. *Id.*

64. *Id.* The screening panel answered the following three questions in its malpractice decree:

- A. Whether the acts or admissions complained of, or found by the panel to exist, or as agreed by the parties, constitute a deviation from the applicable standard of care by the health care practitioner or health care provider charged with that care: *regarding 7(c) as alleged in the Notice of Claim.*
- B. Whether the acts or omissions complained of proximately caused the injury complained of, or as found by the panel, or as agreed by the parties[.]
- C. If negligence on the part of the health care practitioner or health care provider is found, whether any negligence of the part of the patient was equal to or greater than the negligence on the part of the practitioner or provider[.]

*Id.* (emphasis added). The italicized portion was handwritten and followed by an asterisk. The asterisk referred to another handwritten portion on the bottom of the decree, which stated "The panel finds no negligence on the remaining issues." *Id.*; see also ME. REV. STAT. ANN. tit. 24, § 2855(1) (A)-(C) (West 2000 & Supp. 2006) (providing the statutory basis for these three questions).

65. Appendix at 13, *Smith I*, 2006 ME 19, 892 A.2d 433 (Han-04-292).

66. *Smith I*, 2006 ME 19, ¶ 5, 892 A.2d at 435. *Smith v. Hawthorne* has been tried a total of three times. The case was tried twice before the Law Court rendered its decision in *Smith I*, and was tried again on remand to the Superior Court after this decision.

67. Appendix at 8, *Smith I*, 2006 ME 19, 892 A.2d 433 (Han-04-292).

68. *Id.*

69. Brief of Appellant, *supra* note 12, at 2.

70. Appendix at 16, *Smith I*, 2006 ME 19, 892 A.2d 433 (Han-04-292).

to *Irish I*, and allowed defense counsel to tell the jury that “[t]he panel in this case unanimously concluded that the acts or omissions complained of by the Smiths were not the legal cause of the injuries that he has alleged.”<sup>71</sup> After both sides rested, the jury was given a verdict form that combined the issues of negligence and causation, asking “Was the Defendant negligent and was the Defendant’s negligence a proximate cause of the Plaintiff James Smith’s injuries?”<sup>72</sup> The jury returned a verdict in favor of Dr. Hawthorne.<sup>73</sup>

The Smiths appealed this decision to the Law Court, claiming that, as applied in this case, section 2857 violated their rights to a jury trial, equal protection, and due process as protected by the United States and Maine Constitutions.<sup>74</sup>

### B. Oral Arguments Before the Law Court

#### 1. First Round

On January 15, 2005, attorneys for the Smiths and Dr. Hawthorne appeared before the Law Court in what would be the first of two rounds of oral argument in *Smith I*.<sup>75</sup> Counsel for the Smiths, Attorney Gilbert Greif, argued that the Maine Legislature, by enacting section 2857, has created a procedure “unique in the nation” that “requires that the jury be told a half-truth.”<sup>76</sup> He argued that—despite the fact that in a medical case the issue of negligence is more difficult to prove than proximate cause—he was denied the opportunity to explain to the jury that the screening panel found that there was negligence.<sup>77</sup> Chief Justice Saufley’s questions focused on the possibility of salvaging a constitutional interpretation of section 2857, presaging her alignment with the *Smith I* dissent.<sup>78</sup> Mr. Greif responded that the application of the statute is not based on a shifting burden or proof, but rather represents “an attempt by the legislature

71. *Id.* at 24 (Partial Transcript of Proceedings).

72. *Id.* at 29.

73. *Id.* at 28. The verdict form in the Appendix is unmarked, thus it is unclear whether the jury found in favor of Dr. Hawthorne on the basis of the combined negligence and causation question, or on the basis of comparative negligence. *Id.* at 29.

74. See Brief of Appellant, *supra* note 12; see also U.S. CONST. amend. XIV, § 1; ME. CONST. art. I, §§ 6-A, 20.

75. Audio Recording of Oral Arguments, *Smith I*, 2006 ME 19, 892 A.2d 433 (Han-04-292) (on file with the Clerk of the Supreme Judicial Court) [hereinafter 1 Oral Arguments, *Smith I*].

76. *Id.* Maine’s statutory scheme is no longer “unique in the nation” as Mr. Greif suggested. In August of 2005, New Hampshire enacted section 519-B:8, which is virtually identical to Maine’s screening panel provisions. See generally N.H. REV. STAT. ANN. § 519-B:8 (West 2007).

77. 1 Oral Arguments, *Smith I*, *supra* note 75. Mr. Greif outlined the basis of his appeal as follows:

What makes the courts of our nation work is the right to confront and challenge evidence, and the most useful piece of evidence I would have had to challenge that argument that there was no infection, and that there was no breach of the standard of care, was that three people had heard the same evidence . . . and had agreed with our expert that yes there was infection and yes this infection should have been treated more promptly and more efficiently.

*Id.*

78. *Id.* Chief Justice Saufley: “In order to prevail, the plaintiff must prevail on both [negligence and proximate cause] . . . and in order to prevail, the defendant need only rebut one . . . Isn’t it really the legislature just saying if you’ve carried your burden to prevail, whatever it is that got you there goes before the . . . jury?” *Id.*; see also *Smith I*, 2006 ME 19, ¶ 36, 892 A.2d 433, 441 (Levy, J., dissenting).

to place a thumb . . . on the scales of justice, and to tilt the proceeding irrevocably in favor of the doctor.”<sup>79</sup>

Counsel for Dr. Hawthorne, Attorney George Schelling, attempted to distinguish *Irish I* by focusing on the relief sought: whereas the remedy in *Irish* was to supplement section 2857, the remedy in this case would be to “gut” the statute entirely.<sup>80</sup> Mr. Schelling emphasized how panel findings have been afforded less weight after *Irish I*, but that the legislative intent is nevertheless clear: to give “the bottom line” to the jury as to the screening panel findings in non-meritorious cases.<sup>81</sup>

## 2. Second Round

On rehearing before the Law Court, Mr. Greif emphasized that the substantive asymmetry in this case is actually worse than the constitutional violation in *Irish I*.<sup>82</sup> When Justice Calkins asked how the statute should be reconstructed, Mr. Greif responded that he would strike all of paragraph B, and apply paragraph C to both claimant and doctor.<sup>83</sup> Justice Levy then asked whether it was “really within our purview to start cutting and pasting the statute.”<sup>84</sup> When Mr. Greif drew a parallel between the prevention of “effective impeachment of the findings” in *Irish I* and the constitutional challenge in this case, Chief Justice Saufley noted that the “court wrote more into the statute” in the *Irish I* decision and remedied the constitutional defect with the six-point instruction.<sup>85</sup> Mr. Greif responded that the court did not write anything more into the statute in *Irish I*, but simply said that a trial court “in its fundamental core

79. 1 Oral Arguments, *Smith I*, *supra* note 75. Mr. Greif asserted that even though the Smiths prevailed on the issue of comparative negligence, the statute is written so as to preclude the submission of this finding “under any circumstances.” *Id.*

80. *Id.*

81. *Id.*

82. Audio Recording of Oral Arguments, *Smith I*, 2006 ME 19, 892 A.2d 433 (Han-04-292) (on file with the Clerk of the Supreme Judicial Court) [hereinafter 2 Oral Arguments, *Smith I*]. Specifically, Mr. Greif argued that unlike the application of paragraph C that led to substantive asymmetry in this case, the “without comment” provision invalidated in *Irish I* did not always favor the doctor. *Id.*

83. *Id.* The following exchange illustrates what appears to be Justice Levy’s attack on the relief sought by the Smiths, and Justice Alexander’s attempt to salvage the statute by reading “the findings” in paragraph C to mean all of the unanimous findings of the screening panel:

Justice Levy: The question is do we declare it unconstitutional, and invalidate it, or do we rewrite the statute so as to make it constitutional?

Mr. Greif: You declare the disparate treatment between B and C as being unconstitutional.

Justice Levy: Do we have a third avenue? As Justice Alexander observed, in looking at C, it says, if the findings . . . are . . . unanimous and unfavorable to the claimant, the findings are admissible . . . are we prevented from saying what is intended by the legislature . . . is that when they said the findings, they meant all the findings, both the unfavorable and the favorable findings? Do we have that flexibility anymore?

Mr. Greif: It would render the prior subparagraph B . . .

Chief Justice Saufley: We’d have to strike B.

Justice Levy: Because B prohibits that, doesn’t it?

Justice Alexander: No, you don’t have to strike B. What B says is in order for the plaintiff to get it admitted, they have to win on everything, in order for the defendant to get it admitted, they have to win on one thing. What’s wrong with that?

*Id.*

84. *Id.*

85. *Id.*; see also *Irish I*, 1997 ME 50, ¶ 12, 691 A.2d 664, 671.

function” can offer the six-point instruction to the jury.<sup>86</sup> Justice Alexander said that Mr. Greif’s problem is with the judge’s editing of the findings, not with the plain language of the statute.<sup>87</sup>

Attorney Schelling noted what he considered a significant flaw in the Brief for Appellant that the screening panel “in essence” found that the Smiths’ claim was meritorious because they prevailed on the issue of negligence; he argued that this is in fact a non-meritorious case that “should have been weeded out according to the Pomeroy Commission and according to the legislature.”<sup>88</sup> He emphasized that there is no constitutional problem when the court only gives the jury the finding that allowed the doctor to prevail at the screening panel if it is properly instructed as to the difference between legal cause and breach of the standard of care.<sup>89</sup>

### 3. Discussion

Both rounds of oral arguments in *Smith I* revealed several fracture points capable of dividing the court into a 4-3 opinion, with two justices concurring. The first fracture point is revealed through Justice Levy and Chief Justice Saufley’s line of questions to Attorney Greif, which inquired why the court should not defer to the legislative policy determination that a claimant must prevail on both the issues of standard of care and causation at the panel stage in order to get those determinations before a jury. The second fracture point is revealed through Justice Alexander’s statement in the rehearing that the Smiths’ real objection is to the lower court’s omission of certain panel findings, rather than to the statute itself, which can be read so as to provide for the admission of all panel findings at a subsequent trial. The third fracture point is revealed by Justice Levy and Chief Justice Saufley’s joint focus on the sufficiency of the *Irish I* six-point instruction in contextualizing the panel findings. These three issues raised in oral arguments prefigured the central themes of both the dissenting and concurring opinions.

### C. The Decision

The majority opinion of Justice Calkins, joined by Justices Dana, Alexander, and Silver, held that the “application of subsections 2857(1)(B) and (C) by the Superior Court, which denied the plaintiff’s request to admit the panel’s findings on negligence and comparative negligence and allowed in evidence only the panel’s findings on causation, was unconstitutional and denied the Smiths their right to a jury trial under the Maine Constitution.”<sup>90</sup> Quoting *Irish I*, the majority reiterated that the right to a jury trial is defined by the right “to have a determination made by the jury on material

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86. 2 Oral Arguments, *Smith I*, *supra* note 82.

87. *Id.* Justice Alexander: “The law right now says the findings are admissible; your problem is not with the law, your problem is that the judge decided to cut and paste.” *Id.*

88. *Id.*

89. *Id.*

90. *Smith I*, 2006 ME 19, ¶ 25, 892 A.2d 433, 439-40; *see also* ME. CONST. art. I, § 20 (“In all civil suits, and in all controversies concerning property, the parties shall have a right to a trial by jury, except in cases where it has heretofore been otherwise practiced . . .”).

questions of fact.”<sup>91</sup> Although the majority was careful to emphasize that the “precise challenge” to the constitutionality of section 2857 was not present in *Irish I*, it held that the asymmetrical admission of panel findings “violated the Smiths’ constitutional right to a jury trial for the same reasons that giving the panel findings to the jury ‘without explanation’ violated the Irishes’ constitutional right to a jury trial.”<sup>92</sup>

When there are findings favorable to both parties, the admission of only those findings favorable to one party distorts the jury’s fact-finding role. The findings in favor of Smith, like the findings in favor of Hawthorne, were highly probative and relevant to the jury’s determinations of material questions of fact.<sup>93</sup>

The judgment in favor of Dr. Hawthorne was vacated, and the case remanded to the superior court for further proceedings.<sup>94</sup>

Justice Alexander, joined by Justice Dana, concurred in the judgment, but wrote separately in order to argue that section 2857 can be “reasonably construed to require submission to the jury of all unanimous findings, even when ‘the findings’ do not support the same party.”<sup>95</sup> Justice Alexander stated that the court has a duty to preserve a statute’s constitutionality if it is consistent with legislative intent,<sup>96</sup> and must “assume that the Legislature acted in accord with due process requirements.”<sup>97</sup> Justice Alexander concluded his concurrence with a summary of the practical consequences of his all-or-nothing interpretation of section 2857: “if either party wishes to offer the answers to one or more of the unanimous findings of the panel, either all should be admitted or none should be admitted.”<sup>98</sup>

In his dissenting opinion, which was joined by Chief Justice Saufley and Justice Clifford, Justice Levy asserted that the effect of the majority opinion is to render section 2857 unconstitutional as written rather than as applied in this particular case, and that this constitutional analysis is “contrary to the scope and purpose of article I, section 20” of the Maine Constitution.<sup>99</sup> Justice Levy maintained that the absence of similar asymmetric admissibility statutes should not influence the court’s constitutional analysis, and that the majority’s rewriting of section 2857 “undermines the inducement to settle nonmeritorious medical malpractice claims that the statute was intended to achieve.”<sup>100</sup>

#### D. What Remains After *Smith I*

The majority in *Smith I* refused to hold that section 2857 is facially unconstitutional, and limited the scope of the constitutional violation to the application by the superior court that permitted Dr. Hawthorne to submit only the one panel finding that

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91. *Smith I*, 2006 ME 19, ¶ 20, 892 A.2d at 438 (citing *Irish I*, 1997 ME 50, ¶ 8, 691 A.2d 664, 669).

92. *Id.* ¶ 22, 892 A.2d at 439.

93. *Id.*

94. *Id.* ¶ 25, 892 A.2d at 439-40.

95. *Id.* ¶ 33, 892 A.2d at 441 (Alexander, J., concurring).

96. *Id.* ¶ 29, 892 A.2d at 440.

97. *Id.* ¶ 28, 892 A.2d at 440 (citing *Rideout v. Riendeau*, 2000 ME 198, ¶ 14, 761 A.2d 291, 297-98 (plurality opinion)).

98. *Id.* ¶ 35, 892 A.2d at 441.

99. *Id.* ¶ 36, 892 A.2d at 441 (Levy, J., dissenting).

100. *Id.* ¶ 41, 892 A.2d 443.

was favorable to her case. Although the majority opinion in no uncertain terms attacked the substantive asymmetry created by this application, it stopped short of declaring the statute *per se* unconstitutional. But while the majority went to great lengths to explain how the statute should not be construed, it neglected to inform lower courts how it *should* be construed. Justice Alexander's concurrence provided the only practical recommendation for the superior court on remand: "if either party wishes to offer the answers to one or more of the unanimous findings of the panel, either all should be admitted or none should be admitted."<sup>101</sup> What alternative construction of the statute would have been permissible under the majority's holding? If asymmetric admissibility violates the constitution, but the statute itself does not dictate asymmetry, then the only plausible interpretation of the statute after *Smith I* is the concurrence's all-or-nothing approach, which interprets paragraph C so as to include all of the panel findings. Given the lack of any other alternative, it should not be surprising that Justice Mead on remand adhered to the narrow grounds of Justice Alexander's concurring opinion.

Despite the concurrence's saving construction of section 2857, the issue that Dr. Hawthorne raised in *Smith II*—whether a doctor can refuse to submit all unanimous findings when the panel unanimously found that there was either no causation or no breach of duty—essentially blindsided the *Smith I* court. Neither the majority nor concurring opinions in *Smith I* anticipated the evidentiary or constitutional implications of a situation in which the doctor refuses to submit all unanimous panel findings, despite the fact that at least one of these findings was favorable to his or her case.

#### IV. *SMITH V. HAWTHORNE II*: THE CONSTITUTIONALITY OF PROCEDURAL ASYMMETRY

##### A. *Proceedings on Remand to the Superior Court*

In March of 2006—after the Law Court rendered its decision in *Smith I*—Dr. Hawthorne filed a motion *in limine* on remand to the superior court.<sup>102</sup> In this motion, Dr. Hawthorne first requested that the jury not be advised of the panel's finding with respect to the claimed breach of duty, because she did not intend to introduce the panel's finding of proximate cause that was adverse to the Smiths.<sup>103</sup> The motion also requested that the jury should be advised that the panel unanimously decided that Dr. Hawthorne was not negligent with respect to the alleged breaches that were unrelated to the osteomyelitis at the fracture site.<sup>104</sup> The Smiths filed a memorandum in opposition to Dr. Hawthorne's motion, reiterating the central point of Justice Alexander's concurrence: "if either party wishes to offer the answers to one or more of the unanimous findings of the panel, either all should be admitted or none should be admitted."<sup>105</sup>

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101. *Id.* ¶ 35, 892 A.2d at 441 (Alexander, J., concurring).

102. Appendix at 17, *Smith II*, 2007 ME 72, 924 A.2d 1051 (Han-06-356).

103. *Id.*

104. *Id.*

105. *Id.* at 35 (citing *Smith I*, 2006 ME 19, ¶ 35, 892 A.2d at 441 (Alexander, J., concurring)).

In response to these motions, Justice Mead made an advisory ruling in which he allowed all of the panel's findings to come in; however, he gave both parties an opportunity to present their arguments at a hearing on May 8, 2006.<sup>106</sup> After hearing these arguments, Justice Mead affirmed his advisory ruling:

So I'm going to stand by my earlier ruling, and we'll allow the findings, if you still are committed that you want to do this, allow them to go in. Neither party has the power to make it happen, but I think, in the current configuration, the defendant is saying we don't want them. If you say they go, they go.<sup>107</sup>

Mr. Greif, "cognizant this could be the briar patch gambit," requested that all of the findings of the screening panel be admitted.<sup>108</sup> Justice Mead warned Mr. Greif that this could be a double-edged sword, but Mr. Greif nevertheless decided to offer all of the findings.<sup>109</sup> After both sides rested, the jury returned a verdict of \$120,000 for James Smith and \$20,000 for Sheryl Smith plus interest and costs.<sup>110</sup> Dr. Hawthorne appealed the verdict to the Law Court, contending that as the prevailing party at the screening panel stage, she should have the ability to decide whether or not to submit these findings.<sup>111</sup>

#### B. Oral Arguments Before the Law Court

Appearing before the Law Court for the third time in this case, Attorney Schelling argued that Justice Mead erred on remand, and that the correct decision would have been to permit Dr. Hawthorne—as the prevailing party at the screening panel stage—to make the decision concerning admissibility of all the unanimous panel findings.<sup>112</sup> Mr. Schelling's central point was that the evidentiary issue presented in this case did not implicate any of the constitutional questions decided in *Smith I*, and therefore the court should interpret *Smith I* as narrowly as possible in order to preserve the statutory scheme and legislative intent.<sup>113</sup> He attacked the plaintiff's argument, that no party owns the evidence of the screening panel findings, as being "too simplistic."<sup>114</sup> In

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106. *Id.* at 37-38.

107. *Id.* at 42.

108. *Id.*

109. *Id.* at 42-43.

110. *Id.* at 70.

111. Brief of Appellant at 6, *Smith II*, 2007 ME 72, 924 A.2d 1051 (Han-06-356). Dr. Hawthorne argued that allowing the doctor to control admissibility fulfills the legislative intent of the MHSA:

If the prevailing party is not allowed to make the decision as to whether the panel findings are to be admitted, the stated purpose of the MHSA would be frustrated as the admission of "split" findings by the panel to a jury does not expedite the resolution of medical liability claims, does not provide additional helpful information to the jury and has the capacity, especially as shown in the case at bar, to both confuse the jury and allow unnecessary and undue emphasis to be placed on the findings of the panel.

*Id.*

112. Oral Arguments, *Smith II*, *supra* note 37.

113. *Id.* ("The majority as I see it said we will not enforce an interpretation of section 2857 that allows one decision to come in but not the other, but it did not say that the constitution requires the admission of both. That admission issue is not of constitutional dimension; it's an evidentiary issue.")

114. *Id.* Mr. Schelling argued that "[n]o evidence is inherently admissible. Admissible evidence is what the legislature decrees to be admissible." *Id.*

response to the question as to whether either party would be obligated to submit favorable findings, Mr. Schelling responded that it should be up to the party who prevailed at the panel stage.<sup>115</sup> Justice Alexander attacked the notion that a doctor could be considered to prevail in the case of mixed panel findings, and insisted that what Dr. Hawthorne was seeking in this case is a “veto power” over a panel finding of negligence.<sup>116</sup>

Attorney Greif argued that the court should not encourage a system of procedural asymmetry, in which the lawyer, and not the trial judge, determines the admissibility of evidence.<sup>117</sup> Chief Justice Saufley first asked Mr. Greif to respond to the argument that in order for the plaintiff to submit the findings, they would have to be findings that permit liability determinations.<sup>118</sup> Mr. Greif responded that the plain language of the statute did not invite such a reading.<sup>119</sup> Justice Calkins and Chief Justice Saufley refuted this proposition by citing section 2858’s provision that the claimant “must release the claim or claims . . . or be subject to the admissibility of the findings.”<sup>120</sup> Mr. Greif responded that section 2858 “no longer even makes sense as it is drafted” because it was never amended to reflect the changes to 2857.<sup>121</sup> Justice Calkins then suggested that—regardless of this discrepancy—the legislative intent behind section 2858 is clear:

Justice Calkins: Except that it’s still there, and there’s no constitutional claim as I understand it, and it says ‘subject to.’ What else does that mean other than that the defendant is in the driver’s seat if it gets the answer that it wants on one of those two questions?

Mr. Greif: Well I am making a constitutional argument, simply because *Smith I* says that you cannot have a procedural asymmetry . . .

Chief Justice Saufley: But you wouldn’t, you would simply have the defendant saying: “I got one finding unanimously favorable; I elect not to offer.” And at that point, nothing goes to the jury, and it is a traditional jury trial without the

115. *Id.*

116. *Id.* The following exchange with Justice Alexander illustrates the complexity associated with determining which party prevailed when the panel’s findings are mixed:

Justice Alexander: The legislature intended that a negligent doctor have veto power over whether the finding of the doctor was negligence [sic] goes to the jury. That’s what you’re saying, correct?

Mr. Schelling: No . . .

Justice Alexander: Yes it is.

Mr. Schelling: We don’t have a negligent doctor here. We have a doctor who breached the standard of care . . .

Justice Alexander: The panel found the doctor negligent.

Mr. Schelling: They found that she breached the standard of care. Negligence is a combination of breach of the standard of care and causation.

*Id.*

117. *Id.*

118. *Id.* By “liability determinations,” Chief Justice Saufley is referring to unanimous findings favorable to the claimant as to the questions of breach of standard of care *and* causation.

119. *Id.*

120. *Id.* (quoting ME. REV. STAT. ANN. tit. 24, § 2858 (West 2000)).

121. *Id.*

complication of the panel findings. There's nothing asymmetrical about that at all, and in fact is frequently wished for by claimants in these matters.<sup>122</sup>

When Justice Levy asked about the source of the ambiguity in paragraph C, Mr. Greif responded that the "only way this court found to resolve that ambiguity constitutionally is to say that the jury must be told the whole truth."<sup>123</sup> Justice Levy and Chief Justice Saufley quickly dismissed this interpretation, and stated that the evidentiary issue raised here was never addressed in *Smith I*.<sup>124</sup> Although Mr. Greif maintained that the court has to "look to the constitution first and foremost" before inquiring into legislative intent, Justice Calkins revealed that Mr. Greif's argument is more closely tied to Maine Rule of Evidence 501<sup>125</sup> than to a specific constitutional provision.<sup>126</sup>

### C. The Decision

In a 4-2 majority opinion authored by Justice Calkins and joined by Justices Clifford, Levy, and Chief Justice Saufley, the Law Court held that no provision of the MHSA "requires that all of the panel's findings be presented to the jury when the unanimous panel is split between negligence and causation and the practitioner objects."<sup>127</sup> The court rejected the Smiths' argument that *Smith I* requires all unanimous findings to be submitted to the jury, and limited the holding of *Smith I* to the conclusion that "if one finding is admitted, both must be admitted so that the jury's fact-finding role will not be distorted."<sup>128</sup> In its analysis of the MHSA, the court found that the 'subject to' language in section 2858(2) gives the defendant practitioner the

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122. *Id.*

123. *Id.*

124. *Id.* After Mr. Greif offered this interpretation of the majority's holding in *Smith I*, Chief Justice Saufley and Justice Levy responded as follows:

Chief Justice Saufley: No, no.

Justice Levy: The court didn't resolve the ambiguity constitutionally, the court resolved the constitutional problem of asymmetrical findings, but it didn't construe the statute as you propose. And isn't Mr. Schelling's point that if in fact it is ambiguous you have to look to legislative intent? Isn't that how this case gets decided?

*Id.*

125. Maine Rule of Evidence 501 states in pertinent part that "[e]xcept as otherwise provided by Constitution or statute or by these or other rules promulgated by the Supreme Judicial Court of this state no person has a privilege to . . . [r]efuse to disclose any matter." ME. R. EVID. 501.

126. Oral Arguments, *Smith II*, *supra* note 37. The following exchange illustrates the court's reaction to Mr. Greif's constitutional challenges in *Smith II*:

Justice Calkins: If nothing comes in with respect to the panel, there is no constitutional problem, is there?

Mr. Greif: My problem is that you have a general rule of privilege which is that no party has the right to prevent another party from offering evidence. I have a statute that says these findings are admissible.

Chief Justice Saufley: Not if we interpret the statute to say they don't come in under these circumstances, then it is simply not evidence that gets presented to the jury; the same as if the findings were not unanimous, it simply does not get to the jury. It is a completely different constitutional question than the asymmetry looked at by the court in *Smith I*.

*Id.*

127. *Smith II*, 2007 ME 72, ¶ 10, 924 A.2d 1051, 1053.

128. *Id.* ¶ 10, 924 A.2d at 1054.

choice “whether to make the claimant ‘subject to’ the findings” when one of the questions is answered favorably to the defendant.<sup>129</sup> The court also noted that this interpretation of the MHSA is consistent with the rationale behind the establishment of the prelitigation screening panel process to “identify claims of professional negligence which merit compensation and to encourage early resolution of those claims prior to the commencement of a lawsuit; and . . . to encourage early withdrawal or dismissal of nonmeritorious claims.”<sup>130</sup>

In a concurring opinion joined by Justice Clifford, Chief Justice Saufley wrote separately to express the opinion that prelitigation screening panels have “become a cumbersome process with unpredictable results that costs both plaintiffs and defendants money and time in a way that was not intended by the Legislature.”<sup>131</sup> Chief Justice Saufley focused on the fact that “[b]y the time the parties began the trial process, the panel proceedings had already consumed more than a year and a significant amount of the parties’ resources.”<sup>132</sup> Furthermore, the “extensive litigation in this case, which has now consumed eight years of the parties’ lives,” reflects how the Law Court’s “varying interpretations of the statute have undermined predictability in the statute’s application.”<sup>133</sup> Chief Justice Saufley concluded her concurring opinion by suggesting that the legislature reevaluate the “current efficacy” of the MHSA’s screening panel provisions as they have been “interpreted, amended, augmented, and implemented since their enactment,”<sup>134</sup> stating specifically that “it does appear that the process no longer reflects the original legislative intent, that it has become costly and cumbersome, and that the people of this state would benefit from a legislative evaluation of the medical malpractice screening panel system created by the [MHSA].”<sup>135</sup>

Justice Levy wrote separately to address the dissenting justices’ contention that a finding for Dr. Hawthorne in this case is inconsistent with the court’s holding in *Smith I*, and to distinguish the constitutional issue before the court in that case with the question of “whether a plaintiff has the right to admit the panel findings into evidence in a split-findings case over the objection of the defendant” raised in *Smith II*.<sup>136</sup> Justice Levy specifically challenged the dissent’s conclusion that “nowhere in the law” is there a limitation on the admission of split panel findings by citing the “subject to” language of section 2858(2), and rejected the contention that the court’s construction of this statute raises a constitutional problem when construed in a manner consistent with a “legitimate state end.”<sup>137</sup>

In a dissenting opinion joined by Justice Silver, Justice Alexander argued that the court’s conclusion that unanimous findings under section 2857(1)(c) are admissible only with the doctor’s consent “is found nowhere in the law” and “violates the

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129. *Id.* ¶ 11, 924 A.2d at 1054.

130. *Id.* ¶ 12, 924 A.2d at 1054-55 (quoting ME. REV. STAT. ANN. tit. 24, § 2851(1) (West 2000)).

131. *Id.* ¶ 15, 924 A.2d at 1055 (Saufley, C.J., concurring).

132. *Id.* ¶ 16, 924 A.2d at 1055.

133. *Id.* ¶ 21, 924 A.2d at 1056.

134. *Id.* ¶ 22, 924 A.2d at 1056.

135. *Id.* ¶ 22, 924 A.2d at 1057.

136. *Id.* ¶¶ 23, 25, 924 A.2d at 1057 (Levy, J., concurring).

137. *Id.* ¶¶ 26-28, 924 A.2d at 1057-58.

principle of fundamental fairness.”<sup>138</sup> Justice Alexander stated that “[g]iving the defendant doctor sole power to render the panel proceedings a nullity and prevent admission of unanimous panel findings is contrary to the legislative purpose of the Health Security Act.”<sup>139</sup> After disagreeing with the majority’s finding that section 2857(1)(c) contains language that “authorize[s] defendants to decide if split unanimous findings shall be admitted,” Justice Alexander found that the trial court on remand after *Smith I* reasonably determined that both findings were admissible, and that the “most reasonable, plain-meaning interpretation” of section 2157(1)(c) “does not discriminate as to who can move the admission of split, unanimous findings” and “avoids any constitutional problem.”<sup>140</sup>

#### V. HOW THE LAW COURT SHOULD HAVE DECIDED *SMITH V. HAWTHORNE II*

In deciding *Smith II*, the Law Court should have extended the same approach to protecting the jury’s right to meaningful information concerning the screening panel process that it applied in *Smith I*. By allowing the doctor to determine if split panel findings are presented to the jury, the court introduced an unjust and unpredictable evidentiary privilege that allows the doctor—and the doctor alone—to dictate which evidence is and is not admissible. Maine Rule of Evidence 501 states: “[e]xcept as otherwise provided by Constitution or statute or by these or other rules promulgated by the Supreme Judicial Court of this state no person has a privilege to . . . [r]efuse to disclose any matter; or . . . prevent another . . . disclosing any matter or producing any object or writing.”<sup>141</sup> A technically defective statute such as section 2858 should not have the power to supersede this general rule of privilege, regardless of legislative intent.

The plain language of section 2858 indicates that the legislature may have intended to treat the admissibility of panel findings differently for the claimant and doctor:

1. Payment of Claim; Determination of Damages. If the unanimous findings of the panel as to section 2855, subsections 1 and 2 are in the affirmative, the person accused of professional negligence must promptly enter into negotiations to pay the claim or admit liability. If liability is admitted, the claim may be submitted to the panel, upon agreement of the claimant and person accused, for determination of damages. If suit is brought to enforce the claim, *the findings of the panel are admissible as provided in section 2857.*

2. Release of Claim Without Payment. If the unanimous findings of the panel as to either section 2855, subsection 1 or 2, are in the negative, the claimant must release the claim or claims based on the findings without payment *or be subject to the admissibility of those findings under section 2857, subsection 1, paragraph B.*<sup>142</sup>

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138. *Id.* ¶ 36, 924 A.2d at 1059 (Alexander, J., dissenting).

139. *Id.* ¶ 41, 924 A.2d at 1060.

140. *Id.* ¶ 42, 924 A.2d at 1060-61.

141. ME. R. EVID. 501(2)(4).

142. ME. REV. STAT. ANN. tit. 24, § 2858 (West 2000) (emphasis added).

Upon first glance, it may seem as if the legislature's disparate treatment of the findings with respect to the claimant and the doctor should decide the admissibility question in *Smith II*. The statute clearly provides that a claimant who fails to receive a favorable finding as to breach of duty or causation shall be "subject to the admissibility of those findings," whereas the findings "are admissible" if the doctor loses on both points. But as Mr. Greif noted in his arguments to the Law Court, section 2858 "no longer even makes sense as it is drafted."<sup>143</sup> According to the plain language of section 2858, if the findings of the panel are unanimous and *unfavorable* to the claimant, the claimant will be subject to the admissibility of those findings under section 2857, subsection 1, paragraph B, which refers to the situation in which the claimant *prevails* on breach of duty and causation.<sup>144</sup> If section 2858 had been amended to reflect the 1999 amendments to section 2857, one could not assume that the choice of language in subsections 1 and 2—and the correspondingly disparate treatment of the findings' admissibility—was unintentional or carelessly chosen. In light of this legislative oversight, however, all that remains is a reading of sections 2857 and 2858 *in pari materia* that is patently ambiguous.

As the Law Court stated in a footnote in *Irish II*, "[t]he 1999 revision of section 2857(1) . . . may necessitate development of new jurisprudence regarding use of unanimous panel findings."<sup>145</sup> There is no clear way to determine whether the legislature's failure to respond to this call by overlooking section 2858 in its 1999 amendments was simply a technical glitch, or a more fundamental failure to provide a coherent legislative response to the constitutional challenges raised in *Irish I*. Furthermore, it would be an anachronism to apply the legislative intent of section 2858—enacted in 1985—to the interpretation of the post-*Irish I* section 2857—amended in 1999. When section 2858 was originally enacted, the legislature intended that the panel findings under section 2857 be introduced at a subsequent trial "without explanation." After this language was omitted in the wake of the constitutional challenge upheld in *Irish I*, the legislative intent from the 1985 enactment of section 2858 no longer provides any meaningful insight on the interpretation of section 2857.

As Justice Alexander explained in his concurring opinion in *Smith I*, "[w]hen a statute is ambiguous, we must look beyond the words of the statute to construe its meaning, considering the statute's history, underlying policy, our rules of construction, and other extrinsic factors to ascertain legislative intent."<sup>146</sup> There is no clear evidence

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143. Oral Arguments, *Smith II*, *supra* note 37.

144. ME. REV. STAT. ANN. tit. 24, § 2858 (West 2000).

145. *Irish II*, 2000 ME 2, ¶ 6 n.1, 743 A.2d 736, 737 n.1.

146. *Smith I*, 2006 ME 16, ¶ 30, 892 A.2d 433, 440 (Alexander, J., concurring). Admittedly, Justice Alexander did not reach the question of section 2857's ambiguity without first presenting *Rideout*'s deferential standard: "[b]ecause we must assume that the Legislature acted in accord with due process requirements, if we can reasonably interpret a statute as satisfying those constitutional requirements, we must read it in such a way, notwithstanding other possible unconstitutional interpretations of the same statute." *Id.* ¶ 28, 892 A.2d at 440 (quoting *Rideout v. Riendeau*, 2000 ME 198, ¶ 14, 761 A.2d 291, 297-98 (plurality opinion)). However, the well-established assumption of legislative consistency with due process requirements explicated in *Rideout* should not necessarily dictate the constitutionality of a statute that has so often lent itself to unconstitutional applications. If the Law Court has so frequently found constitutional defects in various applications of the statute, and *Rideout*'s deferential standard applies, then one must assume that the legislature envisioned—but never explicated—an application of the statute that

in the history of the MHSA that the legislature intended to provide an evidentiary advantage for the doctor in the event of mixed panel findings.

The legislative history of section 2857 suggests that the type of evidentiary discretion sought by Dr. Hawthorne in this case would produce a procedural advantage for the doctor that the legislature never envisioned. There would have been no need for the legislature to consistently amend, repeal, and fine-tune different versions of section 2857 if the doctor was considered to have the final say as to the admissibility of the panel findings. In the amendments to the 1999 Act to Provide Fairness to Victims of Medical Malpractice,<sup>147</sup> the Senate removed the Judiciary Committee's amendment which stated that "the findings are admissible only against the claimant,"<sup>148</sup> and added what would become paragraph B to provide for the admissibility of panel findings against the doctor.<sup>149</sup> The summary which accompanied these amendments stated that the new version "adds language to retain the admissibility of *all* unanimous panel findings."<sup>150</sup> There is nothing in the legislative history of section 2857 to support the proposition that the party who prevailed at the screening party stage would be able to subsequently control the admissibility of the unanimous findings.

The underlying policy of the MHSA also seems incompatible with the idea that the doctor should dictate admissibility of mixed findings. The express purpose of the screening panel process, as outlined in section 2851, is to "identify claims of professional negligence and to encourage early withdrawal or dismissal of nonmeritorious claims."<sup>151</sup> The legislative history of section 2857 illustrates a consistent attempt to retain the incentive for a claimant to abandon his or her claim when the screening panel has not answered the questions of breach of duty and causation in his or her favor.<sup>152</sup> The Law Court in *Smith II* should have retained the statutorily-prescribed incentive for a claimant to abandon non-meritorious claims by holding that the jury needs to hear all unanimous panel findings upon motion by either party.

Furthermore, the mandatory admission of all unanimous panel findings would create an incentive for abandoning non-meritorious claims that is far stronger than the threat of procedural asymmetry. If it is true that a doctor is considered to prevail at the screening panel stage when the claimant fails to meet his burden of proof as to standard of care and causation, then mandatory admission would simply convey the underlying basis for this no liability finding to a jury. What better incentive would there be for such a plaintiff to abandon his claim if "the findings" in paragraph C was interpreted to include all the findings of the screening panel, or if the legislature amended section

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is consistent with due process requirements. It is unclear how the process of inferring what particular application of the statute is consistent with legislative intent is any different than the process one would apply in interpreting an ambiguous statute.

147. L.D. 1325 (119th Legis. 1999).

148. Comm. Amend. A to L.D. 1325, No. S-352 (119th Legis. 1999).

149. Sen. Amend. A to Comm. Amend. A to L.D. 1325, No. S-381 (119th Legis. 1999).

150. *Id.* (emphasis added).

151. ME. REV. STAT. ANN. tit. 24, § 2851 (West 2000).

152. *See, e.g.*, Sen. Amend. A to Comm. Amend. A to L.D. 1325, No. S-381 (119th Legis. 1999). The Senate amendment's new paragraph B provided for the admissibility of "the findings" against the person accused of professional negligence, and the accompanying summary stated that this change "add[ed] language to retain the admissibility of all panel findings." *Id.*

2857 so as to clarify that all of the panel findings—both unanimous and non-unanimous—are admissible against either party in a subsequent trial?

#### VI. HOW THE MAINE LEGISLATURE SHOULD AMEND SECTIONS 2857 AND 2858

There is no shortage of options facing the Maine Legislature after *Smith I* and *II*. It may decide—on the basis of the majority opinions in *Smith I* and *II*—that section 2857 is not unconstitutional as written, and therefore that the screening panel process as outlined in sections 2851 through 2859 requires no amendments whatsoever. However, even the most deferential reading of these statutes cannot overlook the nonsensical reference in section 2858, subsection 2 to the pre-1999 version of section 2857. At the very least, section 2858, subsection 2 needs to be amended to refer to 2857, subsection 1, paragraph C instead of paragraph B. It is unlikely that this de minimis fine-tuning of the statutory language will be sufficient to remedy the underlying constitutional and evidentiary defects that have been raised in *Smith I* and *II*, or that have yet to be addressed by the Law Court.

The Maine Legislature could choose to amend section 2857 by following the statutory schemes of New Mexico and Montana, which provide that the findings of the screening panel are inadmissible at a subsequent trial.<sup>153</sup> This option, however, seems to undermine the legislative intent explicated in section 2851 to “identify claims of professional negligence which merit compensation . . . and to encourage early withdrawal or dismissal of nonmeritorious claims.”<sup>154</sup> In a jurisdiction where no screening panel findings are admissible, each malpractice claimant would begin each trial with a *tabula rasa*, completely free of any prejudicial effect that the panel findings might have on the jury. The most significant problem with this legislative scheme is that it completely disarms the incentive-creating function of the screening panel. A claimant who has lost on the three issues of breach of duty, causation, and comparative negligence would be free to proceed to trial under the same set of facts, and would face no statutory disincentives for doing so.

A third option would be for the Maine Legislature to adopt the approach of those jurisdictions that allow for the entire screening panel report to be admitted on motion by either party, regardless of who prevailed and whether or not these findings were unanimous. Many other states with similar prelitigation screening panel statutes provide that the entire screening panel report shall be admissible at a later trial. Kansas and Nebraska’s statutes specify that the panel’s report is admissible in any subsequent court action, provided that the report is not conclusive and that any member of the panel can be cross-examined.<sup>155</sup> Delaware’s statute provides that the report of the

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153. MONT. CODE ANN. § 27-6-704(2) (2005) (providing that the decision, reasoning, and basis of the panel’s decision are inadmissible at a subsequent trial); N.M. STAT. ANN. § 41-5-20 (West 2006) (providing that the report of the medical malpractice panel “shall not be admissible as evidence in any action subsequently brought in a court of law”).

154. ME. REV. STAT. ANN. tit. 24, § 2851(1) (West 2000).

155. NEB. REV. STAT. § 44-2844 (2006) (“The report or any minority report of the medical review panel shall be admissible as evidence in any action subsequently brought by the claimant in a court of law, but such report shall not be conclusive and either party shall have the right to call any member of the medical review panel as a witness.”); see also KAN. STAT. ANN. § 65-4904 (2006) (“The written report of the screening panel shall be admissible in any subsequent legal proceeding, and either party may subpoena any and all members of the panel as witnesses for examination relating to the issues at trial.”).

screening panel is admissible as prima facie evidence in a subsequent trial, although the panel is only charged with determining whether there was a breach in the standard of care and not causation.<sup>156</sup> Massachusetts law provides for a mandatory submission of claims to a medical malpractice tribunal and states that “the decision of the tribunal shall be admissible as evidence at a trial,” regardless of the unanimity of the findings or their favorability to either party.<sup>157</sup>

In the case of a doctor who has unanimously prevailed on either the issue of breach of duty or causation, the admission of the entire screening panel report should not have any effect on the legislative intent to create incentives for abandoning non-meritorious claims. After *Smith I*, a doctor is not constitutionally permitted to submit only that question favorable to his or her case; what difference, then, would the admission of the entire report have in a case such as Dr. Hawthorne’s, in which one unanimous finding was favorable to her case, and the other was unfavorable? Amending section 2857 to require that the entire screening panel report be admissible would simply extend the scope of admissibility to include non-unanimous findings, which are not completely devoid of an incentive-creating function.

Section 2857 currently rests on the flawed assumption that disincentives for doctors and claimants need to be generated by manipulating the rules of admissibility so as to favor one party over the other at a subsequent trial. As *Smith I* revealed, however, at least one application of this admissibility disincentive is constitutionally defective. And as *Smith II* reveals, the evidentiary question of which party should control the admissibility of mixed unanimous panel findings is not addressed in section 2857, and can only be answered by attempting to infer legislative intent from an inaccurately drafted section 2858. But manipulating the admissibility of panel findings is not the only way to generate incentives for settlement or abandonment of non-meritorious claims. An equally powerful incentive could be created by requiring the party who unanimously ‘lost’ at the screening panel to pay the other’s reasonable expert and attorneys’ fees at a subsequent trial. Section 2858 could be amended to read:

1. PAYMENT OF CLAIM; DETERMINATION OF DAMAGES. If the unanimous findings of the panel as to section 2855, subsections 1 and 2 are in the affirmative, the person accused of professional negligence must promptly enter into negotiations to

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156. DEL. CODE ANN. tit. 18, § 6811 (2007). The Delaware statute requires that the panel make one or more of the following findings:

- (1) The evidence supports the conclusion that the defendant or defendants failed to comply with the appropriate standard of care;
- (2) The evidence does not support the conclusion that the defendant or defendants failed to meet the applicable standard of care;
- (3) There is a material issue of fact, not requiring expert opinion, bearing on liability for consideration by the Court or jury, which issue of fact shall be identified in the opinion; or
- (4) The conduct complained of was or was not a factor in the resultant damages, and if so, whether the plaintiff suffered:
  - a. Any disability and the extent and duration of the disability; and
  - b. Any permanent impairment and the percentage of the impairment.

*Id.*

157. MASS. GEN. LAWS ANN. ch. 231, § 60B (West 2000 & Supp. 2007).

pay the claim or admit liability. If liability is admitted, the claim may be submitted to the panel, upon agreement of the claimant and person accused, for determination of damages. If suit is brought to enforce the claim and the court finds in favor of the claimant at a subsequent trial, the findings of the panel are admissible as provided in section 2857: court shall assess fees and expenses of counsel and experts for the respective parties, in amounts the court finds equitable, against the person accused of professional negligence. If suit is brought to enforce the claim, and the court finds in favor of the person accused of professional negligence at a subsequent trial, fees and expenses of counsel and experts shall be assessed against the respective parties.

2. RELEASE OF CLAIM WITHOUT PAYMENT. If the unanimous findings of the panel as to either section 2855, subsection 1 or 2, are in the negative, the claimant must release the claim or claims based on the findings without payment or ~~be subject to the admissibility of those findings under section 2857, subsection 1, paragraph B~~ bring suit to enforce the claim. If suit is brought to enforce the claim and the court finds in favor of the person accused of professional negligence at a subsequent trial, the court shall assess fees and expenses of counsel and experts for the respective parties, in amounts the court finds equitable, against the claimant. If suit is brought to enforce the claim, and the court finds in favor of the claimant at a subsequent trial, fees and expenses of counsel and experts shall be assessed against the respective parties.<sup>158</sup>

These amendments would not only provide an independent incentive for settlements and dismissals, but would also supplement the incentives created by the mandatory admission of the entire screening panel report as mandated by the newly-amended subsection 1 of section 2857:

1. PROCEEDINGS BEFORE PANEL CONFIDENTIAL. Except as provided in this section ~~and section 2858~~, all proceedings before the panel, ~~including its final determinations~~, must be treated in every respect as private and confidential by the panel and the parties to the claim.

A. The ~~findings and other~~ writings of the panel other than the malpractice decree mandated by paragraph B of this subsection and any evidence and statements made

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158. See generally ME. REV. STAT. ANN. tit. 13-C, § 1332 (West 2005) (allowing the court to “assess the fees and expenses of counsel and experts for the respective parties, in amounts the court finds equitable” against either a corporation or shareholder in a stock appraisal proceeding); 42 U.S.C. § 1988 (2000) (allowing the court, “in its discretion” and under certain limited circumstances, to allow the prevailing party other than the United States reasonable attorney’s costs and expert fees); FED. R. CIV. P. 68 (“If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.”). The allocation of fees outlined in this proposed amendment is akin to the British Rule, which numerous scholars have championed as a means of encouraging settlements. See, e.g., Jonathan Fischbach & Michael Fischbach, *Rethinking Optimality in Tort-Litigation: The Promise of Reverse Cost-Shifting*, 19 BYU J. PUB. L. 317, 321 (2005) (finding that an ideal fee-shifting rule “would discourage plaintiffs from carrying weak claims to a jury” and “would reduce the potential for irrational jury verdicts or excessive awards by imposing substantial financial risk on parties who decline to settle their cases before judgment”); Bradley L. Smith, Note, *Three Attorney Fee-Shifting Rules and Contingency Fees: Their Impact on Settlement Incentives*, 90 MICH. L. REV. 2154, 2186 (1992) (finding that the cost of cases tried under the British Rule tend to be more expensive, and that these higher costs “will usually foster settlement despite the inhibitory impact of legal costs ‘discounted’ due to the probability of fee recovery if successful”).

by a party or a party's representative during a panel hearing are not admissible and may not otherwise be submitted or used for any purpose in a subsequent court action and may not be publicly disclosed, except that:

1. Any testimony or writings made under oath may be used in subsequent proceedings for purposes of impeachment; and
2. The party who made the statement or presented the evidence may agree to the submission, use or disclosure of that statement or evidence.

~~B. If the panel findings as to both the questions under section 2855, subsection 1, paragraphs A and B are unanimous and unfavorable to the person accused of professional negligence, the findings are admissible in any subsequent court action for professional negligence against that person by the claimant based on the same set of facts upon which the notice of claim was filed.~~

B. The panel shall summarize its findings as to the questions under section 2855, subsection 1, paragraphs A, B, and C in a malpractice decree, which shall be admissible upon motion by either party in any subsequent court action for professional negligence based on the same set of facts upon which the notice of claim was filed. The malpractice decree shall be admissible in its entirety without regard to the unanimity of the panel's findings as to any question or questions under section 2855, subsection 1, paragraphs A, B, and C. The malpractice decree shall not be conclusive evidence of liability or the lack thereof.

~~C. If the panel findings as to any question under section 2855 are unanimous and unfavorable to the claimant, the findings are admissible in any subsequent court action for professional negligence against the person accused of professional negligence by the claimant based on the same set of facts upon which the notice of claim was filed.~~

C. No panel member may be asked or compelled to testify at a subsequent court action concerning the deliberations, discussions, findings, or expert testimony or opinions expressed during the panel hearing.

The confidentiality provisions of this section do not apply if the findings were influenced by fraud.

While this newly amended version of section 2857 undoubtedly limits the scope of the confidentiality provisions currently in force, it does not entirely invalidate them. The deliberations of the panel will still be kept confidential; it is only the panel's malpractice decree that will become admissible at a later trial. Neither party will be allowed to call any panel member to the stand, although this statute would leave the door open for the calling of expert witnesses who may have testified before the panel. The confidentiality provisions of section 2857 have already been substantially weakened by the court's holding in *Smith I*; no longer can all the findings of the panel be kept confidential except for the one finding favorable to the doctor. In light of the constitutional defect of this interpretation revealed by *Smith I*, what more would this amended version of section 2857 do other than expand the scope of admissibility at a subsequent trial to include non-unanimous findings?

As it is currently drafted, section 2857 relies on the misconception that only unanimous panel findings are effective in creating disincentives for the pursuit of non-meritorious claims. Although neither *Smith I* nor *Smith II* addressed the admissibility of non-unanimous findings, the Law Court will inevitably face a variety of appeals from superior court decisions that refused to allow non-unanimous findings in favor of either party before the jury. The iterations of potential constitutional challenges to these admissions decisions are almost overwhelming in scope. If, for example, a panel found 2 to 1 in favor of the claimant on breach of duty and causation, and 3 to 0 in favor of the doctor on comparative negligence, the plain language of section 2857 seems to suggest that none of these findings will be admissible.<sup>159</sup> If a doctor prevails 2-1 on breach of duty, causation, and comparative negligence, what current statutory mechanism exists for getting those findings before a jury? The disincentives that are generated in these cases are inconsistent with the legislative intent to convey the panel's underlying findings to the jury so as to promote settlements and dismissals prior to trial.

Permitting the admissibility of the entire malpractice decree would allow the findings to speak for themselves and generate their own incentives for abandoning a non-meritorious claim or defense. The legislature could simultaneously distance itself from the constitutional and evidentiary challenges raised in *Smith I* and *II*, and create an evidentiary approach to the admissibility of panel findings upon which the courts and both sides of the Maine bar could consistently rely.

## VII. CONCLUSION

In the midst of a nationwide malpractice crisis in the 1970s, the Pomeroy Commission recommended that voluntary professional malpractice advisory panels be established in order to “(1) prevent, where possible, the filing of court actions against physicians for professional malpractice in situations where the facts do not allow at least a reasonable inference of malpractice[, and] (2) to make possible the fair and equitable disposition of such claims against physicians as are, or reasonably may be, well founded.”<sup>160</sup> The legislature embraced these underlying purposes, and the efficacy of this voluntary system in mitigating the effects of Maine's malpractice crisis eventually led to the enactment of a mandatory prelitigation screening panel process.

It soon became clear that in adopting this mandatory screening panel process, the legislature may not have anticipated section 2857's vulnerability to various constitutional challenges. In *Irish I*, the Law Court held that section 2857's “without comment” provision violated the claimant's right to a jury trial by depriving the fact-finder of information necessary to render a fair verdict. The legislature responded by removing the “without comment” provisions, but this amendment was insufficient to forestall further constitutional challenges. In *Smith I*, a malpractice claimant challenged an application of section 2857 which allowed the doctor to submit only the one unanimous finding favorable to his or her case when there was also a unanimous

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159. Note that section 2857 as currently drafted provides no mechanism for the admissibility of a unanimous finding in favor of the claimant in this particular case, or when either the question of breach of duty or causation is answered in favor of the doctor. See ME. REV. STAT. ANN. tit. 24, § 2857 (West 2000).

160. *Pomeroy Report*, *supra* note 17, at 24.

unfavorable finding. The Law Court agreed that the application of the statute in this case denied the Smiths their right to a jury trial under the Maine Constitution, but refused to hold that the statute is per se unconstitutional.

In *Smith II*, Dr. Hawthorne asserted that the party who prevailed at the panel stage with respect to his or her particular burden of proof should be able to control the admissibility of the panel's findings at a subsequent trial. By inferring legislative intent from the "subject to" language in section 2858(2), a majority of the Law Court held that the doctor should control the admissibility of mixed panel findings when one question has been answered favorably to the defendant. However, the question remains whether section 2858, which was never amended to reflect the legislature's 1999 changes to section 2857, should be dispositive of any question relating to legislative intent when so much of this intent was declared constitutionally deficient in *Irish I*. Although the questions raised in *Smith II* are not of the same constitutional dimension as in *Smith I*, the Law Court should nevertheless have extended the same protections of the jury's right to meaningful information that it applied in *Smith I*.

In order to remedy the current defects of section 2857, the Maine Legislature must first abandon the misconception that non-unanimous panel findings would be ineffective in generating incentives for settlement or the abandonment of non-meritorious claims. It must then consider the possibility of adding supplemental incentives in the form of an award of reasonable expert and attorneys' fees, assessed against the party who unanimously lost at the screening panel and then loses again at a subsequent trial. The threat of these fees in conjunction with the admissibility of the entire malpractice decree should be more than sufficient in deterring the pursuit of a claim or a defense that the panel unanimously finds to have no merit. In the situation where the panel's finding was not unanimous on all questions, it can be argued that this is not really a conclusive statement by the panel one way or the other, and that one of the parties has at least raised a question that merits litigation before a court of competent jurisdiction. A panel finding of 2 to 1 as to any question under section 2858 would simply be a statement that more fact-finding is necessary to make a conclusive determination, which is not inconsistent with the overarching purpose of the screening panel process to promote pretrial settlements and dismissals.

The Law Court may have to this point been able to salvage a narrow constitutional application of sections 2857 and 2858, but it is unlikely that the current version of these statutes will be able to withstand any further constitutional challenges. The legislature can help to streamline medical malpractice litigation in Maine by codifying a consistent and predictable evidentiary rule that would allow for the admissibility of the entire screening panel malpractice decree and the assessment of reasonable expert and attorneys' fees against the party who unanimously loses at the screening panel stage, refuses to abandon his claim, and then loses at a subsequent trial. Minor, non-intrusive amendments may provide temporary relief, but until the legislature reappraises the basic assumptions underlying sections 2857 and 2858, the constitutional infirmity of admissibility-oriented disincentives will remain a problem long after *Smith I* and *II* have been forgotten.