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BILL ANALYSIS

Senate Fiscal Agency

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Senate Bill 910 (Substitute S-1 as passed by the Senate)

Sponsor: Senator John J. H. Schwarz, M.D.

Committee: Health Policy

Date Completed: 10-8-90

RATIONALE

A crisis in emergency medical care exists in Michigan, according to some observers, with hospitals either temporarily or permanently closing their emergency rooms. This situation is believed to result, in part, from an unwillingness of some physicians--especially specialists--and other health care personnel, who fear liability, to come to emergency rooms to provide service. Some people believe that if health professionals, who in good faith render emergency care or treatment, were granted immunity, there would be a greater willingness on their part to service emergency room calls.

CONTENT

The bill would amend the good samaritan Act to establish immunity for a hospital and a "health professional" employed by or under contract to that hospital who in good faith rendered emergency care or treatment until a voluntary health professional-patient relationship was established; provide that a patient and a health professional would be considered to have knowingly entered into a voluntary health professional-patient relationship and the patient would be considered no longer to be receiving medical care or treatment as an emergency patient when the health professional and patient entered into a written agreement, as described in the bill; require that the agreement be offered as soon as possible after the patient no longer needed to be treated as an emergency patient or within 12 hours after the patient entered the hospital, whichever was sooner; require hospitals to post a notice, as described in

the bill, on an emergency patient's limited right to sue for damages; require a hospital that advertises its services to place conspicuously in the advertisement the language of the notice; and, prohibit a limit on liability if a health professional-patient relationship existed before medical care was rendered.

Immunity

Under the bill, a health professional employed by, under contract to, or otherwise authorized by a hospital to work or practice in the hospital, who in good faith rendered emergency medical care, emergency medical treatment, or emergency medical direction to a patient within the hospital and the hospital in which the emergency or subsequent medical care, treatment, or direction was rendered, would not be liable for civil damages as a result of an act or omission in the rendering of the medical care, treatment, or direction except for gross negligence or willful and wanton misconduct. The emergency medical care, treatment, or direction to a patient would include, but not be limited to, obstetrical care rendered to a woman who was in active labor and subsequent medical care, treatment, or direction until the patient and health professional knowingly consented to a voluntary health professional-patient relationship and the patient no longer was receiving medical care, treatment, or direction as an emergency patient, as determined under the bill.

"Health professional" would mean a physician, dentist, podiatrist, intern, resident, physician's assistant, registered professional nurse, licensed

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practical nurse, physical therapist, clinical laboratory technologist, respiratory therapist, certified registered nurse anesthetist, x-ray technician, ambulance attendant, emergency medical technician, emergency medical technician specialist, or advanced emergency medical technician.

Written Agreement

The bill specifies that a patient and a health professional would be considered to have knowingly entered into a voluntary health professional-patient relationship and the patient would be considered no longer to be receiving medical care, treatment, or direction as an emergency patient when both the health professional and the patient or the patient's representative voluntarily entered into a written agreement. The agreement would have to state that the health professional and the patient knowingly consented to a voluntary health professional-patient relationship and that, in the professional opinion of the health professional or the attending physician and as understood by the patient or the patient's representative, the patient no longer was receiving care as an emergency patient. The agreement would have to be offered by the health professional as soon as possible after, in the professional opinion of the health professional or the attending physician, the patient no longer needed to be treated as an emergency patient or within 12 hours after the patient entered the hospital, whichever was sooner.

Notice

As a condition precedent to the limitation on liability granted under the bill, each hospital in the State would have to post a notice in the patient waiting and admission areas of the hospital. The notice would have to inform emergency patients of their limited right to sue for damages, and be in the form described in the bill.

As a condition precedent to the limitation on liability granted under the bill, a hospital that advertised its services to the public would have to include in the advertisement the language of the notice, which would have to be placed conspicuously in the advertisement and printed so that it was readable in contrast with surrounding material in the advertisement.

("Condition precedent" is not defined in the bill, but the term usually refers to a condition that must happen or be performed before an agreement is effective or binding.)

Liability Limitation

The Act currently provides that in instances in which the actual hospital duty of a person did not require a response to an emergency situation, certain medical professionals, as listed in the Act, who respond in good faith to a life-threatening emergency or to a request for emergency assistance within a hospital or other licensed medical care facility are not liable for civil damages as a result of an act or omission in rendering the emergency care, except for gross negligence and willful and wanton misconduct. The Act also specifies that the exemption from liability does not apply to a physician or to a licensed nurse in cases in which a physician-patient or nurse-patient relationship existed before the emergency.

The bill would revise these provisions to include within the limitation of liability a health professional employed by, or under contract to a hospital, and to specify that the limitation on liability would not apply to a health professional if a health professional-patient relationship existed before the emergency medical care was rendered. The bill also would delete references to hospital and specific medical professionals and replace them with references to a "licensed health facility" and "health professional", respectively. "Licensed health facility" would mean a health facility or agency licensed under the facilities and agencies article of the Public Health Code, such as a hospital, health maintenance organization, home for the aged, nursing home, and county medical care facility.

MCL 691.1502

FISCAL IMPACT

The bill would have no fiscal impact on State or local government.

ARGUMENTS

Supporting Argument

According to a 1988 study issued by the Michigan State Medical Society, medical malpractice insurance rates in Michigan are the

highest among the Great Lakes states. In fact, doctors in Michigan pay insurance rates that are three to five times higher than rates paid by doctors in Indiana, the study revealed. These high insurance rates coupled with high probabilities of being sued and physicians' fears of liability are contributing factors to what some people see as a crisis in Michigan's emergency medical care services. Many physicians, especially those who possess certain medical specialties, are not responding to emergency room calls due to fears of being sued by the patients. These concerns are well-founded, as evidenced by the observation made by some hospital administrators from across the State, that lawsuits stemming from their hospitals' emergency room services far exceed lawsuits resulting from other activities offered in the hospital continuum of services. Senate Bill 910 (S-1) would be a step in the right direction to help alleviate the State's liability crisis, which is having an adverse effect on the type of medical care made available in the State.

Response: There is some doubt as to whether there, indeed, is a medical malpractice crisis in the State. According to the Michigan Trial Lawyers Association, of all the malpractice lawsuits that have occurred in Michigan from 1983 to 1989, only 6.9% reportedly stemmed from an emergency room situation. Furthermore, approximately 100 lawsuits against hospital emergency room physicians were filed in the State between 1988 and 1989. Considering that in the Detroit metropolitan area some emergency rooms of large hospitals are in contact with 100 patients per day, the fact that 100 lawsuits against emergency rooms were filed in one year for the entire State is not dramatic.

Supporting Argument

Medical personnel who work in emergency room settings often face less than ideal conditions when treating a patient. Most of the time, the patient has had no prior contact with the emergency room staff. The medical personnel must try to help the patient, while having little or no knowledge of the patient's medical history. This situation is complicated further by the patient's condition at the time he or she arrives at the emergency room. Sometimes the patient may be badly injured, comatose, or even abusive. This only contributes to the difficulties that emergency room physicians must deal with in making a diagnosis and determining a course of

treatment. Although the physicians and staff try to do their best under these circumstances, they often are vulnerable to being sued by the patient. As a result, hospitals have had problems in getting members of their medical staff to cover the emergency room call list. While a hospital's bylaws may state that physicians on staff at the hospital should cover the emergency room, many doctors choose not to go to the emergency room when summoned because of the likelihood that they will be sued by the patient. Furthermore, since hospitals cannot force these physicians to attend to emergency room cases, some hospitals have closed their emergency room doors due to a lack of staff. Concern about being sued and the cost of liability insurance has increased, especially for physicians who are trained in high-risk specialties. In response, many doctors have elected to drop their liability insurance or have not answered emergency room calls because they have been told by their insurance carrier that to do so could result in a loss of insurance coverage. Similar circumstances existed in Florida a few years ago, which led that state to enact legislation similar to Senate Bill 910 (S-1).

Opposing Argument

Current Michigan law already holds any physician liable only for what the "average" physician would know under similar circumstances. Thus, the average emergency room physician's knowledge, background, training, and certification make up the standard against which emergency room physicians are judged in a malpractice lawsuit; they are not held to an extraordinary standard of care. Under Senate Bill 910 (S-1), however, physicians and certain other health professionals would not be liable for civil damages as a result of an act or omission in the rendering of emergency or subsequent medical care, treatment, or direction except for gross negligence or willful and wanton misconduct. This means that physicians no longer would be required to do what was reasonable under the circumstances, and that emergency room personnel no longer would have any realistic standard of care that they owed the patient who entered the emergency room. The effect of this provision would be to reward incompetence and remove accountability from the medical system in this State.

Opposing Argument

According to some estimates, there are more than 1 million people in the State who are not covered by health insurance. These people must rely on hospital emergency rooms as their primary source of medical care. If Senate Bill 910 (S-1) were enacted, many indigent people would not be able to seek relief from a negligent situation that occurred in an emergency room, except in cases of gross negligence. Furthermore, the bill could be viewed as an initial step toward granting immunity to any physician or medical personnel who treats the indigent. If there are problems with the medical malpractice insurance industry in the State, then the industry should be investigated. The solution to a malpractice problem, however, is not to take from emergency room patients, especially the poor who rely on hospital emergency rooms for their health care, the ability to seek redress for inadequate medical care.

Response: On the contrary, the bill could ensure that indigent persons had access to medical care through emergency rooms. If the medical system is not available to the poor because hospitals now are closing emergency rooms out of fear of being sued over care rendered in those emergency rooms, that access to medical care for the poor no longer will be available.

Opposing Argument

The bill proposes a fundamental change in the good samaritan Act, which was designed to encourage competent volunteers to offer assistance without the fear of being sued. Immunity granted under the Act is appropriate when doctors have been asked to help out in emergency situations, such as at the scene of an accident. The bill inappropriately would extend the immunity to people and institutions that are in the business of providing emergency care. Emergency health services are a thriving business in the State. Ready care and trauma clinics are opening across the State and are soliciting business. In addition, some physicians are trained as specialists in providing emergency care. In fact, physicians who specialize in emergency care can be certified in this specialty, much like physicians are certified in other medical specialties. These physicians are trained to work in emergency rooms, and are used to staff these facilities. Other physicians who work in emergency rooms are considered

"moonlighters" who do so at their own discretion in order to supplement their income. It is not clear why professional emergency care providers should be immunized from lawsuits in the same way as persons who volunteer their services in emergency situations.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.