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Effort to Exempt ER Care From Liability Stirs Debate

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A bill that would grant immunity from malpractice liability for emergency health care services has cleared committee in the state House of Representatives, opening up discussions over the reach of the proposed amendment, its possible effect on patient care and what it would mean for potential litigants.

Plaintiffs and defense counsel expressed starkly different views of HB 1064, which was reported out of the insurance committee May 17 and now awaits a full House vote. Alternatively viewed as a dangerous and devastating bill or one with a fair and finite purpose, it would amend the Medical Care Availability and Reduction of Error Act to exempt from liability any emergency health care providers who could not reasonably obtain a patient's medical history at the time of care, unless "clear and convincing evidence" shows them to be grossly negligent. The bill would raise the standard to prove malpractice by ER physicians from the current requirement of a "preponderance of the evidence."

Plaintiffs attorney Thomas J. Duffy of Duffy + Partners, who testified before the insurance committee regarding HB 1064, said immunizing emergency workers from liability could lead hospitals to loosen their standards, understaff emergency rooms without fear of reprisal and allow doctors not certified for emergency care to begin providing it.

"It would be one of the worst results for patient safety that could ever happen in the commonwealth of Pennsylvania," Duffy said.

In Philadelphia, home to sizable teaching hospitals with inexperienced doctors sometimes in emergency rooms, the results would be bad, Duffy said, but in rural hospitals often staffed by physician service companies, the effects would be even worse. Knowing that they will be held accountable for errors keeps hospitals acting in the best interests of patients, and removing any level of accountability would damage care, he said.

John Gismondi, who represents medical malpractice and personal injury plaintiffs, said the bill would carve out special treatment for "a group that doesn't need it." He said it would be a "devastating" bill for patients, who would have their rights restricted as malpractice claims would be turned away at the courthouse door.

"Why would we be giving special treatment to those rendering emergency care?" Gismondi asked.

But defense attorneys took a much softer view of HB 1064, lauding its attempt to provide additional protections to doctors facing the intense pressures of emergency treatment. Gary Samms, chair of Obermayer Rebmann Maxwell & Hippel's professional liability practice group, said the amendment would allow doctors to get patients the best treatment without hesitation brought on by concerns about their inability to get a complete medical history.

Stephen Ryan, who handles medical malpractice defense at Marshall Dennehey Warner Coleman & Goggin, said the bill would affect a relatively small number of patients because doctors typically have some way to access medical records, or a family member is at the hospital to provide any necessary information that would alter a patient's care. The impact on malpractice litigation, therefore, would be limited, but the bill would provide appropriate lenience to emergency workers faced with critical decision-making, he said.

"It's just a recognition that sometimes you're flying blind and it's not fair to impose liability on a doctor who's got one hand tied behind his back," Ryan said.

Samms estimated that the bill would affect a very small number of cases—perhaps less than 2 percent—because it would only exempt from liability emergency care in which providers lack complete medical records. As state Rep. Eli Evankovich, R-Allegheny, the bill's primary sponsor, noted in a memo regarding the bill, it is targeted at doctors making decisions without knowledge of medical issues such as a patient's diabetes, serious allergies to medication or pre-existing heart condition.

Joseph L. Messa Jr. of Messa & Associates, president of the Philadelphia Trial Lawyers Association, said changing the law so emergency physicians cannot be held accountable for their errors would put patients at risk of more significant and more frequent injuries. He also questioned how far the bill could be extended if enacted into law. He said he worries that the principles of the bill would be expanded into scenarios beyond its text, possibly allowing an obstetrician or family doctor meeting a patient for the first time to seek immunity for any mistakes created by their lack of a complete medical history at the time of care. Gismondi suggested the possibility of a patient going into cardiac arrest while in the operating room, wondering whether or not any treatment that followed would be open to suit.

"How often will this come into play?" Gismondi asked. "That depends on how broadly you want to say the statute is to be interpreted. Physicians would try to give it the broadest possible application."

Samms, though, said the bill is clear as to which situations would fall under its protections, and drafted tightly enough to prevent it from being expanded into circumstances beyond its intended purpose.

Any encroachment on patients' rights, even if the bill's protections were not expanded, would reduce the number of claims by raising the burden on plaintiffs to demonstrate a deviation from the standard of care, Gismondi said. The trickle-down effect, he said, would diminish the practice of some attorneys handling medical malpractice cases. In addition to opposition from the plaintiffs bar, Gismondi said he expects a more broad-based coalition to speak out against the bill.

Messa said the PTLA is "strongly and actively opposing the bill," and the Pennsylvania Association for Justice is doing the same.

Samms said he expects the bill has a better chance of being enacted after November's election.

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