

HOUSE BILL REPORT

HB 2492

As Reported by House Committee On:
Judiciary

Title: An act relating to liability of health care providers responding to an emergency.

Brief Description: Concerning liability of health care providers responding to an emergency.

Sponsors: Representatives Rodne, Jinkins, Morrell and Tharinger.

Brief History:

Committee Activity:

Judiciary: 1/31/14, 2/5/14 [DPS].

Brief Summary of Substitute Bill

- Provides immunity to health care providers (providers) credentialing or granting practice privileges to other providers if the provider so credentialed or privileged was responding to an emergency proclaimed by the Governor and the procedures used were substantially consistent with specified standards.
- Provides that the immunity does not extend to acts or omissions constituting gross negligence or willful or wanton misconduct.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 12 members: Representatives Jinkins, Chair; Hansen, Vice Chair; Rodne, Ranking Minority Member; Nealey, Assistant Ranking Minority Member; Goodman, Haler, Kirby, Klippert, Muri, Orwall, Roberts and Walkinshaw.

Minority Report: Do not pass. Signed by 1 member: Representative Shea.

Staff: Cece Clynch (786-7195).

Background:

Proclamation of Emergency.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

The Governor is authorized to proclaim an emergency in any area in the state where a public disorder, disaster, energy emergency, or riot exists that affects life, health, property, or the public peace. The proclamation must be in writing and filed with the Office of the Secretary of State, with as much public notice as is possible. The proclamation ends when it is terminated by subsequent order of the Governor, and any proclamation must be terminated when order is restored to the area.

Actions for Injury Occurring as the Result of Health Care.

Per statute, there are three different types of claims that may be brought against health care providers:

1. Professional negligence - that injury resulted from the failure of the provider to follow the accepted standard of care. Necessary elements of this cause of action include proof:
 - a. of failure to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he or she belongs acting in the same or similar circumstances; and
 - b. that such failure was the proximate cause of the injury.
2. Breach of warranty - that a provider promised the patient that the injury suffered would not occur.
3. Failure to provide informed consent - that injury resulted from health care to which the patient did not consent.

A hospital has an independent duty to exercise care in credentialing and granting practice privileges to providers.

Statutory Immunity Provisions.

A variety of immunity provisions exist in statute, including immunity for:

- uncompensated emergency care at the scene of an emergency;
- uncompensated health care services provided at a community health care setting;
- gratuitous, good faith assistance provided at the scene of a boat collision;
- use of a defibrillator at the scene of an emergency;
- performance of duties by a poison center medical director or information specialist; and
- acts or omissions of paramedics and emergency medical technicians rendering emergency medical services under appropriate supervision.

Generally, the immunity afforded by these statutes does not extend to acts or omissions constituting gross negligence or willful or wanton misconduct.

"Gross negligence" means the failure to exercise slight care. According to Washington Pattern Jury Instructions, "It is negligence which is substantially greater than ordinary negligence. Failure to exercise slight care does not mean the total absence of care but care substantially less than ordinary care."

"Willful or wanton misconduct," rather than being a form or gradation of negligence, is a different mental state that includes premeditation or formed intention. It operates in the nature of a defense, such that with proof of willful or wanton misconduct an immunity provision is inapplicable.

Summary of Substitute Bill:

A provider credentialing or granting practice privileges to other providers to deliver health care in response to an emergency is immune from civil liability arising out of the credentialing or granting of practice privileges if:

- the provider so credentialed or granted privileges was responding to an emergency proclaimed by the Governor; and
- the procedures used to credential or grant privileges were substantially consistent with the standards for granting emergency practice privileges adopted by the Joint Commission on the Accreditation of Health Care Organizations.

Acts or omissions constituting gross negligence or willful or wanton misconduct are not immunized.

The following definitions apply for purposes of this immunity statute:

- "Credentialing" means the collection, verification, and assessment of whether a health care provider meets relevant licensing, education, and training requirements.
- "Emergency" means an event or set of circumstances for which the Governor has proclaimed a state of emergency.
- "Health care provider" means:
 - the same as given the term in statutes governing actions for injuries resulting from health care, and includes persons licensed by the state to provide health care such as physicians, nurses, dentists, chiropractors, nurse practitioners and others;
 - an employee or agent of a member of such a profession acting in the course and scope of his or her employment;
 - an entity, whether or not incorporated, facility, or institution employing, credentialing, or providing practice privileges to one or more such health care professionals, including, but not limited to, a hospital, ambulatory surgical facility, clinic, health maintenance organization, or nursing home, or an officer, director, employee, or agent thereof acting in the course and scope of his or her employment;
 - a pharmacist or pharmacy; or
 - in the event any of the above is deceased, his or her estate or personal representative.

Substitute Bill Compared to Original Bill:

The substitute bill makes the following changes to the underlying bill:

- strikes the provision that granted immunity to health care providers (providers) delivering health care in an emergency;
- retains all other provisions of the bill, including the provision that grants immunity to providers credentialing or granting practice privileges to other providers to deliver health care in response to an emergency, but requires that the procedures utilized for credentialing/privileging must be "substantially consistent" (rather than "consistent")

- with standards adopted by the Joint Commission on the Accreditation of Health Care Organizations;
- adds a definition for "clinic" which is defined as a "place for treatment of patients on an outpatient basis by a health care provider;" and
 - narrows the definition of "health care provider" from all those providers covered under the Uniform Disciplinary Act to only those providers included in the definition of "health care provider" found in statutes governing actions for injuries resulting from health care.
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Appropriation: None.

Fiscal Note: Not requested.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) The Cascadia subduction zone, in which this area lies, can produce very large earthquakes of the magnitude of 9.2 or 9.3 on the Richter scale. It has been said that a large earthquake here could result in 8,000-10,000 casualties and that most of the bridges and roads would be out. There would be a huge need for emergency personnel. This bill provides a fast track to get providers from elsewhere credentialed. With hurricanes Sandy and Katrina, there was a great need for emergency personnel and the need for emergency credentialing was highlighted. The immunity provided in this bill will support disaster preparedness. Washington was ranked last in a recent report on disaster preparedness. It was last due to several factors, including money, lack of coordination, and the lack of immunity and emergency credentialing. An emergency room physician's malpractice insurance doesn't cover that provider outside of the hospital in which he or she ordinarily works. This will allow for rapid medical response. It includes reasonable liability limits, and does not provide immunity for acts of gross negligence or willful or wanton behavior. The standard of care in an emergency is undefined, and gets argued in court. The bill is limited to situations in which the Governor has declared an emergency. Providing emergency medical care in New Orleans after Katrina was very different than a typical medical practice. Housed in tents in a parking lot, there was electricity but no water. Providers from as far away as Nashville had to be credentialed on the spot. It is very important that the best health care providers be willing to respond to an emergency and that these aren't the ones who evacuate the area due to liability concerns. Without doctors willing to provide the care, those in need of medical care are ministered to by regular people who are protected by Good Samaritan laws. The 2008 Department of Health workgroup found that providers need liability protection. In 2009 the Institute of Medicine said the same thing. There are parameters in the bill. It is only when there is an emergency and subsequent conditions cause a lack of personnel or material resources that renders the provider unable to provide the level or manner of care that would have been required in the absence of the emergency. Liability concerns affect people's willingness to serve.

(Opposed) While the work on this is appreciated, the bill causes some concerns. It is not necessary and will have unintended consequences. Negligence already has a flexible standard of care. Additionally, RCW 38.52.180 also provides protections for emergency response. The gross negligence standard of care may be less flexible. As described in one book by a physician, horrible things can happen in a hospital during an emergency such as Katrina. There is no problem with the credentialing piece.

Persons Testifying: (In support) Representative Rodne, prime sponsor; Christopher Kang, Washington Chapter of the American College of Emergency Physicians; Ashley Kelmore, Washington State Association of Local Public Health Officials; Katie Kolan, Washington State Medical Association; Dan Diamond, Harreson Medical Centerin; and Jeff Sconyars, Seattle Children's Hospital.

(Opposed) Larry Shannon, Washington State Association of Justice.

Persons Signed In To Testify But Not Testifying: None.