Ohio Legislative Service Commission

Bill Analysis

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H.B. 276

130th General Assembly
(As Introduced)

Reps. Stautberg, Becker, Blair, Blessing, Hackett, Hottinger, Johnson, Scherer, Sears, Smith

BILL SUMMARY

- Grants immunity to a health care facility or location in a medical claim action for damages resulting from an act or omission of a health care practitioner who is an independent medical practitioner if the facility or location has provided notice that the health care practitioner is or could be an independent medical practitioner.
- Prescribes the form of the above notice.
- Generally provides that a health care facility or location is considered as having provided the notice if the facility or location provided a copy of the written notice to the patient or patient's representative prior to providing the medical services or posted the notice in all the regular and established admitting areas of the facility or location.
- Applies its provisions only to a health care facility or location that requires independent medical practitioners to maintain a minimum of $1 million in professional liability coverage as a condition of their ability to provide medical services at the facility or location.
- Provides that the above provisions do not apply to an action brought against the state in the Court of Claims.
- Provides that a health care provider's, employee's, or representative's statements or affirmations expressing *error or fault* made to the victim of an unanticipated outcome of medical care or the victim's relative or representative that relate to the victim's suffering, injury, or death are not admissible as evidence of an admission of liability or an admission against interest in a civil action brought by the victim or in an arbitration proceeding.

- Provides that a health care provider's, employee's, or representative's communications made to the victim or the victim's relative, acquaintance, or representative following an unanticipated outcome of medical care and made as part of a review in good faith by the provider, employee, or representative into the cause of or reasons for the unanticipated outcome generally are inadmissible as evidence.

- In order for a plaintiff to recover damages in a civil action upon a medical claim, requires the plaintiff to establish by a preponderance of the evidence that the defendant's act or omission in rendering medical care or treatment is a deviation from the required standard of medical care or treatment and the direct and proximate cause of the injury, death, or loss to person.

- Provides that any loss or diminution of a chance of recovery or survival by itself is not an injury, death, or loss to person for which damages may be recovered in a civil action upon a medical claim.

- States the findings of the General Assembly that the application of the so-called loss of chance doctrine improperly alters the requirement of direct and proximate causation, and abrogates the decision in *Roberts v. Ohio Permanente Medical Group, Inc.*, 76 Ohio St.3d 483 (1996), which adopted the loss of chance doctrine.

CONTENT AND OPERATION

Civil immunity of health care facility or location

The bill provides that a "health care facility or location" is not liable in damages for injury, death, or loss to person in a civil action asserting a "medical claim" if the injury, death, or loss to person is the result of an act or omission of a "health care practitioner" who is an "independent medical practitioner" and the health care facility or location has provided notice as described below that the health care practitioner is or could be an independent medical practitioner. (See "**Civil immunity of health care facility or location – Definitions**.") A health care facility or location is considered as having provided the notice if the health care facility or location either: (1) provided a copy of the notice in writing to the patient or the patient's representative prior to providing the medical services at issue, or (2) has posted the notice in all of the regular and established admitting areas of the facility or location. In the case of an emergency and in the absence of posting of such notice, a health care facility or location must provide a copy of the notice in writing to the patient or the patient's representative as soon as practicable under the circumstances.[1]

[1] R.C. 2305.27(B) and (C).

Form of notice

The bill requires the above notice to be in substantially the following form:[2]

"NOTICE

> Not all of the health care practitioners who are providing your medical services while you are here are employed by or agents of [name of health care facility or location]. If you want to determine whether a health care practitioner is an employee or agent of [name of health care facility or location], contact [name and phone number for contact person]. In the absence of confirmation that a health care practitioner is an employee or agent of [name of health care facility or location], you should assume that the practitioner is not an employee or agent of [name of health care facility or location].
>
> [Name of health care facility or location] is not legally responsible for the acts or omissions of health care practitioners who are not employed by or agents of [name of health care facility or location]."

Applicability

The bill applies its provisions only to a health care facility or location if it requires independent medical practitioners, as a condition of their ability to provide medical services at the facility or location, to maintain a minimum of $1,000,000 in professional liability coverage. The provisions do not apply to any action brought against the state in the Court of Claims, including, but not limited to, any action in which a state university or college is a defendant.[3]

Miscellaneous provisions

The bill provides that its provisions:[4]

- Do not preclude liability for damages for injury, death, or loss to person under any other provision of the Revised Code or federal law.

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[2] R.C. 2305.27(D).

[3] R.C. 2305.27(E) and (F).

[4] R.C. 2305.27(G) and (H).

- Do not create a new cause of action or substantive legal right against a health care facility or location.

- Do not affect any immunities from civil liability or defenses established by another section of the Revised Code or available at common law to which a health care facility or location may be entitled in connection with medical services provided by the facility or location.

Definitions

For purposes of the above provisions, the bill defines the following terms:[5]

"Health care facility or location" means a hospital, clinic, ambulatory surgical facility, office of a health care professional or associated group of health care professionals, training institution for health care professionals, or any other place where medical, dental, or other health-related diagnosis, care, or treatment is provided to a person.[6]

"Health care practitioner" means all of the following as licensed, authorized, or certified under applicable law:[7] a dentist or dental hygienist; a registered or licensed practical nurse; an optometrist; a dispensing optician, spectacle dispensing optician, contact lens dispensing optician, or spectacle-contact lens dispensing optician; a pharmacist; a physician authorized to practice medicine and surgery, osteopathic medicine and surgery, or podiatry; a physician assistant; a practitioner of a limited branch of medicine; a psychologist; a chiropractor; a hearing aid dealer or fitter; a speech-language pathologist or audiologist; an occupational therapist or occupational therapy assistant; a physical therapist or physical therapy assistant; a professional clinical counselor, professional counselor, social worker, independent social worker, or social work assistant; a dietitian; a respiratory care professional; and an emergency medical technician-basic, emergency medical technician-intermediate, or emergency medical technician-paramedic.

"Independent medical practitioner" means any health care practitioner who is not an actual employee or agent of the health care facility or location in which the medical services are being provided.

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[5] R.C. 2305.27(A).

[6] By reference to R.C. 2305.234, not in the bill.

[7] By reference to R.C. 2317.02(B)(5) and 4769.01, not in the bill.

"Medical claim" means any claim that is asserted in any civil action against a physician, podiatrist, hospital, home, or residential facility, against any employee or agent of a physician, podiatrist, hospital, home, or residential facility, or against a licensed practical nurse, registered nurse, advanced practice registered nurse, physical therapist, physician assistant, emergency medical technician-basic, emergency medical technician-intermediate, or emergency medical technician-paramedic, and that arises out of the medical diagnosis, care, or treatment of any person. "Medical claim" includes the following:[8]

- Derivative claims for relief that arise from the medical diagnosis, care, or treatment of a person.
- Claims that arise out of the medical diagnosis, care, or treatment of any person and to which either of the following applies: (a) the claim results from acts or omissions in providing medical care, or (b) the claim results from the hiring, training, supervision, retention, or termination of caregivers providing medical diagnosis, care, or treatment.
- Claims that arise out of the medical diagnosis, care, or treatment of any person and that are brought under the grievance procedure for violation of the rights of a resident of a nursing home.

Medical malpractice

Defendant's expression of error or fault or other communications

The bill modifies current law by providing that in any civil action brought by an alleged victim of an "unanticipated outcome" of medical care or in any arbitration proceeding related to such a civil action, any and all statements, affirmations, gestures, or conduct expressing apology, sympathy, commiseration, condolence, compassion, *error, fault,* or a general sense of benevolence that are made by a health care provider, an employee of a health care provider, *or a "representative of a health care provider"* to the alleged victim, a relative of the alleged victim, or a "representative of the alleged victim," and that relate to the discomfort, pain, suffering, injury, or death of the alleged victim as the result of the unanticipated outcome of medical care are inadmissible as evidence of an admission of liability or as evidence of an admission against interest (new language is italicized).[9] (See "**Medical malpractice – Definitions**.")

[8] By reference to R.C. 2305.113, not in the bill.

[9] R.C. 2317.43(A).

The bill provides that in any civil action brought by an alleged victim of an unanticipated outcome of medical care, in any arbitration proceeding related to such a civil action, or in any other civil proceeding, any communications made by a health care provider or the provider's employee or representative to the alleged victim or the victim's relative, acquaintance, or representative following an unanticipated outcome and made as part of a "review" (see "**Medical malpractice – Definitions**") conducted in good faith by the health care provider, employee, or representative into the cause of or reasons for an unanticipated outcome, are inadmissible as evidence unless the communications are recorded in the medical record of the alleged victim. Nothing in this provision requires a review to be conducted.[10]

Definitions

The bill modifies the following definitions in current law:[11]

"Representative *of an alleged victim*" means a legal guardian, attorney, person designated to make decisions on behalf of a patient under a medical power of attorney, or any person recognized in law or custom as a patient's agent.

"Unanticipated outcome" means the outcome of a medical treatment or procedure that differs from an expected result *or any outcome that is adverse or not satisfactory to the patient*.

The bill defines the following terms for purposes of its provisions:[12]

"Representative of a health care provider" means an attorney, health care provider, employee of a health care provider, or other person designated by a health care provider or employee to participate in a review conducted by a health care provider or employee.

"Review" means the policy, procedures, and activities undertaken by or at the direction of a health care provider, employee of a health care provider, or person designated by a health care provider or employee with the purpose of determining the cause of or reasons for an unanticipated outcome, and initiated and completed during the first 45 days following the occurrence or discovery of an unanticipated outcome. A review may be extended for a longer period if necessary upon written notice to the patient or a relative or representative of the patient.

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[10] R.C. 2317.43(B).

[11] R.C. 2317.43(C)(3) and (6).

[12] R.C. 2317.43(C)(4) and (5).

Damages not recoverable for loss of chance of recovery

The bill provides that in any civil action upon a medical claim in order for the plaintiff to recover any damages resulting from the alleged injury, death, or loss to person, the plaintiff must establish by a preponderance of the evidence that the act or omission of the defendant in rendering medical care or treatment is a deviation from the required standard of medical care or treatment and the direct and proximate cause of the injury, death, or loss. Direct and proximate cause of the injury, death, or loss is established by evidence showing that it is more likely than not that the defendant's act or omission was a cause in fact of the injury, death, or loss. Any loss or diminution of a chance of recovery or survival by itself is not an injury, death, or loss for which damages may be recovered.[13]

For purposes of the above provisions, "medical claim" has the same meaning as in the law governing medical malpractice actions.[14]

Findings

The bill states that the General Assembly finds that in civil actions based upon a medical claim, the negligent act or omission of the responsible party must be shown to have been the direct and proximate cause of the injury, death, or loss to person complained of. The General Assembly also finds that the application of the so-called loss of chance doctrine in those actions improperly alters or eliminates the requirement of direct and proximate causation. Therefore, the Ohio Supreme Court decision adopting the loss of chance doctrine in *Roberts v. Ohio Permanente Medical Group, Inc.*[15] is abrogated (see **Comment**).[16]

COMMENT

The "loss of chance doctrine" was adopted in *Roberts v. Ohio Permanente Medical Group, Inc*. The syllabus of the Court states the following:

> 1. In order to maintain an action for the loss of a less-than-even chance of recovery or survival, the plaintiff must present expert medical testimony showing that the health care provider's negligent act or omission increased the risk

[13] R.C. 2323.40(B).

[14] R.C. 2323.40(A).

[15] 76 Ohio St.3d 483 (1996).

[16] Section 3.

of harm to the plaintiff. It then becomes a jury question as to whether the defendant's negligence was a cause of the plaintiff's injury or death. . . .

2. The amount of damages recoverable by a plaintiff in a loss-of-chance case equals the total sum of damages for the underlying injury or death assessed from the date of the negligent act or omission multiplied by the percentage of the lost chance.

3. To ascertain the amount of damages in a case of lost chance of survival or recovery, the trial court must instruct the trier of fact to consider the expert testimony presented and (1) determine the total amount of damages from the date of the alleged negligent act or omission, including but not limited to lost earnings and loss of consortium; (2) ascertain the percentage of the patient's lost chance of survival or recovery; and (3) multiply that percentage by the total amount of damages.

HISTORY

ACTION	DATE
Introduced	09-30-13

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