

124th General Assembly Enacts Tort Reform

This bulletin provides a general overview of the three tort reform bills enacted by the 124th General Assembly. Additional tort reform is expected during the 125th General Assembly.

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- Other Copies:** A copy of this bulletin has been mailed to your hospital's risk manager and in-house legal counsel. OHA Bulletins are also available on the Internet at www.ohanet.org.

Executive Summary

Three tort reform bills of interest to hospitals and the medical community were enacted at the end of 2002. Those bills:

- modify joint and several liability by creating proportionate liability for defendants with 50 percent or less responsibility for the actionable event
- revise and extend peer review protections to health care entities
- create a rebuttable presumption that certain accredited health care entities did not negligently credential a member of the medical staff
- enact non-economic damage caps of \$500,000 or \$1 million depending upon severity of injury
- shorten the time by which a medical negligence lawsuit must be brought

- allow defendants to introduce evidence that the plaintiff has received unsubrogated collateral benefits because of the injury
- enable the periodic payment of future damages in excess of \$50,000
- require plaintiff lawyers to obtain probate court approval when contingency fees exceed the non-economic damage cap
- provide a mechanism for recovering a defendant's legal expenses when the plaintiff attorney includes that defendant in the case without a reasonable good faith basis
- make favorable changes to existing binding arbitration statutes

Together these bills will stabilize the Ohio medical liability insurance market in the coming years, but only if the provisions are upheld by the Ohio Supreme Court. Several of the above provisions previously have been ruled unconstitutional by the Court, although they generally have been revised to address constitutional issues or new information and arguments exist to justify reconsideration of precedents by the Court.

SB 120: Joint and Several Liability Reform

Ohio's joint and several liability law has been significantly changed by the enactment of SB 120. Signed by the governor on January 8, the bill takes effect April 9 and applies to all tort actions that accrue on or after that date. Whether or not it applies to tortious conduct before the effective date will require a case-by-case analysis to determine when the tort action accrued. Clearly in some cases SB 120 will apply to incidents occurring prior to April 9, 2003.

SB 120 was enacted in response to unfair results flowing from the application of traditional joint and several liability law on defendants with minor involvement in negligent events. Under traditional law, a defendant with modest involvement in a tortious event could be made to pay damages caused by the primary tortfeasor. For example, Doctor A could be made to pay for damages caused by the mistake of Doctor B even though Doctor A had minor involvement in the mishap.

Reforms effected by passage of SB 120 result in a mix of proportionate as well as joint and several liability. It is proportionate liability for defendants with 50 percent or less liability, meaning that any defendant to whom 50 percent or less of the tortious conduct is attributable pays only a corresponding percentage of economic and non-economic damages. For example, if Doctor A, Doctor B, and Nurse C are each one-third responsible for the tortious event, Nurse C cannot be made to pay more than one-third of the economic and non-economic damages.

However, joint and several liability remains applicable for any defendant who is more than 50 percent responsible for the tortious conduct. If 60 percent of the tortious conduct is attributable to Doctor A, 20 percent to Doctor B, and 20 percent to Nurse C, then Doctor A can be made to pay 100 percent of the compensable damages. In such case, Doctor A can then seek a contribution of 20 percent of the damages from Doctor B, and 20 percent from Nurse C—although that can be a challenging task.

In assessing the role of all parties, SB 120 requires determination of the percentage of tortious conduct caused by persons from whom the plaintiff does not seek recovery. The bill additionally requires that compensatory damages be reduced by the percentage of the plaintiff's contributory negligence.

It is not apparent whether SB 120 raises constitutional issues such as the so-called "open courts" provision in section 16 of article I of the Ohio Constitution. Litigators should expect, however, challenges related to statutory interpretation and application.

Readers interested in the statutory language and a more detailed analysis, including information not recited above, should consult the legislative search engine located at <http://www.legislature.state.oh.us/search.cfm>.

SB 179: Modernized Peer Review Protection

Ohio's statutes protecting the peer review and credentialing process date from the 1960s and have been unsatisfactory since the early 1990s when integrated delivery systems and hospital affiliations became commonplace. For example, statutes used the term "quality assurance" and made it difficult to do system-wide credentialing. An attempt to modernize the statutory language appeared successful with the enactment of HB 350 in 1996, but the effort failed when the Ohio Supreme Court in *State v. Sheward* (1999) ruled the legislation void in its entirety (by a vote of 4-3) for reasons unrelated to the peer review provisions.

SB 179 was passed by the Ohio General Assembly in December 2002 and was signed by the governor on January 8, 2003. Effective April 9, 2003, Ohio will have new peer review protections. Other important provisions in the bill—protection of incident reports and a presumption against negligent credentialing—also will take effect that day, apparently even to pending legal actions.

Since readers are more likely to be involved in implementing and explaining SB 179 changes in their hospitals—as contrasted to the use of SB120 (above) and SB 281 (below) primarily in connection with legal defense—pertinent statutory provisions will be recited here. Section 2305.251(A) provides:

No health care entity shall be liable in damages to any person for any acts, omissions, decisions, or other conduct within the scope of the functions of a peer review committee of the health care entity. No individual who is a member of or works for or on behalf of a peer review committee of a health care entity shall be liable in damages to any person for any acts, omissions, decisions, or other conduct within the scope of the functions of the peer review committee.

The above provision is the same as prior law except that it expands the immunity protection to individuals who "works for or on behalf of a peer review committee." This will protect consultants and other parties who are not permanent members of the committee.

The definition of “health care entity” is new and also very broad:

an entity, whether acting on its own behalf or on behalf of or in affiliation with other health care entities, that conducts as part of its regular business activities professional credentialing or quality review activities involving the competence of, professional conduct of, or quality of care provided by health care providers, including both individuals who provide health care and entities that provide health care.

The above definition should enable hospitals to perform credentialing, peer review and quality improvement activities at a system level, in affiliation with other hospitals, and in connection with external peer review entities such as research foundations. The new statute should enable hospitals to share, without fear of discovery or use in a civil action, quality of care data with independent foundations, such as those studying cardiac catheterization outcomes, medication errors, or other patient outcome measures.

Regarding such legal actions, section 2305.252 provides that proceedings and records of peer review committee meetings “shall be held in confidence and shall not be subject to discovery or introduction in evidence in any civil action against a health care entity or health care provider including both individuals and entities that provide health care.” Individuals participating in peer review committee meetings cannot be made to testify in a civil action regarding the committee proceedings. Should a court order discovery of peer review information, SB 179 changes Ohio law to allow an immediate appeal of the order. Previously the information had to be disclosed and a hospital could not seek appellate review until the close of the trial, too late to prevent harm to the peer review process.

Incident Reports. A new provision, R.C. 2305.253, protects incident and risk management reports. The section states that such reports and their contents are not subject to discovery and are not admissible in a tort action. The person who prepares such reports cannot be made to testify regarding the contents.

Negligent Credentialing. SB 179 also creates a new presumption that an accredited hospital did not negligently credential a practitioner. The purpose of including the presumption was to mitigate the tendency of plaintiff lawyers, since the Ohio Supreme Court’s ruling in *Browning v. Burt* (1993), to allege negligent credentialing in order to bring the hospital deep pockets into lawsuits against physicians—compelling hospitals to mount costly legal defenses, creating unnecessary friction with medical staff members, and sometimes forcing settlements to avoid further legal fees.

Section 2305.251(B) provides a hospital “shall be presumed to be not negligent in the credentialing of an individual who has, or has applied for, staff membership or professional privileges at the hospital” if the hospital shows it was accredited by the JCAHO or AOA at the time of the alleged negligent credentialing. The presumption can be rebutted only pursuant to the statute, such as by showing the hospital medical staff executive committee or governing board was aware of the practitioner’s incompetence but failed to act.

Readers with responsibility for peer review and risk management activities, and those persons who might rely on the presumption against negligent credentialing, should review the statutory language. Both the bill and the analysis are available using the Ohio legislature's search engine at <http://www.legislature.state.oh.us/search.cfm>.

SB 281: California MICRA Reforms

SB 281 is a collection of medical liability reform provisions similar to California's Medical Injury Compensation Reform Act of 1975 (MICRA)—which has been widely credited with stabilizing medical liability insurance premiums in that state. SB 281 was passed by the Ohio General Assembly in December, signed by the governor on January 10, and becomes effective on April 10, 2003. The provisions of the bill apply, however, only to incidents on or after the effective date.

Statute of Limitations. SB 281 does not change prior law that a medical negligence claim must be commenced within one year after the cause of action accrued, unless extended 180 days by written notice to the potential defendant that legal action is contemplated.

Statute of Repose. The bill changes Ohio's statute of repose, which defines an outer limit after which a lawsuit may not be brought even though the cause of action has not accrued. SB 281 specifies that a claim may not be commenced more than four years after the occurrence of the tortious act or omission—unless a statutory exception is present, such as for minors, the mentally incompetent, and foreign bodies. Additionally, the four-year statute may be extended an additional year for a person who could not reasonably have discovered the injury during the first three years after the mishap. While this new statute of repose would be useful in limiting actions for mishaps remote in time, the Ohio Supreme Court must first reconsider its 1990 ruling in *Sedar v. Knowlton Construction Company* which found a similar four-year statute of repose unconstitutional.

Collateral Sources. Previous law in Ohio prohibited the introduction into evidence of collateral sources of payments made to the plaintiff because an alleged injury—hence, juries hear about the medical bills but never hear that they were paid by an insurance company, and they never hear about disability insurance benefits. SB 281 abrogates that common law rule and allows the defendant to introduce evidence of any amount payable as a benefit to the plaintiff as a result of the injury unless another party has subrogation rights.

The provision does not mandate a corresponding reduction in awarded compensatory damages but simply allows the information to be presented to the trier of fact. The future of this provision also will necessarily engage the Ohio Supreme Court, which in *Sorrell v. Thevenir* (1994) found constitutionally unacceptable a mandatory offset of collateral benefits against damages.

Meritless Naming of Defendants. A provision in the bill enables a defendant to file a motion requesting a hearing to determine if the plaintiff had a "reasonable good faith basis" for

asserting the claim against the defendant. The statute enumerates factors the court should consider, such as whether the plaintiff obtained a reasonably timely review of the case by an expert. If the court finds no reasonable good faith basis, the court is required to order court costs and attorneys' fees. This provision may reduce "shotgun" complaints, in which plaintiff attorneys unnecessarily name defendants when more work on their part would exclude those with no involvement in the alleged event.

Non-Economic Damage Cap. The most controversial provision in SB 281 is also the tort reform shown by various studies to have the most stabilizing effect on insurance rates. The bill caps non-economic damages for non-catastrophic injuries at "the greater of \$250,000 or an amount that is equal to three times the plaintiff's economic loss...to a maximum of \$350,000 for each plaintiff or a maximum of \$500,000 for each occurrence." Non-economic damages are capped at \$500,000 per plaintiff or \$1 million per occurrence where the injuries involve "permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system; [or] permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life sustaining activities."

However, the future of these important provisions is dependent upon the Ohio Supreme Court and its reconsideration of two previous rulings, *Morris v. Savoy* (1991) and *State v. Sheward* (1999). Both of these decisions found unconstitutional previous legislative attempts to cap non-economic damages. Additionally, the Ohio constitution prohibits limiting damages for wrongful death.

Contingency Fee Approval. The introduced version of SB 281 capped plaintiff contingency fees depending upon the amount of the recovery—35 percent of the first \$100,000, 25 percent of the next \$500,000, and 15 percent of any recovery over \$600,000. However, the enacted version only requires the plaintiff attorney to apply to the probate court for approval of a contingency fee exceeding the applicable non-economic damage cap. The effect of this provision remains to be seen.

Periodic Payments. SB 281 repealed the former statute that authorized periodic payment of future damages in excess of \$200,000. In its place, the bill allows the defendant to motion for periodic payment of future damages in excess of \$50,000. However, the former statute had been found unconstitutional by the Ohio Supreme Court in *Galayda v. Lake Hospital System* (1994), so reconsideration of that precedent by the Court is expected.

Binding Arbitration. Since 1976, Ohio has had statutes allowing providers to enter into binding arbitration agreements with patients, but such agreements apparently have been rarely used. The purpose of such agreements is to move controversies from the traditional court system to an arbitration model where experts and not laypersons resolve disputes. SB 281 revises the statutes, such as by reducing the amount of time in which the patient is permitted to revoke an agreement. Since courts carefully scrutinize agreements that waive a person's right to trial, providers should consult legal counsel before designing and offering arbitration agreement to patients.

Other provisions. The major provisions in SB 281 are summarized above, but other subjects are also addressed in the bill. For example, immunity for health care workers providing indigent care was expanded to include advanced practice nurses and EMTs. The statute applicable to expert witness testimony was slightly revised. Clerks of common pleas courts are required to submit annual reports summarizing medical negligence actions. The Ohio Medical Malpractice Commission was created to study malpractice issues, and the Ohio Department of Insurance was directed to study the feasibility of a Patient Compensation Fund.

SB 281 is more than 100 pages in length, and the above summary does not identify technical details that may be important to hospital legal counsel. Readers interested in the statutory language and a more detailed analysis should consult the legislative search engine located at <http://www.legislature.state.oh.us/search.cfm>.

Ohio Supreme Court

As noted above, several of the important tort reforms previously have been enacted by the legislature but were rejected as unconstitutional by the Ohio Supreme Court. There are several reasons why tort proponents believe the Court will support the new enactments.

First, drafters of the new tort reform made a determined effort to address the constitutional issues presented by unfavorable Supreme Court rulings. Additionally, other state supreme courts have since found similar tort reform provisions constitutional, and those decisions will provide important guidance to Ohio's Supreme Court. Both published research and the reported experience of other states regarding the effects of tort reform are new, probative information that may influence the Court. Finally, the insolvency or market withdrawal of medical liability insurance companies, and the impact on practitioners and access to patient care, provide a context for the Court to re-examine unfavorable precedent.

Future Tort Reform

OHA and other parties intend to seek additional tort reform during the 125th session of the General Assembly. Subjects under consideration include ostensible agency, loss of chance doctrine, punitive damage caps, and prejudgment interest. Readers are invited to recommend other topics appropriate for redress, and may do so by contacting Rick Sites at OHA.