

Regular Session, 2008

SENATE BILL NO. 217

BY SENATOR MICHOT

LIABILITY. Provides relative to burden of proof, jury charge and expert witness qualification in a malpractice action. (gov sig)

1 AN ACT

2 To enact R.S. 9:2794.1, relative to emergency-related health care services; to provide  
3 relative to burden of proof in a malpractice action based on negligence; to provide  
4 relative to jury instructions; to provide relative to expert witness qualification; to  
5 provide for an effective date; and to provide for related matters.

6 Be it enacted by the Legislature of Louisiana:

7 Section 1. R.S. 9:2794.1 is hereby enacted to read as follows:

8 **§2794.1. Emergency-related health care services; malpractice; burden of**  
9 **proof; jury charge; physician witness expert qualification**

10 **A. Notwithstanding any other provision of law to the contrary, including**  
11 **but not limited to the provisions of R.S. 9:2794(A), (B), and (C), in a malpractice**  
12 **action based on the negligence of a health care provider for injury to or death**  
13 **of a patient arising out of the provision of emergency medical care or services**  
14 **in a hospital emergency room or department, obstetrical unit, diagnostic unit**  
15 **or surgical suite, the plaintiff shall have the burden of proving:**

16 **(1) The degree of knowledge or skill possessed or the degree of care**  
17 **ordinarily exercised by a health care provider licensed to practice in the state**

1 of Louisiana and actively practicing in a similar community or locale and under  
2 similar circumstances; where the defendant practices in a particular specialty  
3 and where the alleged acts of medical negligence raise issues peculiar to the  
4 particular medical specialty involved, the plaintiff has the burden of proving the  
5 degree of care ordinarily practiced by a health care provider within the  
6 involved medical specialty.

7 (2) That the defendant either lacked this degree of knowledge or skill or  
8 failed to use this degree of knowledge or skill, along with his best judgment and  
9 diligence in the application of that knowledge or skill.

10 (3) That as a proximate result of this lack of knowledge or skill or the  
11 failure to exercise this degree of care the plaintiff suffered injuries that would  
12 not otherwise have been incurred.

13 (4) That the health care provider, with willful and wanton misconduct,  
14 departed from accepted standards of emergency medical care reasonably  
15 expected of an ordinarily prudent health care provider in the same or similar  
16 circumstances.

17 B. In a malpractice action based on Subsection A of this Section, the  
18 court shall instruct the jury to consider, together with all other relevant  
19 matters, the following:

20 (1) Whether the health care provider providing emergency medical care  
21 or services had access to the patient's medical history or was unable to obtain  
22 a full medical history, including, but not limited to, the knowledge of preexisting  
23 medical conditions, allergies, or medications, or both.

24 (2) The lack of a pre-existing health care provider-patient relationship.

25 (3) The circumstances constituting the emergency and the emergent  
26 medical condition of the patient.

27 (4) The circumstances surrounding the delivery of the emergency  
28 medical care or services.

29 C. The provisions of Subsection A of this Section shall not apply to

1           subsequent medical care or services unrelated to the original medical  
2           emergency care rendered to the patient.

3           D. For the purposes of this Section, the term "health care provider"  
4           shall have the same meaning as defined in R.S. 40:1299.41(A) and R.S.  
5           40:1299.39.

6           E. For the purposes of this Section, the provisions of R.S. 9:2794(D) shall  
7           apply not only to physicians, but also to any health care provider rendering  
8           emergency medical care or services, though the expert witness, as qualified  
9           under R.S. 9:2794(D) and applicable to this Section, shall be qualified based on  
10          the health care provider's specific profession, education, specialty, training,  
11          licensure and knowledge, relative to the emergency medical care or services  
12          rendered by the healthcare provider and governed by this Section and R.S.  
13          9:2794(D).

14          Section 2. This Act shall become effective upon signature by the governor or, if not  
15          signed by the governor, upon expiration of the time for bills to become law without signature  
16          by the governor, as provided by Article III, Section 18 of the Constitution of Louisiana. If  
17          vetoed by the governor and subsequently approved by the legislature, this Act shall become  
18          effective on the day following such approval.

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The original instrument and the following digest, which constitutes no part  
of the legislative instrument, were prepared by Angela L. De Jean.

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#### DIGEST

Proposed law provides that in a malpractice action based on the negligence of a health care provider for injury to or death of a patient arising out of the provision of emergency medical care or services in a hospital emergency room or department, obstetrical unit, diagnostic unit or surgical suite, the plaintiff shall have the burden of proving:

- (1) The degree of knowledge or skill possessed or the degree of care ordinarily exercised by a health care provider licensed to practice in the state of Louisiana and actively practicing in a similar community or locale and under similar circumstances; where the defendant practices in a particular specialty and where the alleged acts of medical negligence raise issues peculiar to the particular medical specialty involved, the plaintiff has the burden of proving the degree of care ordinarily practiced by a health care provider within the involved medical specialty.
- (2) That the defendant either lacked this degree of knowledge or skill or failed to use this degree of knowledge or skill, along with his best judgment and diligence in the application of that knowledge or skill.

- (3) That as a proximate result of this lack of knowledge or skill or the failure to exercise this degree of care the plaintiff suffered injuries that would not otherwise have been incurred.
- (4) That the health care provider, with willful and wanton misconduct, departed from accepted standards of emergency medical care reasonably expected of an ordinarily prudent health care provider in the same or similar circumstances.

Proposed law provides that in a malpractice action based on proposed law, the court shall instruct the jury to consider, together with all other relevant matters, the following:

- (1) Whether the health care provider providing emergency medical care or services had access to the patient's medical history or was unable to obtain a full medical history, including, but not limited to, the knowledge of preexisting medical conditions, allergies, or medications, or both.
- (2) The lack of a pre-existing health care provider-patient relationship.
- (3) The circumstances constituting the emergency and the emergent medical condition of the patient.
- (4) The circumstances surrounding the delivery of the emergency medical care or services.

Proposed law provides that the provisions of proposed law shall not apply to subsequent medical care or services unrelated to the original medical emergency care rendered to the patient.

Proposed law provides that the term "health care provider" shall have the same meaning as defined in present law.

Proposed law provides that, for the purposes of proposed law, the provisions of present law (R.S. 9:2794(D)) shall apply not only to physicians, but also to any health care provider rendering emergency medical care or services, though the expert witness, as qualified under present law (R.S. 9:2794(D)) and applicable to proposed law, shall be qualified based on the health care provider's specific profession, education, specialty, training, licensure and knowledge, relative to the emergency medical care or services rendered by the healthcare provider and governed by proposed law and present law (R.S. 9:2794(D)).

Effective upon signature of the governor or lapse of time for gubernatorial action.

(Adds R.S. 9:2794.1)