

Testimony of Michael Frank, MD JD
before the Senate Judiciary- Civil Justice Committee
June 10, 2009

Chairman Seitz, Senators,

My name is Michael Frank. I am a physician and attorney. I am board certified in emergency medicine, I've practiced emergency medicine in Ohio for almost 30 years, and law for almost 20. I am now primarily engaged in managing the legal affairs of an emergency physician group headquartered in Canton. We see 1.7 million ER patients a year, more than 300,000 of them in Ohio. I manage all the medical malpractice claims and am intimately familiar with the damage those claims cause to both physicians and the safety net which our emergency care system has come to be. I appreciate the opportunity to comment on Senate Bill 86.

In order to successfully sue a physician for medical malpractice, Ohio law currently requires the patient to prove that the physician made a mistake, a mistake that a reasonable physician in the same circumstances would not have made, and that the mistake injured the patient. This is the standard of "ordinary negligence", a standard which has proved to be so flexible that the bar to entry is extremely low. Analysis of the results of this standard clearly show that the severity of a patient's medical condition, rather than whether the care provided was negligent, is the only reliable predictor of the outcome of malpractice lawsuits. (Localio AR *et al: Relation between malpractice claims and adverse events due to negligence*. N Engl J Med 325:245-251; July 25, 1991. Brennan TA *et al: Relation between negligent adverse events and the outcomes of medical-malpractice litigation*. N Engl J Med 335:1963-7; December 26, 1996.) This is a difficult concept for most physicians to accept, and encourages physicians to avoid situations where patients are more likely to have medical problems which may lead to lawsuits regardless of how competently the physician acts. Those situations are found in abundance in the ER. Not surprisingly, it is becoming increasingly difficult to find specialists willing to be on call for the ER, and the number one problem facing ER groups such as mine is finding enough emergency physicians to staff the ER's. In a

Testimony of Michael Frank, MD JD
before the Senate Judiciary- Civil Justice Committee
June 10, 2009

surprisingly candid, but somewhat understated admission, the Centers for Medicare & Medicaid Services (CMS) said, “We are aware that providing specialty on-call coverage can be challenging for a hospital because of the limited availability of specialty physicians who are willing or able to take call.” (73 Federal Register 48662; CMS Final Rule Preamble CMS 1390-F 7/31/08, p. 873) And in what can only be described as an example of the axiom that no good deed goes unpunished, we are currently defending one of our ER docs who spent three hours calling multiple hospitals trying to find a hand specialist willing to take care of a patient with an amputated finger, but now is being sued because the reimplantation surgery failed because of the delay.

As one small step toward resolving these challenges, we are asking that the medical malpractice standard be changed to require proof of willful or wanton misconduct. Ohio court decisions characterize this standard as requiring evidence of carelessness and an indifference to the consequences of one’s carelessness. The Ohio legislature has adopted the willful or wanton misconduct standard for:

- police officers (ORC §9-86);
- firefighters (ORC §9-60);
- EMT’s and paramedics (ORC §4765.49);
- school team doctors (ORC §2305.231);
- hazmat cleanup volunteers (ORC §2305.232);
- free clinic physicians (ORC §2305.234);
- the state fire marshal (ORC §3737.221);
- governmental employees and officers (ORC §2744.03);
- Good Samaritans providing emergency care (ORC §2305.23);
- ER docs on the radio directing emergency care provided by paramedics (ORC §4765.49); and
- drivers of ambulances and other public safety vehicles (ORC §4511.03).

Testimony of Michael Frank, MD JD
before the Senate Judiciary- Civil Justice Committee
June 10, 2009

In 2003, the Texas state legislature adopted an almost identical standard, requiring proof of “willful or wanton negligence” for physicians providing hospital emergency care. (Tx Civ Prac & Rem §74.153 & 74.154) And yet despite the immunities granted to these groups, there has been no crisis of reckless conduct among our firefighters, among our police officers, among our paramedics and EMT’s. Nor has Texas experienced an epidemic of negligence in the ER.

We quite rightly refer to our emergency care system as a medical safety net. Unfortunately, the safety net is stretched to the breaking point, and I am fearful that many people, yourselves included, may not realize how serious and how close to home this problem really is. Over the past couple of years, there have been several high profile cases of patients who have expired in ER waiting rooms. These cases have garnered much publicity, and even more public outrage, mostly because of the lack of concern displayed by the hospital personnel in the face of the dire straits of these patients. While such indifference exhibited by hospital personnel is clearly more the exception than the rule, you would be wrong in concluding that waiting room deaths and injuries only occur where caring and compassion is lacking. In my ER group, we have defended 3 lawsuits against our physicians involving patients who died of cardiac arrest in the ED waiting room. And the experience in my group is hardly unique. In 2007, the American College of Emergency Physicians surveyed almost 1,500 ER docs, asking if they were aware of any patients who suffered harm, or died, as a result of waiting to be seen in an overcrowded ER. Over 700 of the ER docs said they had personal experience with a patient being harmed, and 200 had personal experience of a patient dying. (*ACEP Poll on the Critical Issues Facing Emergency Patient: August 29 – September 19, 2007.*) My point is that this is not someone else’s problem. It is our problem and it is here now. We are asking for your help in solving that problem.