HB 1636 HD 1

Measure Title:	**RELATING TO EMERGENCY MEDICAL PHYSICIANS.**
Report Title:	**Emergency Room Physicians**
Description:	**Provides additional legal protection for physicians who render medical services in genuine emergency situations involving an immediate threat of death or serious bodily injury, including emergency obstetrical medical care. (HB1636 HD1)**

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TO THE SENATE COMMITTEE ON HEALTH

TWENTY-FIFTH LEGISLATURE
Regular Session of 2009

Monday, March 23, 2009
3:30 p.m.

TESTIMONY ON HOUSE BILL NO. 1636, H.D. 1 – RELATING TO EMERGENCY MEDICAL PHYSICIANS.

TO THE HONORABLE DAVID Y. IGE, CHAIR, AND MEMBERS OF THE COMMITTEE:

My name is J.P. Schmidt, State Insurance Commissioner ("Commissioner"), testifying on behalf of the Department of Commerce and Consumer Affairs ("Department"). The Department supports this bill.

This version of the bill adds a new section under Hawaii Revised Statutes ("HRS") chapter 671 by: (1) creating an exception to liability during the period of emergency medical care for physicians who render emergency medical care or emergency obstetrical medical care (provided no previous doctor-patient relationship existed) in a hospital to one who is in immediate danger of loss of life or has a serious bodily injury, unless the damages resulted from gross negligence or wanton acts or omissions; and (2) defining "serious bodily injury".

Recruiting emergency room doctors is an extremely serious problem in Hawaii, as revealed during deliberations with the Healthcare Task Force in 2005 and the Physician On-Call Crisis Task Force in 2006, and numerous discussions with the public, hospital groups, physician groups, and others. Emergency physicians are paid on a per patient basis by any covering insurers. Therefore, if the patient or patient's insurer does

not pay for the emergency physician's care, the emergency physician does not get paid.

There is a shortage of certain physician specialists and an even greater shortage of physician specialists willing to serve on-call. There is an increased exposure to liability when an emergency physician treats a patient in an emergency situation whom the physician has usually never previously seen or treated. In addition, emergency physicians often receive inadequate or no remuneration for their services. Providing reasonable limits on liability for physicians will help ensure that emergency room patients receive appropriate care in their time of need.

We thank this Committee for the opportunity to present testimony on this matter and ask for your favorable consideration.

HAH
Healthcare Association
of Hawaii

SENATE COMMITTEE ON HEALTH
Senator David Ige, Chair

Conference Room 016
March 23, 2009 at 3:30 p.m.

Testimony in support of HB 1636 HD 1.

The Healthcare Association of Hawaii advocates for its member organizations that span the entire spectrum of health care, including acute care hospitals, two-thirds of the long term care beds in Hawaii, as well as home care and hospice providers. Thank you for this opportunity to testify in support of HB 1636 HD 1, which exempts from liability any physician who renders emergency medical care in a hospital to any person who is in immediate danger of serious bodily injury or death.

This bill addresses the severe shortage of physicians of certain specialties, such as orthopedic surgeons and neurosurgeons, who are willing to take emergency call due to liability concerns. The shortage affects the quality of emergency care available to Hawaii's residents. This bill represents a common sense approach to protecting emergency care physicians in order to ensure the availability of quality emergency medical care. Hawaii's laws will continue to protect residents against negligence and medical malpractice.

For the foregoing reasons the Healthcare Association strongly supports HB 1636 HD 1.

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THE QUEEN'S MEDICAL CENTER

1301 Punchbowl Street • Honolulu, Hawaii 96813 • Phone (808) 538-9011 • Fax: (808) 547-4646

Senator David Ige, Chair
Senator Josh Green, M.D., Vice Chair

Monday, March 23, 2009 – 3:30 p.m.
State Capitol, Conference Room 016
SENATE COMMITTEE ON HEALTH

In Support of HB 1636 HD1 Relating to Emergency Medical Physicians

Chair Ige, Vice Chair Green, and Members of the Committee:

My name is Dr. Gerard Akaka, Vice President of Medical Affairs for The Queen's Medical Center (Queen's), testifying in strong support of HB 1636 HD1 which provides additional legal protection for physicians who render medical services in genuine emergency situations involving an immediate threat of death or serious bodily injury.

Queen's has a severe shortage of orthopedic surgeons, neurosurgeons, and hand and face (plastic) surgeons willing to take emergency call due to liability concerns. The problem is more acute on the neighbor islands. This measure seeks to provide protection to emergency care physicians and ensure the availability of quality emergency medical care.

Hawaii's laws will continue to protect citizens against true negligence and medical malpractice. This bill provides protection only for physicians who provide genuine emergency care (typically within the confines of an emergency room or trauma center) in cases where there is an immediate threat of death or serious bodily harm. Other states, including Florida, Georgia, Oklahoma, South Carolina, Texas, and West Virginia, have enacted some form of protection for physicians who provide emergency care.

In 2006, the Hawaii Legislative Reference Bureau published a report, "On-Call Crisis in Trauma Care: Government Responses," which details the causes of the on-call physician specialist shortage. It concludes that, "Rising malpractice liability insurance premiums, in combination with lower reimbursement rates, render the practice of certain specialties less and less cost effective. There is increasing pressure from malpractice insurers for physicians not to provide emergency room coverage. Several liability insurers have simply stopped providing medical liability coverage for certain physician specialties. During malpractice crises, concerns are expressed that liability costs will drive high-risk specialist physicians from practice, creating access-to-care problems. While the problem is multi-factorial, with reimbursement and managed care arrangements contributing significantly, physician specialists perceive liability to be the strongest driver."

The study also notes, "With trauma injuries, seconds count; the chances of survival significantly decrease and the side effects of injury significantly increase if appropriate care is not given in the first hour immediately following the injury. A shortage of physician specialists can jeopardize a trauma team's ability to provide care. It also increases the risk of delay in patient treatment which in turn increases patients' risk of harm."

Thank you for the opportunity to testify.

Monday, March 23, 2009, 3:30 p.m. CR 016

To: COMMITTEE ON HEALTH
Senator David Y. Ige, Chair
Senator Josh Green, M.D., Vice Chair

From: Hawaii Medical Association
Gary A. Okamoto, MD, President
Philip Hellreich, MD, Legislative Co-Chair
Linda Rasmussen, MD, Legislative Co-Chair
April Donahue, Executive Director
Richard C. Botti, Government Affairs
Lauren Zirbel, Government Affairs

Re: HB1636 RELATING TO EMERGENCY MEDICAL PHYSICIANS

Chairs & Committee Members:

Hawaii Medical Association supports HB1636.

The passage of this measure is a common sense approach to encourage medical professionals to provide help in cases of emergency without thinking about how their actions could create unintended circumstances when an ungrateful individual is looking to create monetary gain.

The measure covers cases of gross negligence as it should.

Thank you for the opportunity to provide this testimony.

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TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE HAWAII ASSOCIATION FOR JUSTICE (HAJ) IN OPPOSITION TO H.B. NO. 1636, HD 1

March 23, 2009

To: Chairman David Ige and Members of the Senate Committee on Health:

My name is Bob Toyofuku and I am presenting this testimony on behalf of the Hawaii Association for Justice (HAJ) in opposition to H.B. No. 1636, HD 1.

A. Study by the Legislative Reference Bureau

The Hawaii Legislature recently requested a comprehensive study of the on-call emergency doctor shortage by the Legislative Reference Bureau (LRB). The LRB submitted a 54 page analysis (Report No. 2, 2006) on the causes for the shortage and potential solutions. The LRB study does not support the premise of this bill that tort reform is the answer to the problem.

The LRB studied the alleged causes of the emergency doctor shortage: 1) Insufficient Compensation; 2) Impact on Lifestyle and their own Private Practice; 3) Supply and Demand - - national shortage of emergency and trauma shortage; and 4) Liability concerns. The LRB study confirmed the impact of insufficient compensation, impact on lifestyle and private practice and supply and demand. However, the LRB was unable to confirm the role of medical malpractice. The LRB report cautioned: "However, evidence on how premiums were affected is mixed and findings are at best inconclusive. In this regard, researchers who study the tort system have found only a loose connection between claim filings and outcomes and premium spikes. Policy makers should be wary of exaggerated and misdirected statistics offered in support of partisan positions.

1. **Uncompensated care:** The study indicates that across the nation, the costs of practicing medicine and delivering trauma care have steadily increased, while reimbursements to physicians from health plans, managed care, Medicare, Medicaid, and safety net programs for the uninsured have dramatically decreased. It is then reported that about half of all emergency services provided in the country are not compensated.

The report quotes the following: "Society is exceeding the goodwill of doctors to be able to cope financially. Many doctors would just as soon quit practicing than continue to work for free."

A study in California reports similar findings. It stated that inadequate or no compensation is the primary reason physicians are not willing to be on-call in emergency situations.

2. **Lifestyle:** The work-life balance has become a driving factor for more physicians, with many striving to tailor the work environment to fit a more desired lifestyle. The report states that there is a national shortage of specialists in many of the areas critical for trauma coverage. One reason for the shortage is that the physician workforce is aging and doctors are retiring or slowing down. Further, other reports and studies indicate that many of the younger doctors and those graduating from medical school are choosing not only to stay in urban areas, but to specialize in areas that don't severely impinge on the lifestyle that they are choosing. "Studies have shown that interest is shifting away from uncontrollable lifestyle specialties among US medical students." "Controllable lifestyle specialties have been defined as specialties 'with practice styles that allow for more control over the timing and number of hours worked, and more personal time for leisure,

family, and avocational pursuits.' " See *Texas Department of State Health Services, Center for Health Statistics, The Supply of Pediatricians in Texas – 2006.*

For example, the number of anesthesiology graduates in the country declined from 1740 in 1993 to 891 and 1999. Also, only 50 new cardiologists are currently being trained nationally, despite a nationwide need for 300 new cardiologists each year.

Another reason is that more physician specialists are doing work in outpatient surgical centers. These physicians may no longer need to have staff privileges at hospitals with the emergency department with on-call requirements attached. In addition to ambulatory surgery centers and specialty hospitals, doctors have expanded office-based clinical capabilities. Also, as we have testified at other hearings, the training (residency) slots for physicians have declined.

The LRB study offers many suggestions to address the emergency and trauma doctor shortage. The LRB study indicates that in light of the value of trauma centers to individuals and society, a few states have helped their trauma centers by developing dedicated public sources of funding to address uncompensated trauma care. It added that trauma funding is generally available to physicians with specialized skills used at a disproportionately high rate for trauma cases.

As for the funding, there are a variety of sources which can be investigated on the state, local and federal levels to support these trauma programs. Some sources that states have utilized include various surcharges, taxes on cigarette sales, direct subsidies to increase Medicaid reimbursements, and even, like California, a general appropriation for specialty physician on-call coverage and indigent care.

In its conclusion, the LRB study indicated that "Clearly, detailed information about the on-call situation at The Queen's Medical Center and the State of Hawaii is needed to figure out which strategies will work best for this State."

HAJ feels that the suggestions relating to the major undisputed causes should be pursued before pursuing tort limitations whose impact have been determined to be "at best inconclusive." Any tort limitation will adversely impact on those injured while other possible solutions should not have any direct adverse effect on our citizens.

B. The Provisions in this bill are too broad

The provisions in this bill provide that "Any physician …who renders emergency medical care in a hospital to a person who is in immediate danger of loss of life or has a serious bodily injury shall not be liable for any civil damages…." This provision extends way beyond emergency room treatment and probably covers everyone in the hospital because it applies to anyone with a serious injury. Generally speaking a person would not be in a hospital if they did not have a serious injury or health problem.

Further, HAJ is aware that there are instances where a physician, including emergency room doctors, need to exceed the bounds of their training to save a patient. However, these situations are already contemplated by the law and the standard of care for the physician depends upon the circumstances under which the treatment took place. It is recognized in the law that the standard of care used is the standard under similar circumstances It is recognized that a doctor is not negligent simply because of an unfortunate event. A doctor is not liable if he or she exercised ordinary care and skill under the circumstances.

Because of our concerns stated above HAJ opposes this measure. Thank you for the opportunity to testify on this bill.

Testimony of Bert Sakuda
In Opposition to H.B. No. 1636, H.D. 1

Chair David Y. Ige and Members of the Senate Committee on Health:

Thank you for this opportunity to testify in opposition to H.B. 1636, H.D. 1, which gives immunity to all doctors who negligently treat patients with serious injury or immediate danger of loss of life in a hospital setting. Presumably, patients would not be in the hospital if their injuries were not serious, so this bill potentially extends to all treatment within a hospital.

The total elimination of patients' protections for negligence in the delivery of emergency medical service is opposed because it is fundamentally unfair and bad public policy to shift the burden of medical errors from the health system to the injured patient - - especially when the immunity granted by this measure will not solve the problem it seeks to cure. Insurance now spreads the cost of medical errors among participants in our health care system. Presently, no single doctor, hospital, nurse, pharmaceutical company, medical device manufacturer or patient pays the entire cost of major medical errors. Everyone shares in the cost through insurance, including the patient who pays for health insurance (the cost of which reflects the cost of providing medical services including malpractice insurance). The measure would completely bar damages for negligence in the rendering of emergency medical treatment and shift the entire burden solely to the patient.

The FACTS Regarding Emergency Medical Treatment

1. Hawaii ranks at the top of the nation for emergency medical specialists.

Emergency medicine is an established medical specialty with Board Certification administered by the American Board of Emergency Medicine. **Hawaii ranks Number One in the nation in the number of Board Certified emergency medical doctors**. Hawaii has 13.9 board certified emergency doctors per 100,000 population. The national average is 8.7. Of the tort reform states constantly referenced by the HMA, California lags far behind in 20th place with 9.2 per 100,000 and Texas ranks at the bottom with 5.7 per 100,000 in 45th place. The American College of Emergency Physicians report: The National Report Card on the State of Emergency Medicine 2009.

Hawaii ranks number six in the nation in the number of emergency doctors who have not yet obtained board certification with 15.3 per 100,000. The national average is 11.8 per 100,000. California and Texas again lag far behind at numbers 27 and 42 with 11.5 and 8.2 per 100,000, respectively.

While it is true that the nation as a whole is experiencing a shortage of emergency doctors (and Hawaii does need more in the neighbor islands and rural areas), Hawaii is well positioned relative to the rest of the nation. The facts simply do not support the claim that Hawaii is doing poorly compared to the mainland because doctors are fleeing to the tort reform states of California and Texas.

While emergency medical doctors are the most critical for staffing emergency rooms, other trauma specialties like orthopedic surgery are also needed for trauma victims. **Hawaii ranks well above California and Texas in the number of orthopedic surgeons** as well. Hawaii ranks number 19 with 9.5 orthopedic surgeons per 100,000. California ranks 33 with 8.7 per 100,000 and Texas ranks 46 with 7.3 per 100,000. Hawaii and Texas is tied for neurosurgeons at 1.5 per 100,000, while California does a little better at 1.7 per 100,000. Again, the facts do not support the hyperbole.

2. Emergency Medical Specialists Are NOT Fleeing Hawaii

The American Medical Association publishes data annually about doctors by state and by specialty. The 2009 edition of Physician Characteristics and Distribution in the US provides the latest data available for the number of doctors in each specialty for the state of Hawaii.

The 2009 edition lists **186 emergency medical specialists** for Hawaii - - **an increase of 34%** more than the 139 listed for Hawaii in the 2005 edition. The 2009 edition lists **126 orthopedic surgeons** for Hawaii versus 117 in the 2005 edition for **a 7% increase**. **Anesthesiologists increased 9%** from 143 listed in the 2005 edition to 156 in the 2009 edition. **Neurosurgeons went down from 25 to 21**. **OB/GYNs increased** from 252 listed in the 2005 edition to 253 listed in 2009.

The Hawaii specific data does not support the contention that these specialists are leaving Hawaii in droves. The proponents' mantra that doctors are fleeing Hawaii, thus requiring the restricting of patients' rights is contradicted by the facts.

3. Every State In The Nation Has A Specialist Shortage - - whether or not they enact tort limitations - - Because There Is A National Shortage.

This fact has been amply demonstrated during past hearings and is discussed in the specific context of emergency on-call specialists in the 2006 LRB study. Study after study have found that the main reasons for the on-call specialist shortage are: first, inadequate or no payment; second, adverse impact on private practice and family life; and third, liability concerns. Addressing the least important factor will not cure the problem unless the most important factors are resolved.

4. Voluntary On-Call Duty Is Dead Because It Does Not Pay

Low reimbursement issues concerning governmental and private health coverage have been discussed ad nauseum and will not be repeated here. The direct effect of the federal Emergency Medical Treatment and Labor Act (EMTALA) on the deteriorating on-call situation, however, merits discussion. Its impact is significant and can not be changed on the state level.

EMTALA was enacted as part of the 1985 omnibus budget bill to stop the practice of "patient dumping" by hospitals and clinics. "Patient dumping" was the practice of keeping only insured patients and sending the uninsured to another hospital. This was widely practiced in

parts of the country to maintain maximum profitability. EMTALA required hospital and clinic emergency departments to accept and treat patients without regard to insurance coverage or ability to pay. It also prohibits withholding treatment pending authorization from health insurers.

The unintended consequence of these restrictions was that on-call physicians were required to treat uninsured patients without compensation. As the uninsured learned that they could receive free treatment at an emergency room, the number of patients that doctors treated for free increased to about 50% on a national average according to the American College of Emergency Physicians. This impacts on-call doctors in two ways. First, if they are called during the work day they don't get paid for the work they do for the uninsured plus they lose the income they would have received from their regular paying patients that they would have seen instead. Second, if they get called in the middle of the night they work all night for free and are then so tired the next day that the risk of errors for their regular patients is increased.

It doesn't pay to treat even those who are insured. The prohibition against getting insurer pre-authorization results in denials of benefits or reductions in payments. As an example, if a Kaiser member is taken to Queens for treatment instead of Kaiser, there is a question whether Kaiser must pay for the treatment. If HMSA determines that a patient did not require emergency treatment, there is a question whether reimbursement should be made at the lower level for a regular office visit. Finally, if there is a payment, the amount under current government and private fee schedules is so low that it simply is not worth the sacrifice to take call.

In addition, EMTALA requires that on-call physicians report to the hospital within a certain time after being called or face a fine of up to $50,000. As a recent letter to the editor from an orthopedic surgeon stated, add to this the potential for uncompensated or inadequately compensated care, disruption to professional and private life, and liability if the doctor is negligent, and it just doesn't make sense to take call.

Current Law Already Addresses The Emergency Treatment Issue

We understand that the primary concerns are: 1) the periodic necessity for emergency doctors to exceed the bounds of their training to save a patient; and 2) the fact that an emergency doctor may have no familiarity with the patient's medical history or access to medical records. These situations are already contemplated by the law and accommodated by adjusting the standard of care for the physician to the circumstances of the treatment.

Standard Court Jury Instruction No. 14.2 instructs the jury that the doctor need only "exercise the care and skill ordinarily used, by a physician practicing in the same field ***under similar circumstances***." Thus, the circumstances of the treatment must already be considered under current law. Doctors are already permitted to explain all extenuating circumstances, such as a need to exceed their area of competency to save a patient, the lack of the latest state of the art equipment at the particular hospital or lack of access to the patient's medical records. Juries are instructed that they must consider those circumstances.

Standard Court Jury Instruction 14.4A further instructs the jury that "Informed consent is not required when: (1) emergency treatment or an emergency procedure is rendered by a health care provider; and (2) the obtaining of consent is not reasonably feasible under the circumstances

without adversely affecting the condition of the patient's health." Juries are instructed that doctors must be given additional discretion during emergency treatment and normal rules regarding the explanation and selection of treatment options do not apply. Standard Court Instruction No. 14.6 makes clear that a doctor is not responsible just because there is a bad result: "A physician is not an insurer of a patient's health. A physician is not negligent simply because of an unfortunate event if the physician conforms to the applicable standard of care." That is, the doctor is not liable just because something went wrong if the doctor exercised ordinary care and skill ***under the circumstances***.

Finally, court procedures allow a doctor to submit Jury instructions tailored to the particular circumstances of the case, should the standard instructions be inadequate. Both patients and doctors routinely submit such proposed instructions for the court's use as necessary to fairly instruct the jury. This procedure is already available to address any unique circumstances of the treatment and case.

Thank you for this opportunity to testify in opposition to HB 1636, HD 1.

From: Doug Hiller [wdbhiller@hotmail.com]
Sent: Monday, March 23, 2009 3:23 AM
To: HTHTestimony
Cc: joshuaboothgreen@yahoo.com
Subject: HB1636HD1: Emergency Physician relief

Categories: Green Category, Blue Category

Dear Senators

If you support access to ER care for Hawaii residents, please support HB1636HD1.

Our physicians for generations have agreed to see patients in the ER, leaving their families at any time of the day or night, frequently providing free care for the most difficult cases.

This care is very often no longer available, as the pool of orthopedic surgeons in Hawaii contracts, and as the remaining physicians take a practical look at their very possible reward for their generosity --- lawsuits.

I stopped taking formal call, and Dr. John Bellatti stopped taking formal call for a period of time after 2005 on the Big Island because we were no longer willing to be sued for contributing our time to the community.

You cannot force doctors to come to Hawaii, and once here you cannot force them to provide services which are unreimbursed and which create huge stress and liability for the physician.

You can, however, make it easier for physicians to follow their very strong natural inclination to help people, by not punishing them for helping: Removing some of the liability from the ER will encourage doctors to cover the ERs and will ultimately decrease insurance premiums, making it more attractive and affordable for doctors to practice in Hawaii....

Please fix things so that I can come home!

Thank you very much.

Doug Hiller, MD Waimea/Wyoming