To Treat or Not to Treat: A Hospital's Duty to Provide Emergency Care

This comment examines a private hospital's duty to treat emergency patients. The common law and statutory approaches provide little protection for seriously ill or injured persons seeking emergency care. This comment proposes adoption of a model duty to treat statute which insures that those seeking aid at a private hospital will receive reasonable care.

INTRODUCTION

Two-thirds of the hospitals in the United States are private institutions.[1] In a single year, their emergency room personnel treated more than 81 million people.[2] Yet, when an injured person enters the emergency room of a private hospital, medical personnel may have no obligation to provide treatment. Absent a duty to treat, a private hospital can turn away an injured person, even if it can provide proper care. In contrast, a public hospital owes a duty to treat all ailing members of the public.[3]

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[1] AM. HOSPITAL ASS'N, HOSPITAL STATISTICS 12 (1980). Statistics in text refer to 1979.

[2] *Id.*

[3] In several cases delineating a hospital's right to exclude a physician, courts have provided some factors distinguishing public and private hospitals. A public hospital is owned, managed, and funded by the government. *See* Hughes v. Good Samaritan Hosp., 289 Ky. 123, 126, 158 S.W.2d 159, 161 (1942); Van Campen v. Olean Gen. Hosp., 210 A.D. 204, 207, 205 N.Y.S. 554, 555-56, *aff'd,* 239 N.Y. 615, 147 N.E. 219 (1924). The government does not control a private hospital, which is managed by private individuals or a corporation. *See* Woodard v. Porter Hosp., Inc., 125 Vt. 419, 422, 217 A.2d 37, 39 (1966). A private hospital's status does not change following the receipt of public funds or exemption from taxation. *See* Van Campen v. Olean Gen. Hosp., 210 A.D. at 207, 205 N.Y.S. at 556.

These standards for distinguishing public and private hospitals were formulated in corporate law cases, but have been adopted in tort cases. *See, e.g.,* Wilmington Gen. Hosp. v. Manlove, 54 Del. 15, 17, 174 A.2d 135, 137-38 (1961).

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This comment examines whether a private hospital has any duty to treat individuals seeking emergency medical care. Courts have used two rationales to impose a duty to treat. Where a hospital has undertaken to provide aid, it has a duty to continue treatment.[4] Alternatively, courts have held that in an unmistakable emergency, a private hospital with a well-established custom of providing emergency care owes a duty to treat anyone relying on that custom.[5] Several states have modified the common law by enacting limited duty to treat statutes.[6] This comment analyzes current case and statutory law, and proposes adoption of a model statute that imposes an objective duty to treat in true emergencies.

I. Duty to Treat Under Common Law

Under common law, private hospitals have no affirmative duty to treat persons seeking emergency care.[7] The absence of duty flows from common law tort principles, which recognize a duty to aid others in only a few situations.[8] Generally, individuals must aid those they have imperiled,[9] and persons with whom they share a special relationship.[10] These situations rarely arise

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[4] *See* notes 12-19 and accompanying text *infra*.

[5] *See* notes 20-31 and accompanying text *infra*.

[6] *See* notes 38-47 and accompanying text *infra*.

[7] *See* Birmingham Baptist Hosp. v. Crews, 229 Ala. 398, 157 So. 224 (1934) (swabbing baby's throat and administering anti-diptheria drug did not create a hospital's duty to provide ordinary medical services). The fact that the actor, here the hospital, realizes or should realize that his action is necessary for the aid or protection of another does not in itself impose upon him any duty to act. W. Prosser, Handbook of the Law of Torts 340 (4th ed. 1971).

[8] The general lack of a duty to give aid follows from the common law distinction between nonfeasance and misfeasance. *See* W. Prosser, *supra* note 7, at 338-39. Misfeasance is an affirmative act causing injury or increased risk of harm to another. It imposes a duty to aid. *Id.* at 338. Nonfeasance, the failure to act at all, does not give rise to a duty to aid unless there is a special relationship between the parties, such as parent and child. *Id.* at 338-39.

[9] *See, e.g.*, Parrish v. Atlantic Coast Line R. Co., 221 N.C. 292, 300, 20 S.E.2d 299, 304-05 (1942) (defendant negligently injured another; held to have a duty to aid the injured party). There is also general agreement that a duty to provide aid exists where defendant's innocent acts place the plaintiff in peril. *See* Restatement (Second) of Torts § 321 (1965); W. Prosser, *supra* note 7, at 342-43.

[10] W. Prosser, *supra* note 7, at 341-42. These special relationships include common carrier-passenger, innkeeper-guest, possessor of land-invitee, and conservator-conservatee. Restatement (Second) of Torts § 314A (1965).

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with respect to private hospitals. Thus, under these rules, private hospitals risk no liability by refusing to treat the injured.[11]

A duty may arise when a private hospital affirmatively acts to treat an injured person. The hospital's acts upon which the injured party relies, or which increase the injured party's peril, constitute an "undertaking."[12] Once treatment is undertaken, the hospital has a duty to continue to provide care.[13] Furthermore, the hospital must provide treatment with due care.[14]

Courts applying the undertaking theory have found that a variety of hospital activities lead to liability. For example, a hospital clearly undertakes to provide treatment by admitting an injured person to its facilities.[15] Similarly, a hospital undertakes treatment by providing an individual with emergency care.[16]

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[11] *See, e.g.*, Birmingham Baptist Hosp. v. Crews, 229 Ala. 398, 399-400, 157 So. 224, 226 (1934). The *Crews* court held that a private hospital does not owe a duty to treat a patient that it deems unacceptable. The hospital need not give a reason for its refusal to provide treatment. *Id.* at 399, 157 So. at 225.

[12]
> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if
> (a) his failure to exercise such care increases the risk of such harm, or
> (b) the harm is suffered because of the other's reliance upon the undertaking.

RESTATEMENT (SECOND) OF TORTS § 323 (1965). "Where . . . the actor's assistance has put the other in a worse position than he was in before . . . because . . . [he] has been induced to forego other opportunities of obtaining assistance, the actor is not free to discontinue his services where a reasonable man would not do so." *Id.* § 323 comment c. *See also* Bourgeois v. Dade County, 99 So. 2d 575 (Fla. 1957) (it is a jury question whether an emergency room intern's superficial examination and subsequent release to police custody of an unconscious man are acts that aggravated patient's condition rendering the hospital liable); Reeves v. North Broward Hosp. Dist., 191 So. 2d 307 (Fla. Dist. Ct. App. 1966) (jury may find that injured person's release following administration of medical tests and sedatives was sufficient to constitute negligence because of failure to continue treatment). *See generally* Powers, *Hospital Emergency Service and the Open Door*, 66 MICH. L. REV. 1455, 1468, 1470 (1968).

[13] RESTATEMENT (SECOND) OF TORTS § 323 (1965).

[14] *Id.*

[15] *See, e.g.*, Le Juene Rd. Hosp., Inc. v. Watson, 171 So. 2d 202, 203 (Fla. Dist. Ct. App. 1965) (legal admission constitutes undertaking, rendering hospital liable for failure to aid).

[16] *See* cases cited in note 12 *supra*. *But see* Birmingham Baptist Hosp. v.

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Often, however, courts stretch the undertaking concept to absurd limits and base a duty to treat on innocuous acts. For example, in Mississippi and Tennessee, an injured person's mere presence in an emergency room was held a sufficient undertaking to establish a duty to treat.[17] In New York, an emergency room phone call to a hospital physician may be sufficient evidence of an undertaking.[18] Other jurisdictions refuse to construe the undertaking concept so liberally and deny liability for a hospital's inaction.[19]

Delaware has departed from the common law undertaking theory. In *Wilmington General Hospital v. Manlove*,[20] an emer-

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Crews, 229 Ala. 398, 399-400, 157 So. 224, 225-26 (1934), discussed in note 7 *supra*.

[17] New Biloxi Hosp. v. Frazier, 245 Miss. 185, 146 So. 2d 882 (1962) (hospital's recording profusely bleeding gunshot victim as an emergency room patient constituted an undertaking); Methodist Hosp. v. Ball, 50 Tenn. App. 460, 362 S.W.2d 475 (1961) (private hospital liable for failure to provide emergency care to accident victim who remained in the emergency room for 45 minutes).

[18] O'Neill v. Montefiore Hosp., 11 A.D.2d 132, 135, 202 N.Y.S.2d 436, 438-39 (1960) (jury could reasonably conclude that a phone call from emergency room employee to hospital doctor while victim was in emergency room constituted an undertaking).

[19] *See, e.g.*, Harper v. Baptist Medical Center-Princeton, 341 So. 2d 133 (Ala. 1976) (emergency room personnel who examined plaintiff and gave him medication did not need to provide further medical care); Birmingham Baptist Hosp. v. Crews, 229 Ala. 398, 157 So. 224 (1934) (emergency treatment does not create duty to provide ordinary hospital services); Fabian v. Matzko, 236 Pa. Super. 267, 344 A.2d 569 (1975) (phone call by plaintiff's husband to emergency room doctor is not an undertaking by hospital).

[20] 54 Del. 15, 174 A.2d 135 (1961).

Law review commentators embraced Manlove as signaling a new trend in establishing a hospital's duty to provide emergency care. *See* Powers, *supra* note 12; Note, *Torts—Hospitals—Undertakings—Duty of Private Hospital Maintaining Emergency Ward to Treat in Case of Unmistakable Emergency*, 40 TEX. L. REV. 732 (1962); Comment, *Torts—Private Hospitals—Liability for Refusal to Provide Emergency Treatment*, 64 W. VA. L. REV. 234 (1962); Recent Development, *Duty to Admit Emergency Patients Imposed on Private Hospital Maintaining an Emergency Ward*, 62 COLUM. L. REV. 730 (1962); Recent Development, *Private Hospital Must Admit Unmistakable Emergency Cases*, 14 STAN. L. REV. 910 (1962); Recent Case, *Torts—Liability of Private Hospital-Refusal of Treatment in Emergency Ward*, 31 U. CIN. L. REV. 183 (1962).

However, since the *Manlove* decision 21 years ago, only a few courts have considered the *Manlove* rule. *See, e.g.*, Guerrero v. Copper Queen Hosp., 112 Ariz. 104, 537 P.2d 1329 (1975) (*Manlove* rule rejected in the absence of a statutory or public policy requiring care; however, concurring opinion contends

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gency room nurse refused to treat an infant suffering from a high fever and diarrhea. After returning home untreated, the infant died of bronchial pneumonia. The Delaware Supreme Court held that the hospital may be liable for the infant's wrongful death, even though treatment was not undertaken. The court held that in an unmistakable emergency, a private hospital with a well-established custom of providing emergency care owes a duty to treat anyone relying on that custom.[21]

Although *Manlove* purportedly imposes a broad duty to treat, the case confuses rather than clarifies the analysis of hospital liability. The *Manlove* decision identifies but fails to define three requirements that establish a duty to treat.[22] The first inquiry is whether an "unmistakable emergency" exists.[23] The *Manlove* court suggested several tests for this determination but did not clearly define "unmistakable emergency."[24] Although suggesting that a nurse often objectively determines whether an emergency exists,[25] the court presents, but fails to reconcile, dif-

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Manlove should apply); Richard v. Adair Hosp. Found. Corp., 566 S.W.2d 791 (Ky. Ct. App. 1978) (after denial of summary judgment for the hospital, appeals court remanded the case and held the *Manlove* rule applied); Stanturf v. Sipes, 447 S.W.2d 558 (Mo. 1969) (remanded after denial of summary judgment; appellate court suggested *Manlove* might apply if underlying facts fully developed); Fabian v. Matzko, 236 Pa. Super. 267, 344 A.2d 569 (1975) (where stroke victim's husband telephoned emergency room doctor who then refused to treat plaintiff, court considered *Manlove* but distinguished it on its facts).

These courts have not clearly adopted the *Manlove* rule, perhaps because of its conflicting standards and undefined terms. *See* notes 24-33 and accompanying text *infra*.

[21] Wilmington Gen. Hosp. v. Manlove, 54 Del. 15, 16, 174 A.2d 135, 140 (1961).

[22] *See* notes 23-33 and accompanying text *infra*.

[23] Wilmington Gen. Hosp. v. Manlove, 54 Del. 15, 16, 174 A.2d 135, 140 (1961).

[24] The court suggested several independent, yet conflicting standards to determine whether an emergency exists. First, the facts in the case did not indicate that a "layman could reasonably say that [the infant] was in 'immediate danger.'" *Id.* at 25, 174 A.2d at 141. Second, the court mentioned that before a jury question arose, the situation must be such that an "experienced nurse should have known" that an unmistakable emergency existed. *Id.* Third, the court stated that the hospital would not be liable if the nurse's opinion was "honest," "not clearly unreasonable in the light of the nurse's training." *Id.* at 24, 174 A.2d at 140. Finally, the court stated that a graduate nurse's reasonable opinion might be appropriate. *Id.* at 26, 174 A.2d at 141.

[25] *Id.* at 25, 26, 174 A.2d at 140, 141.

HeinOnline -- 15 U.C. Davis L. Rev. 1051 1981-1982

fering standards for finding an emergency.[26] The cases considering *Manlove* do not clarify the unmistakable emergency requirement.[27] They either ignore the requirement or summarily conclude that an emergency did or did not exist.[28]

The second prerequisite to a duty to treat under *Manlove* is that the hospital have a "well-established" custom of providing emergency care.[29] *Manlove* suggests that the mere maintenance of an emergency department indicates a "well-established" custom.[30]

Finally, *Manlove* requires that the prospective patient rely on the hospital's custom of providing emergency care.[31] Although the opinion does not define reliance, it does suggest that reliance may exist where the failure to treat aggravates the plaintiff's injuries.[32] Additionally, one case considering *Manlove* agrees that the patient's delay in seeking treatment from another source is

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[26] *See* note 24 *supra*.

[27] *See* cases cited in note 20 *supra*.

[28] *See, e.g.*, Stanturf v. Sipes, 447 S.W.2d 558 (Mo. 1969). In *Stanturf*, the only hospital in the locality refused to provide emergency care to a man with frostbitten feet. The delay in obtaining treatment resulted in the amputation of his feet. The Missouri court discussed the other elements of the *Manlove* rule, but failed to mention the "unmistakable emergency" requirement. *Id.* at 562.

The *Manlove* rule was also examined in Fabian v. Matzko, 236 Pa. Super. 267, 344 A.2d 569 (1975). The *Fabian* court stated that the situation before it "was not an unmistakable emergency. In fact, there were no facts which would have indicated to [the emergency room doctor] that this was an emergency room situation." *Id.* at 273, 344 A.2d at 572. In Richard v. Adair Hosp. Foun. Corp., 566 S.W.2d 791 (Ky. App. 1978), an emergency room nurse twice refused to aid an infant with bronchial pneumonia who died a few hours later. The court said only that pneumonia presents an emergency situation. *Id.* at 793.

[29] Wilmington Gen. Hosp. v. Manlove, 54 Del. 15, 25, 174 A.2d 135, 140 (1961).

[30] *Id.* at 23, 174 A.2d at 139. *Cf.* Stanturf v. Sipes, 447 S.W.2d 558, 562 (Mo. 1969) ("long established rule of the hospital to accept all persons for treatment upon the payment of a $25 admittance fee . . . ."). *But see* Fabian v. Matzko, 236 Pa. Super. 712, 716, 344 A.2d 569, 573 (1975) (Spaeth, J., concurring) (mere maintenance of a hospital emergency room is not a "well-established" custom).

[31] Wilmington Gen. Hosp. v. Manlove, 54 Del. 15, 25, 174 A.2d 135, 140 (1961).

[32] *Id.* at 23, 174 A.2d at 139. ("such a refusal might well result in worsening the condition of the injured person, because of the time lost in a useless attempt to obtain medical aid"). *See also* RESTATEMENT (SECOND) OF TORTS § 323 comment c (1977), set forth in note 12 *supra*.

HeinOnline -- 15 U.C. Davis L. Rev. 1052 1981-1982

sufficient evidence of reliance.[33]

Both the undertaking theory and *Manlove* base the hospital's duty to treat on an analysis of the hospital's conduct. The undertaking theory focuses on acts by the hospital in furtherance of treatment.[34] The results under this approach are inconsistent and unpredictable.[35] The *Manlove* approach is similarly inadequate.[36] Its application requires a well-established custom of providing care, and places primary reliance on the hospital personnel's determination of the patient's need for care.[37] Neither approach adequately considers the interests of the prospective patient or the hospital. As a result, persons in need of emergency care cannot rely on common law to require private hospitals to provide care.

II. Duty to Treat Under Statutory Law

In reaction to the inadequate judicial approaches to the duty to treat, nine state legislatures have enacted emergency care statutes.[38] These statutes impose upon a private hospital a lim-

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[33] Stanturf v. Sipes, 447 S.W.2d 558, 562 (Mo. 1969) (plaintiff "had reason to rely . . . [I]t could be found that plaintiff's condition was caused to be worsened by the delay resulting from the futile efforts . . . to obtain treatment . . . .").

[34] *See* notes 12-15 and accompanying text *supra*.

[35] *See* notes 12-19 and accompanying text *supra*.

[36] *See* notes 20-33 and accompanying text *supra*.

[37] *See* notes 20-32 and accompanying text *supra*.

[38] Cal. Health & Safety Code § 1317 (West 1979):

> Emergency services and care shall be provided to any person requesting such services or care . . . for any condition in which the person is in danger of loss of life, or serious injury or illness, at any health facility . . . that maintains and operates an emergency department to provide emergency services to the public when such health facility has appropriate facilities and qualified personnel available to provide such services or care.
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> Neither the health facility, its employees, nor any physician . . . shall be held liable in any action arising out of a refusal to render emergency services or care if reasonable care is exercised in determining the condition of the person, or in determining the appropriateness of the facilities, the qualifications and availability of personnel to render such services.
>
> Emergency services and care shall be rendered without first questioning the patient or any other person as to his ability to pay therefor . . . .

Fla. Stat. Ann. § 401.45 (West 1979):

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ited duty to provide emergency care. As is true of the common

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(1) No person shall be denied treatment for any emergency medical condition which will deteriorate from a failure to provide such treatment at any hospital . . . that operates an emergency department providing emergency treatment to the public.

(2) A hospital or its employees or any physician . . . responding to an apparent need for emergency treatment pursuant to this section shall not be held liable in any action arising out of a refusal to render emergency treatment or care if reasonable care is exercised in determining the condition of the person and in determining the appropriateness of the facilities and the qualifications and availability of personnel to render such treatment.

IDAHO CODE ANN. § 39-1391 (Bobbs-Merrill 1977):

Any hospital . . . may provide to any person appearing or represented to be seriously sick or injured, without admission of such person to the hospital and without the immediate presence of a licensed physician and surgeon, such emergency treatment . . . . Neither any hospital nor its agents or employees providing such services, . . . nor shall any such hospital, its agents or employees, or any physician be held liable in any civil action arising out of the furnishing of such services and care, in the absence of gross negligence under the existing circumstances.

a. The furnishing of emergency . . . services and care . . . shall not in and of itself constitute admission to such hospital of the person receiving such services and care nor shall such hospital, its employees, or any physician be subject to civil suit for abandonment or failure to provide care if, upon examination by a licensed physician and surgeon, it is determined by such physician, in the good faith exercise of his professional judgment, that the admission of any person receiving or presented for such services and care is not advisable or required.

ILL. ANN. STAT. ch. 111 ½, § 86 (Smith-Hurd 1977):

Every hospital . . . which provides general medical and surgical hospital services shall provide a hospital emergency service . . . and shall furnish such hospital emergency services to any applicant who applies for the same in case of injury or acute medical condition where the same is liable to cause death or severe injury or serious illness.

KY. REV. STAT. ANN. § 216B.400 (Bobbs-Merrill Supp. 1980):

Where a person has been determined to be in need of emergency care by any person with admitting authority, no such person shall be denied admission by reason only of his inability to pay for services to be rendered by the hospital.

Id. § 216B.990(3):

Any hospital acting by or through its agents or employes [sic] which violates the provisions of KRS 216B.400 shall be punished by a fine of not less than one hundred dollars ($100) nor more than five hundred dollars ($500).

HeinOnline -- 15 U.C. Davis L. Rev. 1054 1981-1982

law, they focus on the hospital's conduct to determine the pres-

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LA. REV. STAT. ANN. § 40:2113.4 (West 1981):

A. Any general hospital . . . which offers emergency room services to the public and is actually offering such services at the time shall make its emergency services available to all persons residing in the territorial area of the hospital . . . .

B. "[E]mergency" means a physical condition which places the person in imminent danger of death or permanent disability, or in cases of rape; however, the person may be directed to another hospital . . . which specializes in care and treatment of rape victims. "Emergency services" means those services which are available in the emergency room and surgical units in order to sustain the person's life and prevent disablement until the person is in condition to be able to travel to another appropriate facility without undue risk of serious harm to the person . . . .

N.Y. PUB. HEALTH LAW § 2805-b (McKinney 1977):

1. Every general hospital shall admit any person who is in need of immediate hospitalization with all convenient speed . . . . Every general hospital which maintains facilities for providing out-patient emergency medical care must provide such care to any person who, in the opinion of a physician, requires such care.

2. In cities with a population of one million or more, a general hospital must provide emergency medical care and treatment to all persons in need of such care and treatment and applying to such hospital therefor. Such care may be provided or procured by the general hospital at a location other than the general hospital if, in the opinion of the attending physician, the general hospital does not have the proper equipment or personnel at hand to deal with a particular medical emergency.

Nothing in this act shall be construed to deny to the attending physician the right to evaluate the medical needs of persons applying to the hospital for emergency treatment and to delay or deny medical treatment where, in the opinion of the attending physician, no actual medical emergency exists. However, no person actually in need of emergency treatment, as determined by the attending physician, shall be denied such treatment by a general hospital in cities with a population of one million or more for any reason whatsoever.

TENN. CODE ANN. § 53-5201 (1977):

Every hospital, either public or private, . . . shall furnish . . . hospital emergency services to any applicant who applies for the same in case of injury or acute medical condition where the same is liable to cause death or severe injury or illness.

Id. § 53-5203:

[Violators shall be] guilty of a misdemeanor and upon conviction . . . shall be punished by fine of not less than . . . $50 nor more than . . . $1000 for each offense.

WYO. STAT. ANN. § 35-2-115 (Michie 1977):

HeinOnline -- 15 U.C. Davis L. Rev. 1055 1981-1982

ence or absence of a duty to treat.[39] The statutes differ from the common law because they eliminate the need to find an undertaking.[40] Although statutory language varies, either the medical condition of a potential patient or the medical judgment of hospital personnel triggers a hospital's statutory duty to treat.

Medical condition statutes existing in six states base a hospital's duty to treat on the potential patient's medical condition.[41]

> (a) Emergency service and care shall be provided, . . . to any person requesting such services or care, . . . for any condition in which the person is in danger of loss of life, or serious injury or illness, at any hospital . . . that maintains and operates emergency services to the public when such hospital has appropriate facilities and qualified personnel available to provide such services or care.
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> (b) Neither the hospital, its employees, nor any physician . . . shall be held liable in any action arising out of a refusal to render emergency services or care if ordinary medical care and skill is exercised in determining the condition of the person, and a decision is made that such refusal shall not result in any permanent illness or injury to such person or a decision is made that sufficient qualified personnel are not available to treat said person, or a decision is made that facilities or equipment are not available to treat said person or in determining the appropriateness of the facilities, the qualifications and availability of personnel to render such services.

[39] *See* notes 7-33 and accompanying text *supra*.

[40] For a discussion of the common law undertaking requirements, see notes 12-19 and accompanying text *supra*.

[41] CAL. HEALTH & SAFETY CODE § 1317 (West 1979) ("Emergency . . . care shall be provided . . . for any condition in which the person is in danger of loss of life or serious injury or illness . . . ."); FLA. STAT. ANN. § 401.45 (West 1979) ("No person shall be denied treatment for any emergency medical condition which will deteriorate from a failure to provide such treatment at any hospital . . . that operates an emergency department . . . ."); ILL. ANN. STAT. ch. 111 ½, § 86 (Smith-Hurd 1977) ("Every hospital . . . which provides . . . a hospital emergency service . . . shall furnish such emergency services . . . in case of injury or acute medical condition where the same is liable to cause death or severe injury or severe illness"); LA. REV. STAT. ANN. § 40:2113.4 (West 1981) ("Any general hospital . . . which offers emergency room services . . . shall make its emergency services available to all persons residing in the territorial area of the hospital . . . in order to sustain the person's life and prevent disablement . . . ."). The Louisiana statute is unique in limiting required emergency services to people living in the area surrounding the hospital. TENN. CODE ANN. § 53-5201 (1977) ("Every hospital, either public or private . . . shall furnish . . . hospital emergency services to any applicant who applies for the same in case of injury or acute medical condition where the same is liable to cause death or severe injury or illness . . . ."); WYO. STAT. ANN. § 35-2-115 (Michie 1977) ("Emergency . . . care shall be provided . . . for any condition in which the person is in danger of loss of life, or serious injury or illness

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In five of these states,[42] this duty to treat extends to persons in danger of serious illness, injury, or death.[43] These statutes provide little or no guidance for determining the seriousness of the prospective patient's condition. Florida's medical condition statute goes beyond requiring serious illness, injury, or death, and imposes a nearly absolute duty to treat.[44] The Florida legislature mandates that emergency medical care must be provided to any victim whose medical condition will "deteriorate" without emergency treatment. Since medical reality dictates that almost every illness or injury will deteriorate if left untreated, the duty to treat is practically unlimited.[45]

The medical condition statutes do not indicate who, if anyone, determines the prospective patient's condition.[46] Indeed, these provisions do not explicitly require anyone to examine the injured or ill person. Absent any obligation to examine or to determine the extent of injury, these statutes create an illusory duty.[47] If interpreted to require examination by hospital employees, these laws are indistinguishable from medical judgment statutes.

Medical judgment statutes base the duty to treat on the judgment of hospital personnel.[48] They impose a duty to treat only when emergency room personnel determine that the injured person requires aid. The New York and Idaho statutes require a

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[42] CAL. HEALTH & SAFETY CODE § 1317 (West 1979); ILL. ANN. STAT. ch. 111 ½, § 86 (Smith-Hurd 1977); LA. REV. STAT. ANN. § 40:2113:4 (West 1981); TENN. CODE ANN. § 53-5201 (1977); WYO. STAT. ANN. § 35-2-115 (Michie 1977).

[43] *See* note 41 *supra*.

[44] FLA. STAT. ANN. § 401.45 (West 1979) ("No person shall be denied treatment for any emergency medical condition which will deteriorate from a failure to provide such treatment at any hospital . . . that operates an emergency department. . . .").

[45] *Id.* This statute is being repealed as of July 1, 1982, perhaps because of its excessively broad scope. The Florida legislature has explained the repeal by noting that the statute exceeds the state's police power since it is not "necessary to protect the public health, safety, or welfare from significant and discernible harm or damage." FLA. STAT. ANN. § 11.61 (West 1979).

[46] *See* statutes cited in note 41 *supra*.

[47] At the present time, no published opinion has construed the medical condition statutes. Therefore, it is impossible to speculate whether courts may imply a duty to examine in these statutes.

[48] IDAHO CODE ANN. § 39-1391a (Bobbs-Merrill 1977); KY. REV. STAT. ANN. § 216B.400 (Bobbs-Merrill Supp. 1980); N.Y. PUB. HEALTH LAW § 2805-b (McKinney 1977), set forth in note 38 *supra*.

HeinOnline -- 15 U.C. Davis L. Rev. 1057 1981-1982

physician to make this determination.[49] Kentucky's medical judgment statute is broader since "any person with admitting authority"[50] may determine the patient's need for care.

Reasonable care in evaluating the prospective patient's condition is not required by the medical judgment statutes.[51] In New York, apparently a physician's subjective judgment that an individual does not require aid discharges the duty to examine.[52] As a result, an untreated New York plaintiff faces a difficult task in proving any duty to treat.[53] Idaho's medical judgment statute requires the physician's opinion to be a "good faith exercise of his professional judgment."[54] It is unclear whether Idaho's standard is equivalent to a requirement of reasonable care. If not, an untreated plaintiff must show that the physician denied treatment in bad faith. Curiously, the Idaho statute imposes liability for the gross negligence of non-physician hospital personnel who provide emergency care.[55] Kentucky fails to specify a standard for determining when a hospital must treat a prospective patient.[56] In permitting "any person with admitting authority" to make the decision, the Kentucky statute may not even require a determination based on trained medical judgment. Presumably,

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[49] IDAHO CODE ANN. § 39-1391a (Bobbs-Merrill 1977) ("such physician, in the good faith exercise of his professional judgment. . . ."). Idaho allows non-physicians to provide care. *Id.* § 39-1391 (the hospital may provide emergency treatment "without the immediate presence of a licensed physician or surgeon. . . ."). N.Y. PUB. HEALTH LAW § 2805-b (McKinney 1977) ("care to any person who, in the opinion of a physician, requires such care"). However, the New York statute provides that when a physician determines that a person requires aid, that person cannot be turned away for any reason in cities populated by over one million people. *Id.* § 2805-b(2).

[50] KY. REV. STAT. ANN. § 216B.400 (Bobbs-Merrill Supp. 1980).

[51] *See* note 48 *supra*.

[52] N.Y. PUB. HEALTH LAW § 2805-b(1) (McKinney 1977) ("hospital . . . must provide such care to any person who, in the opinion of a physician, requires such care").

[53] A plaintiff would presumably have to show that the denial of treatment was based on something other than the patient's condition and that the doctor believed the patient to be in need of care.

[54] IDAHO CODE ANN. § 39-1391a (Bobbs-Merrill 1977). *See* note 38 *supra*.

[55] IDAHO CODE ANN. § 39-1391a (Bobbs-Merrill 1977). The Idaho statute does not explain why a hospital is liable for a doctor's bad faith but only for the gross negligence of non-physician personnel.

[56] KY. REV. STAT. ANN. § 216B.400 (Bobbs-Merrill Supp. 1980) ("Where a person has been determined to be in need of emergency care by any person with admitting authority. . . .").

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the subjective judgment of a non-medical employee with admitting authority could relieve the hospital of a duty to treat.

Only three states provide specific remedies.[57] Kentucky and Tennessee enforce the duty to treat by criminal sanctions.[58] Both states authorize criminal fines against hospitals that unlawfully refuse emergency care. Unfortunately, the authorized fines are minimal,[59] and thus provide little deterrence. The Louisiana medical condition statute includes an administrative remedy.[60] It is doubtful whether such an approach is so directly related to a refusal to treat that it would prevent hospitals from turning away those needing care. Further, these laws do not authorize civil remedies, thus creating a possibility that the specified remedy is an exclusive one.[61]

The emergency care statutes are an ineffective alternative to the common law duty to treat. The inadequacies of the common law also plague the emergency care statutes. Under the medical condition and medical judgment statutes, a hospital's own subjective determinations trigger the duty to treat emergency patients.[62] This subjective standard offers little protection to seriously ill or injured persons seeking emergency care. Moreover, the statutes fail to specify who determines the need for care, or

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[57] KY. REV. STAT. ANN. § 216B.990(3) (Bobbs-Merrill Supp. 1980); LA. REV. STAT. ANN. § 40:2113.4 (West 1980); TENN. CODE ANN. § 53-5203 (1977).

[58] KY. REV. STAT. ANN. § 216B.990(3) (Bobbs-Merrill Supp. 1980); TENN. CODE ANN. § 53-5203 (1977).

[59] KY. REV. STAT. ANN. § 216B.990(3) (Bobbs-Merrill Supp. 1980) ("fine of not less than . . . $100 nor more than . . . $500"); TENN. CODE ANN. § 53-5203 (1977) ("guilty of a misdemeanor and upon conviction . . . shall be punished by fine of not less than . . . $50 nor more than . . . $1000 for each offense").

[60] LA. REV. STAT. ANN. § 40:2113.4 (West 1980) ("Any such hospital found to be in violation of this section shall not receive any client referrals from the Department of Health and Human Resources").

[61] Even if these statutes are not construed to preclude civil remedies, courts which imply such remedies are creating a fiction to find tort liability. W. PROSSER, *supra* note 7, at 190-91.

[62] *See* note 48 and accompanying text *supra*.

Additionally, California, Florida, and Wyoming do not impose a duty, but merely limit liability for a failure to render emergency medical care. CAL. HEALTH & SAFETY CODE § 1317 (West 1979) (no liability "if reasonable care is exercised in determining the condition of the person. . . ."); FLA. STAT. ANN. § 401.45 (West 1979) (no liability "if reasonable care is exercised in determining the condition of the person. . . ."); WYO. STAT. ANN. § 35-2-115 (Michie 1977) (no liability "if ordinary medical care and skill is exercised in determining the condition of the person. . . .").

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the circumstances compelling the hospital to treat prospective patients.

III. Proposal of a Model Duty to Treat Statute

Clearly, a model statute[63] designed to remedy the inadequacies of the common law and the existing statutory law approaches should be adopted.[64] Both the common law undertaking theory and the *Manlove* rationale suffer from imprecise standards for determining when a duty to treat arises.[65] Although the present emergency care statutes purport to clarify the common law, they do not impose upon hospitals a clear duty to treat emergency patients.[66] In an attempt to address these shortcomings, a model statute is proposed below.

The proposed statute differs significantly from existing law by considering both the needs of patients and the medical judgment of hospital personnel. The current focus on the hospital does not encourage fulfillment of the hospital's purpose to provide necessary medical care nor satisfaction of the community's needs. By offering emergency services, a hospital creates reasonable community expectations that emergency care is available. This model statute insures fulfillment of these expectations.

The model statute, presented in the Appendix, establishes standards governing a hospital's duty to treat in emergencies. The fundamental premise of the proposal is that a private hospital has a duty to render reasonable care to persons seeking emergency treatment.[67] An "emergency" is deemed to exist when a prospective patient faces imminent danger of serious illness, in-

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[63] *See generally* "Appendix" *infra.*

[64] Other law review commentators have recognized that a statutory solution is necessary. However, none has drafted a model statute. *See* Note, *The Tort Liability for Refusals to Render Emergency Care,* 4 Mem. St. U.L. Rev. 108, 114 (1973). *Cf.* Note, *Hospital's Duty of Emergency Care: A Functional Approach,* 6 Colum. J.L. & Soc. Probs. 454, 471-77 (1970). The author suggests expanding a hospital's duty to admit by enactment of a medical admission statute. However, the author rejects the same approach for a hospital's refusal to provide emergency care. His conclusion assumes that an effective emergency care statute should not be based on medical judgments. However, we question whether professional judgments can be removed from a hospital's duty to treat. *See* notes 53-56 and accompanying text *supra.*

[65] *See* notes 12-33 and accompanying text *supra.*

[66] *See* notes 38-62 and accompanying text *supra.*

[67] *See* "Appendix" § 3(a) *infra.*

HeinOnline -- 15 U.C. Davis L. Rev. 1060 1981-1982

jury, or death,[68] as determined by trained medical personnel using reasonable care. The model statute mandates that hospitals provide emergency care in life-threatening circumstances.[69] Unlike the present emergency care statutes, this requirement presumes a duty to treat without relying on the discretion of hospital personnel. Further, in borderline cases, the trained medical personnel must regard the condition as a true emergency.[70]

The proposed duty to treat is unique in that it includes a duty to examine. Trained medical personnel, using reasonable care, must examine prospective patients.[71] An examination is essential to make an informed decision about whether an emergency exists. This requirement prevents a hospital from turning away seriously ill or injured persons for non-medical reasons.[72] Present emergency care statutes do not contain such a provision.[73]

The proposed statute provides that only trained medical personnel can determine whether an emergency exists.[74] These include physicians, interns, and registered nurses, all of whom have the requisite skill to evaluate the seriousness of a prospective patient's condition. This intermediate position is broader than the existing statutes that require an "attending physician['s]"[75] judgment, yet more specific than laws permitting a

[68] The requirement of "imminent danger of serious illness or injury or death" is similar to IDAHO CODE ANN. § 39-1391 (Bobbs-Merrill 1977); ILL. ANN. STAT. ch. 111 ½, § 86 (Smith-Hurd 1977); LA. REV. STAT. ANN. § 40:2113.4 (West 1981); TENN. CODE ANN. § 53-5201 (1977); WYO. STAT. ANN. § 35-2-115 (Michie 1977).

[69] *See* "Appendix" § 2(b)(1) *infra*. A duty to treat arises in cases of heart attack, stroke, gunshot or stab wound, or rape. The addition of rape to these life-threatening situations is based on LA. REV. STAT. ANN. § 40:2113.4 (West 1981).

[70] *See* "Appendix" § 2(b)(2) *infra*.

[71] *See* "Appendix" § 3(b) *infra*.

[72] This requirement may have saved plaintiff's life in New Biloxi Hosp. v. Frazier, 245 Miss. 184, 146 So. 2d 882 (1962) where unexamined gunshot victim bled to death after waiting two hours in emergency room; in Methodist Hosp. v. Ball, 50 Tenn. App. 460, 362 S.W.2d 475 (1961), where accident victim suffering from ruptured liver and internal bleeding died after a superficial examination; in O'Neill v. Montefiore Hosp., 11 A.D.2d 132, 202 N.Y.S.2d 436 (1960) where plaintiff suffering from chest and arm pains was not examined in the emergency room and, after leaving the hospital, suffered a fatal heart attack.

[73] *See* note 38 *supra*.

[74] *See* "Appendix" § 3(b) *infra*.

[75] N.Y. PUB. HEALTH LAW § 2805-b(2) (McKinney 1977).

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hospital "employee"[76] or any person with "admitting authority"[77] to decide whether to treat.

To remedy a major defect of existing emergency care statutes, the proposed legislation requires trained medical personnel to use reasonable care in evaluating and treating prospective patients.[78] Under the medical condition and medical judgment statutes, the hospital's own subjective determination triggers the duty to treat emergency patients.[79] This subjective standard is inadequate because it offers little protection to the seriously ill or injured. Three of the nine statutes discuss reasonable care in the context of limiting a hospital's liability rather than affirmatively imposing the standard upon the judgment of emergency room personnel.[80] The difficulty with such provisions is that reasonable care is not required in all circumstances. Instead, these statutes merely provide a defense to a civil cause of action.[81]

The model statute does not impose an absolute duty to treat anyone seeking aid. A hospital has no duty to render clinical treatment to persons not seriously ill or injured.[82] A hospital is not required to expend scarce emergency room resources in routine, non-emergency situations. Likewise, a hospital lacking sufficient emergency facilities is not liable for failure to treat emergency patients.[83] However, a hospital lacking sufficient emergency facilities must use reasonable care to stabilize the emergency patient's condition, and then arrange to transfer the patient to an appropriate facility.[84] Although four of the nine existing emergency care statutes[85] relieve the hospital of liability

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[76] CAL. HEALTH & SAFETY CODE § 1317 (West 1979); FLA. STAT. ANN. § 401.45 (West 1979); IDAHO CODE ANN. § 39-1391 (Bobbs-Merrill 1977); WYO. STAT. ANN. § 35-2-115 (Michie 1977).

[77] KY. REV. STAT. ANN. § 216B.400 (Bobbs-Merrill Supp. 1980).

[78] *See* "Appendix" § 3(b) *infra.*

[79] *See* note 62 and accompanying text *supra.*

[80] CAL. HEALTH & SAFETY CODE § 1317 (West 1979) (no liability "if reasonable care is exercised in determining the condition of the person. . . ."); FLA. STAT. ANN. § 401.45 (West 1979) (no liability "if reasonable care is exercised in determining the condition of the person. . . ."); WYO. STAT. ANN. § 35-2-115 (Michie 1977) (no liability "if ordinary medical care and skill is exercised in determining the condition of the person. . . .").

[81] *Id.*

[82] *See* "Appendix" § 3(c) *infra.*

[83] *See* "Appendix" § 3(d) *infra.*

[84] *Id.*

[85] CAL. HEALTH & SAFETY CODE § 1317 (West 1979); FLA. STAT. ANN. § 401.45

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when its facilities are inadequate to treat prospective patients, they require no further action by the hospital.

The proposed duty to treat extends only to emergency situations. This duty ceases after the hospital provides reasonable care to the emergency patient.[86]

Finally, the model statute expressly provides a civil action for those who have been negligently denied emergency treatment.[87] This provision insures that courts will adopt the statutory standards imposed upon the hospital.[88] In contrast, the existing emergency care statutes do not include explicit civil remedy provisions.[89] Indeed, in Kentucky and Tennessee, the statutory criminal penalties[90] may preclude a plaintiff from maintaining a civil cause of action.[91] The model statute does not impose a criminal penalty, since the fines for a misdemeanor are minimal and have little deterrence value.

A statutory approach to the duty to treat issue would be more effective than that developed under common law theories. The common law approach is ineffective because it is constrained by the undertaking doctrine—a theory developed in cases not involving hospital liability.[92] In addition, the *Manlove* court's attempt to modify the common law has instead created confusion in the law.[93] These problems could be solved by legislation, because statutory law provides both a clear pronouncement of policy and determinate guidelines.

Several additional factors favor adoption of the model statute. First, the statute will save lives by insuring that the seriously ill or injured will receive aid. Second, medical journals indicate that the medical profession itself already perceives a duty to treat those seeking emergency care.[94] Finally, the proposed rule pro-

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(West 1979); N.Y. PUB. HEALTH LAW § 2805-b (McKinney 1977); WYO. STAT. ANN. § 35-2-115 (Michie 1977).

[86] This is similar to the undertaking theory which provides that the duty to treat ceases following the exercise of reasonable care. *See* notes 12-19 and accompanying text *supra*.

[87] *See* "Appendix" § 4 *infra*.

[88] *See, e.g.*, W. PROSSER, *supra* note 7, at 191.

[89] *See* note 38 *supra*.

[90] *See* note 59 *supra*.

[91] *See* note 61 and accompanying text *supra*.

[92] *See* note 9 *supra*.

[93] *See* notes 20-33 and accompanying text *supra*.

[94] *See, e.g.*, Gouge, *Responsibilities and Liabilities for Emergency Care Service*, 33 J. AM. MED. WOMEN'S A. 423 (1978); Stevens, *Liabilities Engendered*

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motes efficient judicial administration. By defining an emergency and establishing a reasonable standard of care, courts can provide consistent rulings and avoid the confusion of the existing law.

CONCLUSION

Each year increasing numbers of people seek emergency treatment from private hospitals.[95] Seriously ill or injured individuals reasonably expect treatment when they enter an emergency room. However, inadequacies in both the common law and statutory law may permit private hospitals to deny treatment to the seriously ill or injured.[96]

This comment proposes a model statute requiring a hospital to provide reasonable emergency care to seriously ill or injured persons. Trained medical personnel must examine the prospective patients to determine whether an emergency exists, using a standard of reasonableness. This model statute insures that those needing emergency care will receive it. Additionally, it shields the hospital from unlimited liability. No liability would result if the hospital is unable to provide care or reasonably determines that emergency treatment is unnecessary.[97] In overcoming the inadequacies of existing law, this proposal fashions a duty to treat that strikes a balance between the hospital's right to deny unnecessary treatment and the right of the prospective patient to receive needed care.

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in Emergency Department Practice, 2 J. LEGAL MED. 17 (1974); Comment, *The Emergency Department Problem—An Overview,* 198 J. AM. MED. A. 380 (1966).

[95] AM. HOSPITAL ASS'N, *supra* note 1, at 12.

[96] *See* notes 15-62 and accompanying text *supra.*

[97] However, a hospital with insufficient emergency facilities must stabilize a seriously ill or injured person and arrange for a transfer to a sufficiently equipped hospital. *See* "Appendix" § 3(d) *infra.*

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APPENDIX

Model Duty to Treat Statute

§ 1 *Purpose:*

The purpose of this statute is to insure that seriously ill or injured persons seeking aid at a private hospital emergency room will receive reasonable care.

§ 2 *Definitions:*

For purposes of this section:

(a) *"Hospital"* is any hospital that maintains and operates an emergency department, and that provides emergency services to the public.[98]

(b) An *"emergency"* is a situation in which a prospective patient is in imminent danger of serious illness, injury, or death as determined by trained medical personnel using reasonable care.

(1) The following situations are conclusively presumed to be emergencies: heart attack, stroke, gunshot or stab wound, rape. This list is not exclusive.

(2) In borderline cases, the trained medical personnel must consider the situation an emergency.

(c) *"Trained medical personnel"* are physicians, interns, or registered nurses.

(d) *"Prospective patient"* means a seriously ill or injured person who is physically present in the emergency room.

(e) *"Reasonable care"* is care given by trained medical personnel who possess a minimum of special knowledge and skill which is customary and usual in that profession.[99]

§ 3 *Duty to Examine and Treat:*

(a) Trained medical personnel, using reasonable care, shall examine prospective patients to determine whether they need emergency care.[100]

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[98] This definition avoids the problem encountered in Fabian v. Matzko, 236 Pa. Super. 267, 344 A.2d 569 (1975), discussed in note 30 *supra*.

[99] *See, e.g.*, W. PROSSER, *supra* note 7, at 161, 165.

[100] In situations where the examining hospital personnel reasonably conclude that an emergency does not exist, an untreated plaintiff could recover in a minority of the jurisdictions which follow the undertaking theory because the ex-

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(b) In an emergency, a private hospital has a duty to provide reasonable care to prospective patients.
(c) A hospital has no duty to provide clinical care to individuals not seriously ill or injured.
(d) A hospital with insufficient emergency facilities is not liable for failure to treat emergency patients. Where the hospital has insufficient emergency facilities, its personnel must stabilize a seriously ill or injured person's condition, and arrange for transfer to a sufficiently equipped facility.

§ 4 *Civil Remedy:*

Any aggrieved person or his/her representative may bring a civil action for negligent refusal to treat against the hospital and/or any emergency room employee under this section. In addition to compensatory damages, punitive damages may be awarded in appropriate circumstances.

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amination may be an undertaking. *See* notes 15, 17, and 18 *supra*. However, these courts extend hospital liability to unreasonable limits. *See* notes 15-19 and accompanying text *supra*.

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