

## **Position Statement: Definition of Negligence for EMTALA-Mandated Emergency Care**

The American Academy of Emergency Medicine (hereinafter AAEM or the Academy) supports an increased level of scienter for EMTALA mandated care.<sup>[1]</sup> Specifically, AAEM supports state laws that require plaintiffs to prove gross negligence or recklessness, by clear and convincing evidence, in cases alleging negligence for emergency department care, and for subsequent care to stabilize emergency medical conditions.<sup>[2]</sup>

Within the setting of an ongoing liability crisis in the United States, this change in the burden of proof will address current threats to the viability of emergency medical care. Approximately 15% of all emergency departments in the U.S. closed in the past 20 years. Hospitals face an increased difficulty in maintaining on-call physicians in vitally important specialties. Subsequently, many emergency departments must now pay physicians to assume on-call responsibilities, a relatively recent phenomenon.

Moreover, emergency departments, emergency physicians, and on-call specialists disproportionately bear the burden of EMTALA's unfunded mandate. Approximately 20-25% of emergency department patients currently have no health insurance and do not pay for their emergency care. The recent Health Care Reform legislation signed into law will diminish this, but the economic burden of EMTALA will continue to be borne by emergency departments and providers. This is due to the payment disparities caused by a disproportionately high number of underfunded patients that seek care in emergency departments under the purview of EMTALA, which requires provision of an appropriate medical screening examination and stabilizing treatment, but provides no payment under this mandate. This EMTALA mandate, along with the heightened risk of caring for acutely ill patients with whom the physicians have no prior relationship has resulted in the closure of emergency departments and a growing scarcity of physician specialists to provide stabilizing care. Physicians must often practice defensively in this setting, significantly increasing the cost of health care.

Therefore, the Academy supports recent legislative activity in states requiring plaintiffs to prove gross negligence or recklessness, by clear and convincing evidence, in cases alleging negligence for emergency department care, and for subsequent care to stabilize emergency medical conditions. This will help reverse the trends of emergency department closures, the scarcity of physicians to assume on-call responsibilities, and the excesses of defensive medical practice.

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<sup>[1]</sup> Emergency Medical Treatment and Active Labor Act 42 U.S.C. §1395dd

<sup>[2]</sup> See, e.g.: Georgia OCGA §51-1-29.5 (2009)