

In Favor of Bill 6622, AAC The Burden of Proof in Medical Malpractice Cases and the Standard of Care Related to Emergency Medical Care and Treatment.

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I have practiced Emergency Medicine for 30 years, from the days in which we referred to it as “the pit”, to our current all inclusive, sophisticated, highly evolved departments and practice models. Emergency physicians have always assumed the burden of care for all types of patients, whose immediate, and not so immediate, health needs are not being met in the community. The Emergency Department has become the “de-facto” universal health care facility, government sponsored but *not* government paid for (just ask former president George W. Bush, when asked about our universal access to health care he responded, “just go to the ER”). As a result none should kid themselves, we are *all* paying the cost, regardless of which pocket it is coming from.

EMTALA I believe was a great victory for the rights of patients, and one I approve of personally, as a caregiver, and as a citizen of an evolved and humanitarian society.

On the other hand when this legislation was enacted, it effectively granted all parties, regardless of ability to pay, access, to all levels of sophisticated and expensive care. That is because the ability to perform just a medical screening exam has never been possible, without feeling discriminatory against certain patients, or placing the physician in the unwanted position of hospital gatekeeper, without support for decisions that turned out wrong. Combined with the fear of litigation for a bad decision, it is an impossible situation.

Whether we consider health care a “right” or a “privilege” in the current debate, it is clear that we cannot manage to have it both ways with our current financial resources. EMTALA requires the ED to provide a “basic medical screening exam”. That is out of touch with reality of medical practice. A “medical screening exam” is an impossibility, when the most essential demand of our practice is to rule out the “worst case scenario”. Even then, bad outcomes can happen, as medicine is not a perfect science. For example, it is well known that coronary artery disease, leading to a heart attack cannot be ruled out 100% even with the best and most expensive testing. Whether judgment alone is used as a criteria for proceeding with costly testing or, if testing is done *without* restriction (and this is currently often the case— for fear the of “not doing a test” is one of the most common causes of malpractice suits), there will still patients who will have *false negative tests* and will have an untoward event. As a result the average physician (that means one who has been sued, because most of us have been), cannot afford to allow judgment alone to suffice. The one thing we know *is* true, is that if a bad patient outcome occurs, we will very likely be sued. The effect of a malpractice suit on the physician is at the

very least, psychologically devastating and can be economically, as well as professionally devastating, regardless of outcome.

It simply doesn't make sense to be held responsible for all patients, as EMTALA requires, and have no protection from malpractice for performing what the legislation requires. As a result of our current malpractice laws of course, *all patients* are over tested.

If current malpractice laws do not change, our fear of litigation will continue to force many or all of us to order tests to *falsely* reassure the patient and protect ourselves against a suit. When an untoward event, no matter how remote or unlikely, needs to be considered on *every* patient—and this is the crux of the matter—for the only purpose of covering our own backs, cost will never be held down. It is simple arithmetic; you can't have it both ways. In my view, there is simply no way to hold down health care costs *in general*, without significant medical malpractice reform. If the government also requires that we treat all patients regardless of the ability to pay, a concept which I support, then they will be treated in *all ways* the same as everyone else, and that means going way beyond a basic screening exam for everyone.

Being an Emergency Physician is a demanding, challenging and rewarding profession. The current malpractice environment has added frustrating and exasperating to that list of adjectives. Being caught between the demands of caring for everyone that no one else will take care, regardless of their ability to pay, of and having no protection from every physician's worst nightmare, being sued, is not an envious one.

Respectfully submitted,

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