

# Fairfield County Medical Association

*Physicians Dedicated to a Healthier Fairfield County*

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## Memorandum of Support

March 13, 2012

Re: An Act Concerning the Professional Standard of Care for Emergency Medical Care Providers

To Members of the Public Health Committee

We are in favor of the proposed changes raised in House Bill No. 5434, **An Act Concerning The Professional Standard Of Care For Emergency Medical Care Providers**, specifically the following:

In Section 52-184c, subsection (a), paragraph (2): The substitution of "clear and convincing evidence" for "negligence" which appears in paragraph (1).

We believe that "clear and convincing evidence" as defined in Black's Law Dictionary copyright 2000 hereafter referred to as BLD more adequately defines the burden of proof as it pertains to the unusual circumstances under which medical care is often delivered in the emergency room. BLD page 457 states plainly that clear and convincing evidence indicates that the item to be proved is highly probable or reasonably certain. More importantly, as stated in BLD page 962, it is a *greater burden than "preponderance of evidence"* (italics ours). BLD page 962 in part considers preponderance of evidence as that which may not be sufficient to free the mind wholly from all reasonable doubt.

We also believe that substitution of "reckless disregard" for "reasonably prudent" in paragraph (3) represents a higher degree of burden of proof. BLD page 1021 defines "reckless disregard" as a *conscious indifference to the consequences of an act* (italics ours). Whereas, in defining the reasonably prudent person, BLD on page 1018 states that such person acts sensibly, without delay, and takes the proper but not excessive precautions. The current statute makes no mention of *conscious indifference to the consequences of an act* (italics ours) which stipulation would clearly raise the standard of proof from reasonably prudent to reckless disregard.

Finally, in Section 52-557b subsection (a) we further believe that the words "does not apply to acts or omissions constituting gross, willful, or wanton negligence" should be deleted and be replaced by "shall not apply to acts or omissions which may constitute reckless disregard". Since "reckless disregard" occurs when a person acts with conscious indifference to the *consequences of that act* (italics ours) it represents a higher burden of proof than "acts or omissions contributing to gross, willful, or wanton negligence" because the stipulation in the former would require the act committed be done not only willfully or wantonly but with indifference toward its consequences.

**Bases for Position:** We believe the complexity and unusual circumstances that attend the delivery of care by physicians in emergency rooms or by volunteers rendering emergency services necessitates the higher burden of proof reflected in the changes we suggest.

Physicians in emergency rooms often are required to act quickly with incomplete knowledge of a patient's medical, social, or psychological background. Often the physicians do not have an ongoing doctor-patient relationship with patients who use the emergency room. Under these less than desirable circumstances, the actions of such physicians should require a higher legal burden of proof above the one that currently exists. Without these changes, physicians will continue to be reluctant to act in some circumstances knowing that the outcome if unfavorable may in retrospect be misconstrued as negligence. The result could have serious consequences for a patient's health resulting in a deterioration of his/her condition, and even death.

It is not unusual for critically ill patients who present in the emergency room not to have any health insurance. This combined with the greater risk of medical liability because the physician may not be familiar with the patient's medical

background makes some specialists reluctant to accept hospital emergency department on-call coverage. For these patients, the result can be a delay in diagnosis and treatment that can have disastrous consequences.

Oliver Wendell Holmes, Jr. in his book, *The Common Law* said that it was experience and the needs of the times that determined the law by which men were governed.

Clearly, a balance needs to be struck between what protects the individual and what best serves the needs of society. This dilemma has yet to be solved to the satisfaction of either the medical or legal professions, and they have been struggling for decades looking for a solution acceptable to all.

As medical science has progressed so has the demand for perfection in health care. We believe, however, that there are human limitations to the provision of health care and that despite the experience and the historical wisdom which the legal profession system has at its command, and despite what the legal profession understands as valid factors contributing to those human limitations, there remains much that is unclear and unsaid, manifested in part by the changes herein proposed.

It is our intent that the change in language that we propose may advance however slightly the evolution and understanding of tort law as it applies to the practice of medicine, knowing full well that solutions are still evolving. Medical legal actions exact a tremendous financial toll on the health care delivery system both in terms of the indirect costs for medical liability insurance and the costs of defensive medicine. Unwarranted medical liability claims exact a tremendous psychological strain on physicians and other health care providers.

Defensive medicine wastes untold amounts of money and resources and the fear of frivolous suits have poisoned the doctor-patient relationship both of which are reason enough to change the burden of proof in medical liability actions so that they respond, in the words of Oliver Wendell Holmes, "to the felt necessities of the times".

We believe that the changes we propose in Raised Bill No. 5434 represent a crucial step toward that end.

We have made frequent reference to Black's Law Dictionary for purposes of clarification. It is considered a time-honored and respected reference used by most attorneys in the United States. The first edition was published in 1891.

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