



SAVING LIVES - REDUCING RISK

From The Editor

In preparation for my presentations at the 2007 ACEP Scientific Assembly in Seattle, I have collected a group of recent EMTALA cases from the federal courts. TSG has not published EMTALA related issues in the newsletter recently and this seems like a good opportunity. As you work through the cases, remember that the EMTALA statute and all related regulations and inter-

pretive guidelines are available at www.thesullivangroup.com and can be accessed by clicking on the EMTALA navigation button. For those of you going to the ACEP Scientific Assembly this year please stop by the TSG Booth on the Exhibit Floor. **We are at booth #1038.**

TSG has recently seen significant growth as we have developed partnerships with several large hospital organizations. As a result we have created a new role at TSG, that of the Clinical Risk Executive. After much consideration we feel that this role is best filled by veteran Allied

Health Professionals who are interested in a new and very interesting career path. See more information about this role in the body of the newsletter.

As always comments and feedback on the newsletter are welcome!

Thanks and enjoy ■
Dan Sullivan, MD, JD, FACEP

Now Hiring For A New

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Clinical Risk Executive (CRE). TSG is currently recruiting for a Nurse Practitioner AND a Physician Assistant to fill a new position as Clinical Risk Executive. This is a great opportunity for veteran allied health practitioners to bring



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risk management, patient safety, and quality improvement programs to hospitals all over the United States. There are no weekend shifts, nights, or holidays! TSG has grown rapidly over the last 18 months and there is a strong need for this critical role to support our client base. The CREs will be working directly with emergency medicine practices, insurers, and hospitals to implement the TSG cycle of risk and safety. There are many opportunities for growth and development in this organization. The CREs will need strong communication skills, be comfortable with live and web-based presentations, and have a better than average familiarity with the Microsoft Office suite of products. Knowledge of informatics would be particularly welcome as we develop cutting edge solutions in risk and safety in the electronic medical record marketplace.

For additional information:
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Patient Injured In Medical Center Parking Lot Has No EMTALA Claim

A federal court in California found a plaintiff who fell and was injured in the parking lot of a medical center had no claim under the Emergency Medical Treatment and Active Labor Act (EMTALA) against the hospital. Plaintiff Maria Addiego was taken by her daughter to the California Pacific Medical Center (CPMC) for an outpatient appointment. As the plaintiff got out of her car in CPMC's parking garage, she fell and broke her hip. Although they were located about thirty yards from CPMC's emergency department, the parking attendant called the security department who refused plaintiff's request for

immediate medical attention from the emergency department. Instead, security called 911. After Ms. Adiego had been lying on the ground for nearly an hour, an ambulance came and transported her thirty yards to CPMC's emergency department. Ms. Adiego filed suit against the hospital, alleging that CPMC violated EMTALA by refusing to transport her to the emergency department, and instead requiring that the San Francisco Fire Department do so. The defendant hospital moved to dismiss. Ms. Adiego alleged that the CPMC's failure to provide her with a medical screening exam and "stabilization" while she was in the parking garage violated the Act and caused her damages.



The court held that EMTALA is a statute aimed at prohibiting patient dumping and once the plaintiff was

taken to the medical center she received treatment and was not "dumped" in any way. The court further held



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TSG Discussion

that EMTALA contains no requirement that a medical center use its own personnel to transport a patient injured on its premises to the emergency department. The court said that EMTALA does not require a hospital to use its own personnel to transport people requesting services from the parking garage to the emergency room, or, in the alternative, to send emergency room personnel to a parking lot to “screen” and “stabilize” a person requesting emergency services.

The plaintiff did not allege that CPMC refused to provide her medical care, or that it failed to stabilize her condition before transferring or discharging her from the hospital. In fact, once plaintiff arrived at the CPMC emergency department she was admitted to the hospital. The court dismissed the EMTALA claim.

Good result! Remember that the 250-yard rule is alive and well. If a patient requires emergency medical attention within 250 yards of the hospital facility, the hospital has an EMTALA obligation to screen and provide stabilizing treatment. The issue in this case is not whether the hospital had an obligation, rather how that obligation is carried out.

The federal courts and CMS do not always agree on interpretation of hospital requirements under EMTALA. The courts are not bound to follow CMS interpretations of the law and regulations. Although this court decided the ambulance call was appropriate, CMS may not agree. At a distance of 30 yards, it would not be a surprise to find a CMS determination that the hospital personnel were required to respond and not let her lay there for an hour waiting for an ambulance.



However, analysis of these court proceedings is important. Enough guidance from the courts and CMS is likely to follow. In this case the security staff made a determination that the most appropriate response was to call for a city ambulance and have the patient transported to the ED. A patient could be 250 yards from the ED and it may be an easy call to send ED personnel with a backboard and stretcher. A patient could be 30 yards away but two floors up in a parking garage and the ED may be up for grabs. The specific circumstances and state of the ED really dictate the appropriate response. The court was correct in not establishing precedent that ED personnel are required to respond outside the ED to begin screening and stabilizing treatment ■

Addiego v. City and County of San Francisco, No. C 05-04819 CRB (N.D. Cal. Feb. 17, 2006).



Wisconsin Supreme Court Holds That EMTALA's Screening Requirement Applies To Baby Born In Birth Center Of Hospital

The Wisconsin Supreme Court held that EMTALA imposes a duty upon a hospital to provide a medical screening examination to a newborn that is born in the birthing center of the hospital and otherwise meets the conditions set forth in the EMTALA Statute. Specifically, the high court rejected the hospital's argument that the phrase "comes to the emergency department" in the Statute required that a baby be born in a hospital emergency department.

Shannon Preston and Charles Johnson (Preston) filed a complaint against Meriter Hospital alleging that the hospital's employees failed to provide any care following the premature birth

of their child, Bridon Michael Johnson, who later died. Preston, who was on Medical Assistance, claimed that the staff discriminated against her and made no attempt to prolong Bridon's life, who at only 23-and-2/7ths weeks, weighed only 700 grams.

The trial court granted Meriter Hospital summary judgment (dismissed the claim) on all of Preston's claims, interpreting her EMTALA claim as saying that the hospital failed to stabilize the medical condition of Bridon in violation of EMTALA. The court of appeals then affirmed, concluding that the EMTALA requirement did not apply to the newborn, Bridon, because he arrived at Meriter Hospital through the birthing center, as opposed to the emergency department. The family appealed.

Preston argued that the court of appeals' interpretation of the EMTALA Statute section 1395dd(a) was inconsistent with the intent of EMTALA, and implied a duty

to screen any time an individual arrived at a place in a hospital with the capacity to respond to a request for emergency medical care. Meriter Hospital argued that "comes to the emergency department" meant that the hospital had a duty only to screen when an individual arrived in the emergency department. The Wisconsin Supreme Court agreed with Preston, reversing and remanding the case back to the lower court.



Recognizing that the parties' conflicting interpretations were both reasonable, the high court looked at the statute's legislative intent and implementing regulations. The high court examined 42 C.F.R. § 489.24(b), where the Department of Health and Human Services (DHHS) defined the phrase "comes to the emergency department" to mean: "with respect to an individual requesting examination or treatment, that the individual is on the **hospital property** (property includes ambulances owned



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and operated by the hospital, even if the ambulance is not on hospital grounds)." The high court found that DHHS' interpretation was permissible and it was not "arbitrary and capricious," and rationally connected to EMTALA's primary objective of ensuring access to emergency medical treatment.

The high court then ruled that Preston's complaint stated a claim upon which relief could be granted, recognizing that the "alleged failure to provide care implicitly included the failure to provide an appropriate medical screening examination. All this occurred in a major hospital in a place with the capacity to respond to a request for emergency care."

"The duty to provide a medical screening examination should not depend upon the hospital room—be it the emergency room, the birthing center, or an operating room—into which a baby is born," the high court concluded.

Careful to point out the limitations upon its ruling, the high court recognized that its opinion did not decide the appropriateness of the medical screening examination, whether Meriter discriminated against Bridon, and did not rule on whether the requirement applied to Bridon as an inpatient.

Three judges concurred with the ruling, pointing out that the majority did not address the issue of whether or not a newborn infant was considered to be an inpatient upon his or her mother's admission to the hospital, saying that the parties should fully brief this issue before the circuit court. Another judge dissented with the opinion, saying that it "overlook[ed] Bridon's status as an inpatient." Specifically, the dissent said that the screening provision did not apply to hospital inpatients, arguing that Bridon became an inpatient when his mother was admitted before his birth.

TSG Discussion

This decision should come as no surprise. The hospital's EMTALA obligations extend beyond the emergency department and into the labor and delivery suite. They certainly cover the patient in labor through the delivery of the placenta, but what about the newborn? This and other cases indicate that the hospital's duty to screen and stabilize within the hospital's capability extend to the newborn.

The court concurring judges raise some interesting issues including the status of the newborn as an inpatient. The most recent EMTALA regulations and interpretive guidelines carve out the admitted patient. The general rule now is that EMTALA obligations end at patient admission. If a patient is a direct admission then EMTALA is not applicable. However, CMS has clearly indicated that moving a patient to inpatient status is not to be used as a "ruse" to avoid EMTALA obligations. This case was remanded to the lower court



to consider that and other issues. However, review the following case, which is directly on point regarding the “ruse” issue ■

Preston v. Meriter Hosp., Inc., No. 2003AP1376 (Wis. July 13, 2005).

U.S. Court In Alabama Refuses To Dismiss EMTALA Stabilization Complaint, Finding Hospital May Have Admitted Patient As A Subterfuge To Avoid Liability

An Alabama federal court denied a hospital’s motion to dismiss an EMTALA stabilization claim finding that the plaintiff’s claim could be read to support the theory that the hospital admitted her husband as an inpatient before discharging him without treating his injuries in order to protect itself from

exposure to EMTALA liability. Thomas Henry Morgan, who did not have medical insurance, was rushed to the emergency department at North Mississippi Medical Center (hospital) after he sustained serious injuries in a fall from a tree stand during a hunting trip in the state. Morgan received emergency care at the hospital and was subsequently admitted.

Morgan’s wife (plaintiff) was notified by the hospital that she would need to make payment arrangements. This notification began before the patient was admitted to the hospital. After several attempts to get payment, the hospital discharged

Morgan without performing an MRI of the brain, which had been ordered by the treating physician. An ambulance carried Morgan back to his home in Alabama where he died twelve hours later from untreated injuries related to the fall.

The Plaintiff sued the hospital in Alabama federal court alleging violations of EMTALA. The hospital moved to dismiss, arguing that the EMTALA claim failed to state a claim upon which relief could be granted and should be dismissed.

The court addressed the viability of plaintiff’s EMTALA claim. Plaintiff based her claim on allegations that the hospital failed to comply with EMTALA’s screening requirement by not performing an MRI on her husband before discharging him. However, the court noted that the purpose of EMTALA’s screening requirement is to ensure that the same screening is performed on the



indigent as would be performed on insured patients.

“Thus, failing to perform even a medically advisable screening test in no way implicates EMTALA unless the Hospital treated Mr. Morgan differently in that regard than it would have treated a simi-



larly situated paying patient," the court found. A key element in this case is that the plaintiff's complaint did not allege that the hospital engaged in disparate screening of Morgan.

In addition, the court said, even if plaintiff had alleged disparate treatment, the EMTALA screening provision would still not be implicated because it only applies to hospital emergency departments. "This court declines to engraft EMTALA's screening duty to encompass a hospital's failure to perform certain desired tests more than a week after a patient is admitted for treatment."



The court, therefore, granted the hospital's motion to dismiss plaintiff's EMTALA screening claim.

Plaintiff also alleged that the hospital violated EMTALA's stabilization requirement because it discharged her husband in an unstable condition. The hospital, on the other hand, argued that because the discharge occurred nine days after Morgan's arrival at the emergency department, it was too distant in time to trigger EMTALA.

The court noted that federal appellate courts take different positions regarding a time limitation on the stabilization requirement. The court here agreed with the Ninth Federal Circuit's construction, finding that "the EMTALA obligation to stabilize a patient ceases at the time of the patient's admission as an inpatient, unless the hospital fails to admit the patient in good faith or does so as a subterfuge to avert EMTALA liability."

The appellate court then went on to find that "a fair reading of the complaint supports a subterfuge theory of liability." The court noted that plaintiff alleged the hospital immediately

made demands for payment after Morgan's arrival at the emergency room and then announced its intention to discharge him despite the hospital's knowledge of his extensive injuries.

The court thus denied the hospital's motion to dismiss plaintiff's EMTALA stabilization claim ■

Morgan v. North Mississippi Med. Ctr., Inc., No. CIV.05-0499-WS-B (S.D. Ala. Dec. 2, 2005).

TSG Discussion

Following the publication of the most recent regulations and interpretive guidelines, it was just a matter of time before the "ruse" cases hit the courts. This court provides an excellent review of the accepted position regarding the screening examination. EMTALA is not a medical malpractice statute; the plaintiff must demonstrate disparate treatment to invoke EMTALA. There may or may not have been disparate treatment, but as the court points out, the plaintiff did not allege disparate treatment, so that element of the complaint



failed as a matter of law. The court then turned to the stabilization issue. The appeals court's obligation here was to determine if the plaintiff's complaint should be dismissed as a matter of law. Therefore the court reviewed only the complaint, and no additional facts. In addition, the court was obligated to review the case "in the best light" for the moving party. That would be the plaintiff as the lower court had dismissed the complaint and the plaintiff was moving to reinstate. In that complaint the plaintiff alleged facts that suggested that the hospital may have attempted to use admission status to avoid performing the MRI exam. Presumably if the MRI had been contemplated late in the admission, and the request for payment was made following that, the appeals court would have dismissed the stabilization claim. But the complaint alleged early requests for payment. Therefore the court entertained the possibility that the hospital may have used admission status to avoid per-

forming the MRI and sent the case back to the lower court for further litigation on the stabilization issue.

The following case involves both screening and stabilization of a newborn and the "admission as a ruse" issue ■

U.S. Court In Puerto Rico Declines To Dismiss EMTALA Claims Against Hospital That Transferred Newborn In Critical Condition

An infant delivered by cesarean section in a hospital operating room who developed medical problems requiring emergency treatment shortly after birth and was allegedly transferred to another hospital without being stabilized is covered by EMTALA, a federal district court in Puerto Rico ruled February 22, 2007. In reaching this conclusion, the U.S. District Court for the District of Puerto Rico declined to dismiss EMTALA claims brought by the infant's

mother against the hospital that made the decision to transfer the infant, who died at the receiving hospital.

Iraida Lima-Rivera gave birth by cesarean section to a baby boy at Hospital San Pablo del Este (HSPE), and the newborn was initially taken to HSPE's regular nursery. The newborn soon developed emergency conditions, including upper gastrointestinal bleeding and vomiting of blood. HSPE staff transferred the baby to its intensive care unit. At some point during the next day, a physician at HSPE decided to transfer the baby to Hospital Interamericano de Medicina Avanzada (HIMA), where records describe the baby on arrival as "crucially ill r/o sepsis." According to the court, evidence showed that upon leaving HSPE, the baby was "totally unstable, with... active upper gastrointestinal bleeding." The baby died at HIMA two days later of cardiac arrest.

Lima-Rivera filed a lawsuit alleging that HSPE's medical treatment of her now deceased baby violated



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EMTALA and constituted medical malpractice under Puerto Rico law. HSPE and its owner, UHS of Puerto Rico, Inc. (defendants), moved to dismiss, arguing lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted.

The district court rejected defendants' contention that they were not required to comply with the stabilization and transfer provisions of EMTALA because Lima-Rivera's newborn was admitted as an inpatient in HSPE's regular nursery. The court emphasized that EMTALA's application is not limited to hospital emergency departments. Citing precedent from the First Federal Circuit, In *Lopez-Soto*, court held that "emergency room arrival is not a prerequisite to liability under EMTALA's stabilization and transfer provisions," joining other federal and state courts that have similarly held, the court explained.

The court found that just as in *Lopez-Soto*, in the present case "the newborn's arrival in the hospital's operating room and the hospital's prompt detection of an emergency medical condition, if proven, would be sufficient to trigger EMTALA's stabilization and transfer requirements."

The court also rejected defendants' contention that *Lopez-Soto* should be disregarded because of a subsequent 2003 regulation (42 C.F.R. § 489.24(d)(2)(i)) in which the Centers for Medicare and Medicaid Services (CMS) clarified that EMTALA ceases to apply when an individual is admitted as an inpatient.



CMS' regulation is an interpretive rule, and therefore does not have "the force and effect of law" and is not "accorded that weight in the adjudicatory process," the court said. Moreover, the regulation was not in effect when defendants allegedly violated EMTALA, as the alleged violations occurred four months before the rule was published in September 2003, the court continued, noting that "generally, the law disfavors retroactivity."

Upon concluding that it did have subject matter jurisdiction over the case pursuant to EMTALA's stabilization and transfer provisions, the court next summarily rejected defendants' argument that Lima-Rivera's allegations were insufficient to establish her claim of EMTALA violations ■

Lima-Rivera v. UHS of Puerto Rico Inc., No. 04-1798 (D.P.R. Feb. 22, 2007)

TSG Discussion

This court was able to sidestep the inpatient admission status issue because of the timing of the facts of the case. However, it clearly did not want the hospital to use the inpatient status to



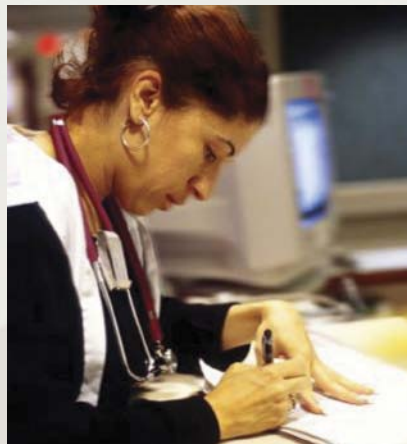
avoid EMTALA liability stating that it was not bound by the CMS regulations. The last case addresses EMTALA in the ED waiting room. Based on the national issues surrounding ED overcrowding and throughput problems, this is a welcome result. Read on.

U.S. Court In Kansas Dismisses "Failure To Screen" EMTALA Claim Alleged By Wife Of Man Who Died After Twenty-Minute Wait In Emergency Room

A hospital that failed to conduct a screening examination of a man who collapsed and died in the hospital's emergency department after a twenty-minute wait did not violate the Emergency Medical Treatment and Labor Act (EMTALA).

The court held that absent evidence the registration clerk violated hospital policy, the hospital's failure to screen in this case did not constitute a violation of EMTALA even given allegations that, prior to triage, the clerk was allegedly informed of the man's serious medical problems, including vomiting blood, difficulty breathing, and other symptoms that could indicate a heart attack.

The patient died at Salina Regional Health Center (SRHC), Inc.'s emergency department (ED). Mr. Parker weighed more than 300 pounds and had a medical history of diabetes and congestive heart failure. Mrs. Parker had driven her husband to the ED, and the



couple waited for approximately twenty minutes for a triage nurse before Mr. Parker collapsed while seated in front of the ED's registration desk.

During this twenty-minute wait, the Parkers approached the registration desk "of their own accord" and the clerk made some inquiry about insurance information, according to the undisputed facts recounted by the trial court. Upon Mr. Parker's collapse, a Code Blue was called, and he received immediate treatment by ED physicians and staff. After two hours of emergency medical treatment, he was pronounced dead.

The patient's wife sued SRHC alleging violations of EMTALA and medical negligence. SRHC moved for summary judgment, arguing that a twenty-minute wait does not violate EMTALA, and also that it had followed the essential elements of its ED policies and complied with all EMTALA requirements. Mrs. Parker asserted that SHRC's reception clerk sought insurance information



from the Parkers before Mr. Parker had been triaged in violation of EMTALA. Moreover, she alleged SHRC violated EMTALA as well as its own policy by waiting twenty minutes rather than providing her husband with an immediate medical examination.

The district court first noted that, under EMTALA, hospitals must create standard emergency room screening procedures based on the hospital's particular needs and circumstances. With respect to a court's review of a failure to screen claim under EMTALA, the focus should only be on "whether the hospital adhered to its own procedures, not whether the procedures were adequate if followed," the court explained. The court noted that "Mere *de minimis* variations from the hospital's standard procedures do

not amount to a violation of hospital policy as a matter of law," the court added. SHRC's ED policy stated that the triage nurse would determine a level of need for care as per health center policy and prior to any inquiry regarding the individual's method of payment or insurance status.

"While plaintiff argues that the hospital violated its own policy since it appears there was at least some inquiry made prior to triage by virtue of Mr. Parker seating himself at the registration desk, in



the court's view, any such violation was minimal, or *de minimis*, under the circumstances of this case," the district court said. Moreover, this conclusion is supported by federal regulations pertaining to the EMTALA

statute," the court reasoned, noting that 42 C.F.R. § 489.24(d)(4)(iv) permits hospitals to "follow reasonable registration processes... including asking whether an

individual is insured, and if so, what that insurance is, as long as that inquiry does not delay screening or treatment." Mrs. Parker also claimed the hospital violated EMTALA because, although she told the registration clerk the symptoms her husband was experiencing, the clerk allegedly failed to immediately report the symptoms to a triage nurse.

Reiterating its earlier observation that a court's sole duty in an EMTALA case is to ask only whether the hospital adhered to its own procedures, the district court said it found no reference (from the record or from its own review of SHRC's ED policy) to a procedure requiring the registration clerk to report symptoms of patients arriving at the ED to a triage nurse.

"To inquire further into this issue would be akin to questioning whether SRHC's procedures were adequate, if followed—something the court is not permitted to do under EMTALA," the district court said. The court therefore granted summary



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TSG Discussion

Another appropriate interpretation of EMTALA. After 30 years the court has begun to articulate reasonable interpretations of EMTALA, sometimes. A strict analysis of the facts suggests that there may have been a violation of ED policy. However, the courts must use some discretion in these matters. With ED overcrowding and an epidemic of throughput problems, fact patterns like this simply cannot put the hospital in EMTALA peril.

follow that precedent or the US Supreme Court has addressed the issue.

judgment in favor of SHRC as to the plaintiff's EMTALA claim and declined to exercise supplemental jurisdiction over Mrs. Parker's state law claim ■

Parker v. Salina Reg'l Health Ctr. Inc., No. 05-04066-KGS (D. Kan. Dec. 1, 2006).

Keep in mind that the federal and district courts are bound only by precedent in their own jurisdiction and that of the US Supreme Court. These facts in another jurisdiction may result in a different interpretation. Therefore, be careful when using any federal court fact pattern as the "law of the land" unless most of the circuits appear to

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