

**THE COURT OF APPEALS EXAMINES MEDICAL SCREENING EXAMINATIONS:  
SEARCHING FOR THE LINE BETWEEN A MEDICAL MALPRACTICE CLAIM  
AND A CAUSE OF ACTION FOR INAPPROPRIATE SCREENING UNDER EMTALA**

Edward Ricco  
Rodey, Dickason, Sloan, Akin & Robb, P.A.

Practitioners who litigate in the area of medical liability are doubtless familiar by now with the Emergency Medical Treatment and Active Labor Act (EMTALA).<sup>1</sup> This 1986 federal law requires any Medicaid-participating hospital that has an emergency department to provide, for any individual who requests examination or treatment, an “appropriate medical screening examination . . . to determine whether or not an emergency medical condition . . . exists.”<sup>2</sup> Furthermore, if the hospital determines that the individual has an emergency medical condition, the hospital generally must provide such further examination and treatment as are needed to stabilize the condition before it may transfer the individual to another facility or discharge the individual.<sup>3</sup>

EMTALA contains an administrative enforcement mechanism,<sup>4</sup> but of greater interest to patients, and hence to litigators, are EMTALA’s private civil remedies,<sup>5</sup> which include a cause of action under which a patient suffering harm resulting from a hospital’s violation of EMTALA

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<sup>1</sup>42 U.S.C. § 1395dd.

<sup>2</sup>*Id.* § 1395dd(a); *see also id.* § 1395dd(e)(1) (defining “emergency medical condition”).

<sup>3</sup>*Id.* § 1395dd(b); for circumstances under which an unstabilized patient may be transferred to another hospital, *see id.* § 1395dd(c). *See also id.* § 1395dd(e)(4) (“transfer” includes “discharge”).

<sup>4</sup>*Id.* § 1395dd(d)(1).

<sup>5</sup>*Id.* § 1395dd(d)(2).

requirements may bring suit for damages against the hospital.<sup>6</sup> EMTALA authorizes a patient injured by a violation of the statute to recover “those damages available for personal injury under the law of the State in which the hospital is located.”<sup>7</sup>

The New Mexico appellate courts had their first encounter with EMTALA in *Godwin v. Memorial Medical Center*.<sup>8</sup> In *Godwin*, the Court of Appeals addressed a number of procedural and substantive issues under the statute, ruling in part adversely to the defendant hospital.<sup>9</sup> The Supreme Court granted the hospital’s petition for a writ of certiorari but quashed the writ after oral argument, leaving the Court of Appeals decision as the current governing law.

*Godwin* involved a patient who went to the emergency room at Memorial Medical Center in Las Cruces after suffering an injury to his back in a fall. The patient was seen by a contract physician, examined, and discharged. Eight days later, the patient returned to the emergency room, complaining of continuing back pain. The patient was seen by the same emergency physician, to whom he reported weakness and numbness in his legs. A CT scan performed on the patient was negative, and the physician testified that at that point he “didn’t know what was going on” with the patient. The patient was again discharged, this time with advice to see a neurologist. Two days later, the patient returned to the hospital and was diagnosed with a subdural hematoma which had compressed his spinal cord. The hematoma was surgically removed at another facility,

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<sup>6</sup>*Id.* § 1395dd(d)(2)(A).

<sup>7</sup>*Id.*

<sup>8</sup>2001-NMCA-033, 130 N.M. 434, 25 P.3d 273, *cert. quashed*, Nos. 26,919 & 26,922, 132 N.M. 193, 25 P.3d 273, and *cert. denied*, 537 U.S. 885 (2002).

<sup>9</sup>*Id.* ¶ 2.

but the patient suffered residual paralysis.<sup>10</sup>

In the lawsuit that resulted from these events, the patient (joined by his wife) asserted a claim for medical malpractice against the emergency physician, a claim for vicarious liability against the hospital, and an EMTALA cause of action against the hospital.<sup>11</sup> The hospital, a government entity under the New Mexico Tort Claims Act, invoked the damage cap and 90-day notice of claim provisions of the Act as defenses to the EMTALA claim and also moved for summary judgment on the merits of the alleged EMTALA violation.<sup>12</sup> Both sides were aggrieved by aspects of the trial court's resolution of these issues and pursued interlocutory appeals, which were granted by the Court of Appeals.

The Court of Appeals decision in *Godwin* addresses a number of questions relating to EMTALA and the interaction of the federal statute with the state Tort Claims Act. The decision first addresses the applicability of the notice and damage cap provisions of the Tort Claims Act when an EMTALA claim is asserted against a hospital that is a government entity. It then deals with the showing necessary to establish an EMTALA violation where a plaintiff claims not to have received an "appropriate medical screening examination" or claims to have been improperly transferred or discharged by a hospital before an emergency medical condition was stabilized.

In analyzing the applicability of the notice of claim provision to EMTALA actions, the Court of Appeals considered three provisions of the statute to be relevant:<sup>13</sup> first, the express

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<sup>10</sup>*See id.* ¶¶ 6-12.

<sup>11</sup>*Id.* ¶¶ 13-15.

<sup>12</sup>*Id.* ¶¶ 3, 16.

<sup>13</sup>*Id.* ¶ 36.

incorporation of state law regarding personal injury damages into EMTALA;<sup>14</sup> second, the specific inclusion of a two-year statute of limitations in EMTALA;<sup>15</sup> and third, EMTALA's *non-preemption* provision, which states that local and state law requirements are not preempted by EMTALA "except to the extent that the requirement directly conflicts with a requirement of" the federal statute.<sup>16</sup> Although EMTALA thus largely incorporates or defers to state law to govern claims under the statute, the Court of Appeals concluded that the 90-day notice requirement directly conflicted with the two-year limitations period and therefore fell within the narrow scope of EMTALA preemption.

The fact of the matter is that if failure to give a 90-day notice bars an Emergency Act claim, the two-year period given is taken away. The two-year limitations period in effect is reduced to 90 days or less and effectively vitiated. These circumstances create a direct conflict between the Tort Claims Act notice-of-claim requirement and the Emergency Act's statute of limitations and purposes.<sup>17</sup>

In contrast to the notice provision, the Court of Appeals held that the tort claim damage cap was compatible with and not preempted by EMTALA. "Rather than directly conflict with the

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<sup>14</sup>42 U.S.C. § 1395dd(d)(2)(A).

<sup>15</sup>*Id.* § 1395dd(d)(2)(C).

<sup>16</sup>*Id.* § 1395dd(f).

<sup>17</sup>2001-NMCA-033, ¶ 38. One member of the panel dissented from this holding, reasoning that the notice provision did not directly conflict with EMTALA because a claimant could comply with both the notice requirement and the statute of limitations and because the notice provision should be viewed not as posing an obstacle to the achievement of congressional objectives but rather as addressing a separate concern that the interests of government be protected by prompt notice of tort claims. *See id.* ¶¶ 78-81 (Pickard, J., concurring in part and dissenting in part).

purposes of the Emergency Act, a state law limitation on damages is more reasonably read as being consistent with the words ‘those damages available’” under state law in a private civil EMTALA action.<sup>18</sup> Thus, “the ‘damages available’ under New Mexico law against [a] government hospital are those ‘damages available’ under the Tort Claims Act.”<sup>19</sup>

In considering the elements of a claim based on a failure to stabilize an emergency room patient prior to transfer or discharge, the Court of Appeals held that a patient seeking to establish an EMTALA violation must prove that the hospital had actual knowledge of the patient’s emergency medical condition. “The stabilization requirement is ‘triggered’ only when an emergency medical condition is detected in the screening process. The stabilization provision does not apply unless it is first determined that an emergency medical condition exists.”<sup>20</sup> Because the evidence in *Godwin* indicated that the patient was discharged before any emergency medical condition was detected by the hospital, the Court of Appeals concluded that the case presented no issue under EMTALA based on a failure to stabilize.<sup>21</sup>

The final area of the court’s discussion – the elements of a prima facie EMTALA claim for failure to conduct an “appropriate” medical screening examination – is the least clear aspect of the Court of Appeals decision and arguably misinterprets the EMTALA statute. Because the standard for determining what is an appropriate screening examination is undefined in the statute, EMTALA could be viewed as imposing liability on a hospital where a screening examination is

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<sup>18</sup>*Id.* ¶ 44; see 42 U.S.C. § 1395dd(d)(2)(A).

<sup>19</sup>2001-NMCA-033, ¶ 44.

<sup>20</sup>*Id.* ¶ 73 (citations omitted).

<sup>21</sup>*Id.*

medically deficient in some way – as when the hospital providing the screening examination fails to detect an emergency medical condition that is actually present. Under that interpretation, EMTALA would provide patients with a federal statutory claim that is essentially indistinguishable from a state law claim for medical negligence in cases in which a hospital conducting a screening examination in accordance with the appropriate standard of medical care would have detected the emergency medical condition. Arguably, a medical screening examination that fails to detect a condition that should be detected by a reasonably competent hospital is not an “appropriate” examination.

Considerable commentary and the great majority of decisions since EMTALA was enacted make it clear, however, that the statute is not an alternative font of liability for medical negligence. In defining an “appropriate” screening examination under the statute, courts look to the purpose for which EMTALA was enacted: to prevent hospitals from “dumping” – to other facilities or the street – uninsured patients in need of emergency care who may be unable to pay for the care provided to them.<sup>22</sup> Because discrimination among patients based on ability to pay is the concern underlying EMTALA, an “appropriate” screening examination is the same examination that the hospital would provide, under its standard protocol, to any other patient presenting the same symptoms or apparent condition.<sup>23</sup> EMTALA requires that patients requesting emergency care

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<sup>22</sup>See 2001-NMCA-033, ¶ 17; see also, e.g., *Bryan v. Rectors & Visitors*, 95 F.3d 349, 351 (4th Cir. 1996); see generally M. Moy, *The EMTALA Answer Book* xxvi-xxviii (2000); L. Joy, *EMTALA: Interpreting & Complying with the Federal Transfer Law* § I(B), at 1-2 (1999). For a further discussion of EMTALA, also see A. Dowdy et al., *The Anatomy of EMTALA: A Litigator’s Guide*, 27 St. Mary’s L.J. 463 (1996).

<sup>23</sup> See *Gatewood v. Washington Healthcare Corp.*, 933 F.2d 1037, 1041 (D.C. Cir. 1991) (EMTALA is not intended to ensure each emergency room patient receives correct diagnosis “but rather to ensure that each is accorded same level of treatment regularly provided to patients in

receive the same level of care, regardless of ability to pay or other factors. But the requirement of an “appropriate” screening examination does not demand more. As one court has held,

EMTALA is implicated only when individuals who are *perceived* to have the same medical condition receive disparate treatment; it is not implicated whenever individuals who turn out *in fact* to have had the same condition receive disparate treatment. The Act would otherwise become indistinguishable from state malpractice law.<sup>24</sup>

Accordingly, most courts hold that a patient claiming a violation of the adequate screening examination requirement of EMTALA makes out a prima facie case not by showing that the screening examination failed to correctly diagnose the patient’s condition but by demonstrating that the hospital failed, in the patient’s case, to follow its ordinary protocol for screening emergency room patients.<sup>25</sup>

In its opinion in *Godwin*, the Court of Appeals appeared to recognize that EMTALA is not a substitute for state malpractice law,<sup>26</sup> and it adopted the view that an EMTALA screening violation is established by showing a departure from the hospital’s standard screening

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similar medical circumstances”); *Collins v. DePaul Hosp.*, 963 F.2d 303, 307 (10th Cir. 1992).

<sup>24</sup>*Vickers v. Nash Gen. Hosp., Inc.*, 78 F.3d 139, 144 (4th Cir. 1996) (citation omitted) (emphasis in original).

<sup>25</sup>*See, e.g., Repp v. Anadarko Mun. Hosp.*, 43 F.3d 519, 522 (10th Cir. 1994); *see also Phillips v. Hillcrest Med. Ctr.*, 244 F.3d 790, 798 (10th Cir. 2001) (“While providing a guaranty for an ‘appropriate medical screening,’ EMTALA . . . does not provide a remedy for an inadequate or inaccurate diagnosis.”).

<sup>26</sup>*See* 2001-NMCA-033, ¶¶ 19, 48.

procedures.<sup>27</sup> Whether the court correctly applied these principles in its analysis of the *Godwin* facts, however, is open to question.

The Court of Appeals took the view that a jury could find that the hospital did not provide the patient with its customary screening in light of evidence that “a neurological examination was part of [the hospital’s] standard screening procedure.”<sup>28</sup> The emergency physician had advised the patient to consult a neurologist but did not himself order a neurological consultation. The Court of Appeals appeared impressed by medical expert testimony that the physician “should have made arrangements to have [the patient] seen by a neurologist . . . on an emergency basis” and that, because no such arrangements were made, the screening examination was “not appropriate.”<sup>29</sup> “[I]f [the emergency physician] diagnosed neurological involvement,” the court said, “but failed to follow through with all facets of [the hospital’s] standard procedure in addressing the neurological condition, the Emergency Act is implicated.”<sup>30</sup> While this statement is correct in that the conclusion follows from the premise under a fair reading of EMTALA, it is not clear that the statement is applicable to the facts in *Godwin* if EMTALA is properly understood.

The Court of Appeals opinion indicates that there was evidence that the emergency physician could have consulted an on-call internist or other medical resources for help in

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<sup>27</sup>*Id.* ¶ 59. In this respect, EMTALA may be seen as imposing a strict liability standard. *See id.* ¶ 19.

<sup>28</sup>*Id.* ¶ 61. The court also noted some evidence regarding a nursing protocol for spinal cord injuries that was not followed in the patient’s case, *id.* ¶ 62, but this fact does not seem to figure in the court’s analysis.

<sup>29</sup>*Id.* ¶ 62.

<sup>30</sup>*Id.* ¶ 65.

determining what was wrong with his patient.<sup>31</sup> But the opinion does not indicate that consultation with a neurologist was a standard part of the hospital's screening protocol in all instances. It stands to reason that a neurologist would be consulted only if the emergency physician, in the exercise of medical judgment, concluded that the patient's condition suggested a potential neurological injury that justified the involvement of a specialist. By his own account, however, the emergency physician in *Godwin* "didn't know what was going on" medically when his patient came to the hospital for the second time.

If that was the case, the patient's injury may well have resulted from the emergency physician's erroneous medical judgment in failing to recognize the need for an immediate neurological consultation, but it was not caused by the physician's failure to follow a particular screening protocol. The injury, in other words, arguably resulted from medical negligence for which a remedy exists under state tort law – but such an injury is outside the remedial scope of EMTALA.<sup>32</sup>

It is true, as the Court of Appeals observed, that "[t]he spheres of medical malpractice and failure to provide an appropriate medical screening" under EMTALA "may overlap."<sup>33</sup> However, where a screening examination departs from the examination that should have been given under the hospital's protocol, not because of any lesser effort to screen the patient but because the

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<sup>31</sup>*Id.* ¶ 61.

<sup>32</sup>*See Marshall v. E. Carroll Parish Hosp. Serv. Dist.*, 134 F.3d 319, 323 (5th Cir. 1998) (“[A] treating physician’s failure to appreciate the extent of a patient’s injury or illness, as well as a subsequent failure to order an additional diagnostic procedure, may constitute negligence or malpractice, but it cannot support an EMTALA claim for inappropriate screening.”).

<sup>33</sup>2001-NMCA-033, ¶ 66.

examining physician misjudged what tests or consultations were needed, there should be no basis for a claim under EMTALA.<sup>34</sup> Because the Supreme Court ultimately decided not to review the Court of Appeals decision in *Godwin*, practitioners will have to await future guidance in distinguishing the potentially overlapping spheres of medical malpractice and EMTALA screening liability.

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*Edward Ricco is head of the appellate practice group at the Rodey Law Firm. With Paul Collins and James Bieg, he prepared an amicus curiae brief on behalf of the New Mexico Hospital Association in the Godwin case.*

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<sup>34</sup>*See Summers v. Baptist Med. Ctr. Arkadelphia*, 91 F.3d 1132, 1139 (8th Cir. 1996) (“[F]aulty screening, in a particular case, as opposed to disparate screening or refusing to screen at all, does not contravene the statute.”) (citation and internal quotation marks omitted).