

Changed Circumstances: The Impact of the COVID-19 Pandemic Upon Healthcare Liability Exposure for Medical Professionals.

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Overview of Negligence

- Elements Plaintiff Must Prove to establish negligence (healthcare liability)
 - **Duty**
 - **Breach of Duty**
 - Causation
 - Proximate Cause
 - Damages

When is duty breached?

Duty is defined as what a “reasonably prudent” provider would do under “same or similar circumstances.”

Same or similar circumstances

- 1) Location
- 2) Resources available
- 3) State of knowledge

Emergency Relief During COVID-19

Coronavirus Aid, Relief, and Economic Security Act (“CARES” Act)

Section 3215 provides immunity to federal and state liability where:

- Volunteer
- Services provided within scope of license
- Services provided in response to emergency
- Act in Good Faith

Exceptions:

- Willful or criminal misconduct
- Gross negligence
- Reckless misconduct
- Flagrant indifference
- Acting under the influence drugs or alcohol

Only in effect during length of emergency

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PPE Shortages/Considerations

- CDC Statement
 - PPE Contingency Strategies
 - Crisis Capacity Strategies
 - Avoiding Unintentional Loss
- FDA Statements on Shortages

PPE – State and Federal Law Considerations

- State Law
 - Emergency Powers statutes
 - Executive Orders
- Existing Federal Law
 - PREP Act 42 U.S.C. 247d-6d
 - Extended by CARES Act
- Employee Protection

Triage

State Emergency Preparedness Guidelines

Example: Tennessee Guidelines promulgated in July of 2016, based upon the Minnesota Healthcare System Preparedness Program.
Guidelines for the allocation of ventilators

Assess patient SOFA (Sequential Organ Failure Assessment)

Compare with Other Patients

Organ System Function

Duration of Benefit/Prognosis

Duration of Need

Response to Mechanical Ventilation

Reallocate if appropriate

Triage

Warning:

HHS Office of Civil Rights Bulletin of March 28, 2020

Reminded providers and facilities they cannot discriminate on the basis of race, color, national origin, disability, age, sex, and exercise of conscience or religion.

Documentation must avoid these concerns

Off-Label Prescriptions

- 3/25/20 Joint Statement of AMA, American Pharmacists Association, and American Society of Health System Pharmacists
 - No incontrovertible evidence to support
 - Must be stewards of limited resources
 - Leave room for professional judgment
 - Applaud trial efforts
- World Health Organization Statement
 - Can be ethically appropriate outside of trial setting
 - Must comply with state and federal law
- CDC Statement
 - Therapeutic options
 - Investigational – Remdesivir, Hydroxychloroquine and chloroquine, others

Off-Label Prescriptions – State and Federal Law Considerations

- PREP Act Application
 - Pandemic counter-measure?
 - Likely no immunity, for now
- State Executive Orders
 - Relaxing Requirements
 - Potential Concerns
- Lawsuit context

Manpower Shortage

- General negligence standard
 - Reasonable under the circumstances in the eyes of a similarly trained provider
- Balance unavailability with duty of care
- Consideration of allowing volunteer providers to assist your medical group
- Precautions if practice overwhelmed by patients

Liability for Others

- COVID-19 Crises creates unique environment
 - Uncertainty and fear among healthcare providers
 - Providers acting in unfamiliar surroundings
 - Experimental/Evolving treatment

Generally no “Captain of the Ship Doctrine”

Not going to impose strict liability on physicians for a patient’s care – only if you control the means and methods by which an action is taken

Consider chain of command options for recalcitrant providers

Responsibility for Physician-Extenders (state regulated – essentially strict liability in many states – physician has delegated a duty and takes the responsibility of his or her agent)

Accountability for Knowledge

- Understanding and treatment protocol are changing rapidly. What is a provider required to know at any given time?
 - What a reasonably prudent physician would know
 - Current and peer-reviewed literature
 - Policies and protocol of facility
 - Directives from official health agencies/organizations (e.g. CDC guidelines, HHS bulletins)

Questions?

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