



LAURA WARNER



SARAH
BERNAMOFF

TORT LIABILITY IN A COVID WORLD PART 4: MEDICAL NEGLIGENCE

Introduction

During the crisis of the COVID-19 pandemic, some doctors may be concerned about liability issues they have not had to consider in the past. For example, what if an emergency room doctor sends a patient home who has COVID-19 but is not experiencing symptoms any worse than a cold, only to have the patient become drastically sicker? Is the standard of care during a pandemic different? How does a doctor decide who to give ventilators to when there are not enough machines to go around? Does a doctor who has come out of retirement to help the COVID-19 fight have to abide by the same standard of care as a regularly practicing doctor? These are not easy questions for doctors during this unprecedented modern global health crisis.

Standard of Care

In general, courts afford a high degree of deference to the standards and customs that the medical profession sets for itself. In [*ter Neuzen v Korn*](#), discussed in [previous articles in this series](#), the Supreme Court found that,

“where a procedure involves difficult or uncertain questions of medical treatment or complex, scientific or highly technical matters that are beyond the ordinary experience and understanding of a judge or jury, it will not be open to find a standard medical practice negligent.” (para 64)

In Alberta, the College of Physicians & Surgeons of Alberta (CPSA) requires its licensees to abide by its Standards of Practice. Of note, the CPSA has published an additional [Standard of Practice for Telemedicine](#), which is defined as provision of medical diagnosis and patient care through electronic communication where the patient and the provider are in different locations. Telemedicine has become more common during the COVID-19 crisis in light of the Alberta Chief Medical Officer of Health’s advice to stay home and orders requiring physicians to discontinue nonessential services.

Urgency

In late March 2020, the Alberta Chief Medical Officer of Health (CMOH) issued order [07-2020](#) which required physicians to discontinue the provision of nonessential health services and limit practice to

“services deemed urgent by the health professional providing the service.” The question becomes: what scenarios are “urgent” and do medical professionals have the same standard of care in urgent scenarios as in regular ones?

The CPSA thereafter published advice to the profession entitled “[COVID-19: Defining Urgent](#).” In defining “urgent”, the CPSA admits that “there is no simple answer. What is urgent is dependent on many factors in each unique clinical context...weighing the benefit of providing care with preventing the spread of COVID-19 by delaying appointments and procedures will be a constant challenge.” Ultimately, it is up to each health care provider to make a determination about what is “urgent”.

When a determination of urgency is made, what is the standard of care in that scenario? Courts have tended to afford some leniency to defendants who were tending to an urgent scenario. For example, in [Horsley v McLaren](#), the Supreme Court held that even though the defendant’s rescue technique was improper, the defendant was affected by the heat of the moment and still did his best to rescue the Plaintiff. In dissenting reasons, Justice Laskin (as he then was) rejected this more lenient standard of care. He would have found negligence because, in his view, this was a case of not putting into action standard procedures required in an emergency, which the defendant had practiced.

Relative Experience

In order to better address the needs of the COVID-19 crisis, the CPSA put out a call to recently retired doctors from all specialties to assist in providing care to fight the virus. The CPSA stated that they were relicensing recently retired doctors within several days.

If a doctor has been out of practice for almost two years, especially from a specialty unrelated to emergency, should a different standard of care apply to that doctor?

If resident doctors are brought to the front lines to assist due to a shortage of doctors, what standard of care applies to them?

The law is clear that experience and length of service of the individual doctor are left out when establishing the legal standard of care. The test is an objective one. A doctor is held to the standard of a reasonably competent and prudent member of that branch of the medical profession.¹

Protection from Liability

In the UK and US, governments have implemented legislation that provides extra protection from liability for doctors treating COVID-19. In the UK, the government implemented the [Coronavirus Act 2020](#). Clauses 10-12 of that Act address indemnity coverage for medical negligence of healthcare workers carrying out public health activities connected to COVID-19. Clauses 28-29 remove the requirement that inquests be held into COVID-19 deaths, as is required for other notifiable diseases like Lyme Disease.

Similarly, in the US, the Department of Health and Human Services recently issued a [declaration](#) under the Public Readiness and Emergency Preparedness Act to provide immunity to liability for activities

¹ See *The Law of Torts*, 4th ed., by Philip H. Osborne at pp. 48-49

related to medical countermeasures against COVID-19.

Several Canadian provinces have implemented some liability protection for physicians, but less encompassing than the measures in the UK and US. For example, in British Columbia the [Emergency Management Act](#) strives to protect a person from liability in circumstances where an individual becomes infected with COVID-19 as a result of the person providing an essential service (see section 3). Ultimately, while the Courts would likely empathize with doctors faced with emergency COVID-19 scenarios, doctors would be well advised to take certain precautionary measures to avoid liability.

First, doctors should be rigorous in their practice of documenting medical decisions. No matter how busy, health care practitioners must accurately document the actions they took or their recommendations to patients. Rigorous documentation also protects patients and promotes research.

Second, if at all possible, doctors should strive to exceed the [Standards of Practice](#) and [Advice to the Profession](#) published by the CPSA. The CPSA is clear that their standards are minimum standards. Doctors could consider exceeding those standards.

Third, try to treat patients not suffering with COVID-19 as normally as possible and take all steps to prevent the spread of the disease to them. With a strain on resources such as the availability of doctors, be careful to continue to tend to vulnerable patients who do not have COVID-19.

Lastly, ensure you have adequate liability coverage. Doctors in unique circumstances, such as those coming out of retirement to assist in the fight against COVID-19, and especially those operating outside the scope of their specialization, or using telemedicine for the first time, should be especially diligent in confirming their coverage.

During the pandemic, health care practitioners may be facing added liability. If you are unsure about your coverage or would like to consult about your potential liability exposure and how to protect yourself, please contact our lawyers at JSS Barristers. We have deep experience assisting professionals with liability issues and would be pleased to assist.

Laura Warner is a partner with JSS Barristers. Click [here](#) for Laura's bio.

Sarah Bernamoff is an associate with JSS Barristers. Click [here](#) for Sarah's bio.