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Contents lists available at ScienceDirect

Science & Justice

journal homepage: www.elsevier.com/locate/scijus

To take care of those on the front line against Covid-19: Is it possible to limit medical liability?

ARTICLE INFO

Keywords:
 COVID-19
 Pandemic emergency
 Medical liability

ABSTRACT

In the context of the COVID-19 pandemic, it is important not to forget, when the emergency is controlled or even over, that those who today are defined in all Countries as “heroes” could in the future be called to answer for alleged damage from professional liability. It is necessary to be prepared, both as health professionals and from a legal and governmental point of view, for a surge of professional liability claims which, with high probability, will begin to emerge in the coming months.

The Covid-19 outbreak, just like every emergency scenario, is having a significant impact on public good requiring health structures and staffs to provide services to a large number of patients despite limited resources and an insufficient number of qualified personnel.

During the current emergency, the principles of welfare and free access to care are forced to contend with the imbalance between real clinical needs and the actual availability of resources.

Moreover, health care providers are forced to move from medical practice standards to services that are associated with greater risks for morbidity or mortality, sometimes very distant from their level of experience and specialization. Many health-care workers have been indeed transferred to newly created Covid-wards, without having the necessary skills, much less the necessary personal protective equipment. The same health structures have converted operational units and retrieved old hospitals, abandoned for years. The difficulty of mastering a pandemic that has not yet revealed all its coordinates has forced the sector to continuously reshape, hand in hand with the exponential increase in cases, its pathways for treating patients within the structures. It is clear that in those critical phases the priorities of care, safety and quality of care, towards some patients, were also lacking.

Legal issues pervade emergency responses and sometimes can even hinder them [1]. Indeed, unpredictable outcomes of this critical medical management raise the spectre of potential civil and criminal liability. Inevitable mistakes may leave health-care personnel – especially when they are outside their scope of employment – open to claims of liability based on negligence. Misdiagnosis, inadequate treatment or death of Covid-19 positive persons are some possible contentious issues looming for health personnel and structures in the not-so-distant future.

Findings of liability are associated with a departure from the expected standard of care and, in law, the standard of care can be defined in terms of what a reasonable practitioner would do under similar circumstances. However, legal standard is by definition fact-specific and flexible, shaped by the conditions under which providers operate. During an emergency, the conduct of healthcare professionals should not be judged by courts as it would be under ordinary circumstances. Some experts have used the terminology “altered standards of care” when proposing medical practice guidelines for public health emergencies [2]. Similarly, courts should likewise use “altered standards of evaluation” when they judge the conduct engaged in by a healthcare professional during an emergency crisis.

On the other hand, hospitals should take a proactive approach to limit the possibility of being held liable by developing specific emergency protocols, having a transparent triage process, and adequately documenting every conducted medical act. Cases of negligence can also be reduced by maintaining a continuous hospital-acquired infection surveillance program and having adequate communication with patients and their family, also using digital tools if they are not allowed to stay close to their relatives, informing them as to current epidemiological and clinical issues having to do with infectious disease [3].

On March 2020, some Italian politicians tabled an amendment that strongly limits the medical liability for the health personnel facing the Covid emergency. According to this amendment, a health-care worker would be held liable only if the alleged harm caused to the patient were due directly to malicious misconduct or gross negligence, where gross negligence means an unjustified violation of the basic principles governing healthcare profession or any emergency protocols established to deal with the situation. Even though such a dissertation has been discussed on the basis of Italian law, no country is excluded from these issues and, therefore, the solution to be adopted should be common, modelled according to the specificities of the legislative system of each individual state, with the difficult aim of striking the right balance between the protection of the weakest (patients) and the defence of those who fight on the front line (health-care personnel).

The hope is that a global emergency, such as the one we are facing, will help to rebalance the doctor-patient relationship in a world where, in the last decades, there has been an increasing excess of “the right to be healed” of individuals and a supposed “duty of perfection” as applied to health-care personnel.

Declaration of Competing Interest

The authors declare that they have no known competing financial interests or personal relationships that could have appeared to influence the work reported in this paper.

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<https://doi.org/10.1016/j.scijus.2020.05.001>

Received 24 April 2020; Accepted 9 May 2020

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