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A Stronger Medical Immunity Vaccine— Protect Doctors Who Put Us First

Doctors and health care providers have continued doing more than just helping patients and putting their own health at risk but while doing so, they were faced with unthinkable challenges that could impact them both legally and financially.

BY ERIC POE

Immunity comes in all shapes and sizes—something that became even more prevalent when COVID-19 hit the world earlier this year. Not only was there a necessary rush to find ways to treat the deadly virus but also prevent it by developing a vaccine to create “immunity” from it. However, that is only part of story and the need for protection resulting from the coronavirus pandemic. Doctors and health care providers have continued doing more than just helping patients and putting their own health at risk but while doing so, they were faced with unthinkable challenges that could impact them both legally and financially.

Within weeks of the dire outbreak, governors across the country, including right here in Pennsylvania and across the river in New Jersey, quickly put legal

protections in place by executive order or legislation to immunize medical professionals treating COVID-19 patients from civil liability during this pandemic. These actions and the expansion of “Good Samaritan Laws” were strong steps in addressing in a great number of situations. However, there remain areas in which medical professionals are at an increased risk to be sued for personal injury or medical malpractice due to the global health crisis.

Two specific instances come to mind—doctors who have altered traditional protocols to include treating patients via telemedicine and those health care professionals working outside their medical specialty, all doing so to assist in the worldwide efforts to curb the spread of COVID-19. In both, these professionals are at an increased risk of a malpractice claims yet not afforded the same



Eric S. Poe of New Jersey Physicians United Reciprocal Exchange. Courtesy photo

immunity protections as those physicians treating coronavirus patients.

Most have heard of the centuries-old Hippocratic Oath—a vow that in part calls for doctors to provide care for benefit of the sick and not for harm. They do so without pause but these noble acts are not immune from civil liability. Today, all of our medical professionals are acting on their promise, whether they are treating COVID patients directly

or altering their practice due to the pandemic. Yet the expanded immunity protections focus solely on the former. That is not enough.

Looking Back to the Onset

When COVID-19 first hit our shores, physicians from all fields were being asked to treat patients outside of the scope of their specialty at hospitals and make-shift medical treatment sites. I experienced this first hand as a medical malpractice insurance executive and practicing attorney. At the time, we fielded an overwhelming number of calls from insured doctors seeking guidance about practicing outside their specialty as they were called to fill the void and monitor patients for others who were infected or simply because all hands were “on deck” to treat the sheer volume of cases.

The problem was that state Good Samaritan laws, like that in Pennsylvania and New Jersey, were written only to protect health care providers if they provide treatment without compensation and when such treatment is rendered during a circumstance of an imminent danger (like rendering help at a car accident site or a heart attack on an airplane). More specifically, the New Jersey statute provides immunity only when one “in good faith renders emergency care at the scene of an accident or

emergency to the victim or victims thereof, or while transporting the victim or victims thereof to a hospital or other facility where treatment or care is to be rendered.” The Pennsylvania statute mirrors the New Jersey statute, providing the same immunity in emergency situations. See 42 Pa. C.S. Section 8332. Indeed, by case law, physicians who assist a patient in the hospital who is experiencing a medical emergency cannot invoke the protections of the statute. See *Velazquez v. Jiminez*, 172 N.J. 240, 262 (2002).

Likewise, the statutory immunity in Pennsylvania is applicable only if the medical professional who “happens by chance” or is otherwise summoned by police to the scene of the emergency. Doctors and nurses who act in “good faith” in such situations, when care cannot be postponed until transported to a hospital, are protected from civil damages unless in cases of intentional harm or gross negligence. See 42 Pa. C.S. Section 8331; see *Phebus v. UPMC Horizon*, 2005 WL 2101415 (Pa. Com. Pl. Mar. 4, 2005). The irony is that Good Samaritan laws do not protect treatment rendered at hospitals, and would not help those medical professionals treating COVID patients in that setting—yes, the emergency scene during this pandemic.

Having reviewed the current statute and addressing the onslaught of concerned physicians’ calls, I urged New Jersey Gov. Phil Murphy to expand immunity and ensure that those risking their own lives to treat COVID patients would not be sued for their selfless acts. The result was one of many executive orders put in place to address COVID-related matters, and Murphy was not alone in expanding such protections for those treating coronavirus patients. Gov. Tom Wolf in Pennsylvania and many others across the country took similar action.

The executive orders in Pennsylvania and New Jersey were issued to immunize physicians and other medical staff specifically when helping treat COVID patients during this state of emergency. They reduced the reach of civil liability and limit it to “gross negligence” or “recklessness,” as distinguished from the standard for professional negligence applicable in ordinary circumstances.

More Is Needed

Strong steps were taken this spring as governors expanded Good Samaritan Laws to protect the medical professionals treating COVID patients from the looming threat of lawsuits when they act quickly to assist in

the pandemic. But COVID has changed so much and the practice of medicine will remain altered for years to come—maybe forever. So, we need to look beyond the immediate actions of doctors treating those diagnosed with coronavirus. Broader legislation should cover physicians who have had their work affected by it.

I believe no one recognized that the use of telehealth would “virtually” become the norm. Consider a patient who had surgery then follow up appointments via telemedicine to preserve PPE, control social distancing and reduce COVID exposure. But what if the surgeon missed a subtle sign of post-surgical infection during the virtual consultation? What if the infection worsens because, due to the inherent limitations of telemedicine, it was not detected immediately?

This is just one of so many possible scenarios. Imagine the dermatologist who misses a cancerous mole through limitations in telemedicine, a plastic surgeon providing wound care in a busy emergency room who misses a sign of a broken bone that even an overworked urgent care doctor might have seen, or general practitioners volunteering to help an overrun ICU. In these cases and others, health care professionals are perhaps open to increased

liability due to circumstances beyond their control due to the pandemic. Unfortunately, the current civil liability protections do not extend to these doctors and nurses. This is despite the fact that they are pitching in to help combat COVID and albeit a bit more indirectly, providing medical care these patients.

So Why and What Now?

We have all heard the numbers and recognize the impacts this pandemic has had on all of us to date. It has also been made clear that we are not yet out of the woods. There is no definitive cure; no approved preventative vaccine. Doctors continue to treat outside their specialty, practice telemedicine, protect PPE inventory and reduce in-office exposure to patients, staff and themselves. As a result, matters of immunization remain, beyond those for health and well-being.

While protecting medical providers treating COVID patients was an important first step, there is a clear need to examine and further expand the protections in place. Lawmakers need urging to ensure those who are assisting in the effort to curb COVID—for whatever reasons and by any means—are properly covered and immunized as well. These professionals are altering their practice

not for personal gain or convenience but rather because it is the right thing to do.

Let’s keep up the momentum and protect the health care workers who are so selflessly working around the clock will protect us all.

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