Physicians’ legal duty of care and legal right to refuse to work during a pandemic

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Considerable literature exists on physicians’ ethical obligations to treat during pandemics, but much less has been written about their legal obligations. Without understanding the legal landscape, physicians could face serious professional and personal consequences: those who breach their legal duties may face negligence lawsuits, and those who do not understand their legal right to refuse to work in unsafe conditions may face serious injury and even death. Globally, physicians are grappling with similar issues, although the legal implications vary in each country. Physicians working during a pandemic in Canada need to be aware of their legal rights and duties specific to the provinces in which they work.

Legal duty of care

Existing patients
Physicians have a legal duty to provide a certain standard of skill and care to their existing patients.1 The legal duty of care is created when a physician agrees to treat a patient who has requested his or her services.1 In determining what that duty requires, physicians should consider whether the care they are providing is that which a “reasonable physician” would provide under the circumstances. Specialists would need to exercise a higher degree of skill in their area of expertise.2

Legal scholars suggest that duty of care comprises several catalogued duties: attending, diagnosing, referring, treating and instructing the patient.1 If a physician breaches the duty of care and a patient experiences an injury as a result, the physician may be found guilty of negligence and forced to pay the injured patient or family monetary damages.3 Professional insurance may cover these costs.4

There is limited case law, literature and legislation on a physician’s legal duty of care during a pandemic.5 Physicians can gain insight into their obligations by becoming familiar with general legal doctrines and legislation developed in non-pandemic cases. For example, physicians working during a pandemic may contemplate terminating their relationship with certain patients. However, an abrupt severance of the physician–patient relationship could result in a negligence suit if it causes injury to the patient that would have been foreseeable to a reasonable physician.3

Others
All Canadian provinces have legislation that outlines the government’s powers during a state of emergency (Table 1). Such legislation permits the government to authorize or, in some provinces, require physicians to provide services they are reasonably qualified to provide if a pandemic is declared a state of emergency. This legislation prevails over other legislation for the duration of the emergency. The liability of physicians acting under provincial statutes varies, but it is usually limited to that of gross negligence or acts that are committed in bad faith.

Regardless of a declared state of emergency, physicians may wonder whether they have a legal obligation to treat people who are not their patients if they require immediate emergency attention. The traditional view is that physicians owe a duty of care only to their existing patients, even in an emergency.1 There is an exception in Quebec, where legislation states that every person must come to the aid of anyone whose life is in peril, unless it would put his or her life or another’s life in jeopardy.6

The courts may be willing to shift away from this traditional position. Physicians working in emergency departments or who regularly provide emergency services may be found to owe a duty of care to people who are not their patients because of the reliance the public places on these physicians to provide emergency treatment.7 These physicians may face liability if they incautiously turn away people who require emergency care during a pandemic. What will be deemed incautious will depend on the circumstances; in assessing liability, the courts will consider what a reasonable physician would have done in those circumstances.

A physician serving a rural or isolated community might also legally be precluded from turning away a person who is not his
or her patient, at least while the condition of the individual is serious and travel to an alternative medical facility is unrealistic.\textsuperscript{1}

Irrespective of a legal duty to care for someone who is not a patient, if a physician chooses to come to a person’s aid during an emergency, he or she may have created a physician–patient relationship and therefore assumed the resulting liability.\textsuperscript{3} Liability may be limited by Good Samaritan legislation, which exists in all provinces except New Brunswick. This legislation states that physicians who provide aid at the scene of an emergency and without expectation of compensation will be found liable only if they commit gross negligence.

**Legal right to refuse to work**

Hospitals and health care facilities in Canada are governed by the occupational health and safety statutes of each province. The provisions for the right to refuse to work because of unsafe conditions are slightly different in each province. For

### Table 1: Provincial legislation for emergency management: government powers to authorize or require physicians to work during a pandemic

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Statute</th>
<th>Government powers</th>
<th>Liable for action under the act</th>
</tr>
</thead>
<tbody>
<tr>
<td>British Columbia</td>
<td>Emergency Program Act</td>
<td>Authorize or require any person to render assistance of a type that the person is qualified to provide or that otherwise is or may be required to prevent, respond to or alleviate the effects of an emergency or disaster.</td>
<td>Bad faith or gross negligence</td>
</tr>
<tr>
<td>Alberta</td>
<td>Emergency Management Act</td>
<td>Authorize or require any qualified person to render aid of a type the person is qualified to provide. Authorize the conscription of persons needed to meet an emergency.</td>
<td>Gross negligence</td>
</tr>
<tr>
<td>Saskatchewan</td>
<td>Emergency Planning Act</td>
<td>Authorize any qualified person to render aid of a type that the person is qualified to provide. Conscript persons needed to meet an emergency.</td>
<td>Bad faith or gross negligence</td>
</tr>
<tr>
<td>Manitoba</td>
<td>Emergency Measures Act</td>
<td>Authorize or require any qualified person to render aid of such type as that person may be qualified to provide.</td>
<td>Bad faith or negligence</td>
</tr>
<tr>
<td>Ontario</td>
<td>Emergency Management and Civil Protection Act</td>
<td>Authorize, but not require, any person, or any person of a class of persons, to render services of a type that that person, or a person of that class, is reasonably qualified to provide.</td>
<td>Bad faith</td>
</tr>
<tr>
<td>Quebec</td>
<td>Civil Protection Act</td>
<td>Require the assistance of any person capable of assisting the personnel deployed.</td>
<td>Intentional or gross fault</td>
</tr>
<tr>
<td>New Brunswick</td>
<td>Emergency Measures Act</td>
<td>Authorize or require any person to render such aid as that person is competent to provide.</td>
<td>Only by order of Lieutenant-Governor in Council</td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>Emergency Management Act</td>
<td>Authorize or require a qualified person to render aid of such type as that person may be qualified to provide.</td>
<td>No liability</td>
</tr>
<tr>
<td>Prince Edward Island</td>
<td>Emergency Measures Act</td>
<td>Authorize or require any qualified person to render assistance of such type as that person may be willing and qualified to perform.</td>
<td>Only by order of Lieutenant-Governor in Council</td>
</tr>
<tr>
<td>Newfoundland and Labrador</td>
<td>Emergency Services Act</td>
<td>Retain persons for the purpose of responding to the declared emergency whose training and qualifications appear to the Lieutenant-Governor in Council, in consultation with the appropriate minister, to be adequate to perform medical, dental, nursing, pharmaceutical, optometrical [sic], engineering and other professional services.</td>
<td>Bad faith or gross negligence</td>
</tr>
<tr>
<td>Yukon Territory</td>
<td>Civil Emergency Measures Act</td>
<td>Minister may do all things considered advisable for the purpose of dealing with the emergency. May do those acts considered necessary for protecting the health, safety and welfare of the inhabitants of the area.</td>
<td>No liability</td>
</tr>
<tr>
<td>Northwest Territories</td>
<td>Civil Emergency Measures Act</td>
<td>Authorize or require a qualified person to render aid of the type that the person is qualified to provide. Authorize the conscription of persons needed to meet an emergency.</td>
<td>No liability</td>
</tr>
<tr>
<td>Nunavut</td>
<td>Civil Emergency Measures Act</td>
<td>Authorize or require a qualified person to render aid of the type that the person is qualified to provide. Authorize the conscription of persons needed to meet an emergency.</td>
<td>No liability</td>
</tr>
</tbody>
</table>
example, in Manitoba, a worker may refuse to work or do
particular work if he or she believes on reasonable grounds
that it constitutes a danger to his or her safety or health or to
the safety or health of another worker or person.8

During a pandemic, physicians may be faced with condi-
tions they believe are unsafe. The right to refuse to work
while unsafe conditions exist depends on the circumstances
and the province in which physicians practise. If physicians
have a legal right, they may stop working until the unsafe
situation has been addressed without facing discipline from
their superiors. Because this right exists to protect workers
from discipline, physicians who are self-employed and
practise from their office do not have a right to refuse to
work. However, these physicians are usually employers and
should be aware of their employees’ right to refuse to work
during a pandemic.

Pandemic as a workplace hazard
A preliminary issue is whether a pandemic virus constitutes a
workplace hazard; much depends on the nature of the virus. One
labour board has stated that an infectious disease might be con-
考idered a workplace hazard if the risk of contracting the virus is
substantially higher in the workplace than in the community.9

Criteria for justifying a refusal to work
Labour boards across Canada have affirmed that workers
must satisfy four criteria to justify a refusal to work because
of unsafe or dangerous conditions:10

• Workers must honestly believe that their health or well-
being is endangered. They cannot refuse to work for a rea-
son unrelated to safety.11
• Workers must reasonably believe that their health or well-
being is endangered. That is, another worker with the same
training and experience would also believe that the cir-
cumstances represent an unacceptable hazard.12
• Workers must communicate their concerns to their supervi-
sor in a reasonable and adequate manner. This usually
requires workers to notify their supervisor of their refusal to
work, and the reasons for their refusal, as soon as possible.
• The danger must be sufficiently serious to justify the
action; it must be immediate13 and more than a matter of
repugnancy, unpleasantness or fear of minor injury.14

Increased susceptibility to infection
During a pandemic, certain populations will emerge for whom
the virus will pose a particularly grave risk. When a physician
with a susceptibility to infection is justifying a refusal to work
he or she should consider the four criteria outlined earlier.

Employers have a duty under human rights law to try to
accommodate workers with particular susceptibilities.15 An
employer who refuses may be found to be discriminating on
the basis of sex (when pregnancy is the source of susceptibility)
or disability (when an underlying medical condition is the
source of susceptibility). What is considered sufficient accom-
modation depends on each case. Human rights law requires
accommodation to the point of undue hardship — that is,
employers must be willing to endure some degree of hardship,16
such as creating a new position or displacing another worker.17

Limits to the right to refuse work

Acceptable hazard
Physicians will be permitted to refuse to practise only if they
reasonably believe that the work environment creates an unac-
ceptable hazard. Policy-makers and labour boards suggest two
types of acceptable hazard: those that are inherent to the occu-
pation of the worker and those that are part of the normal
working conditions.14 The occupational health and safety
statutes of Alberta, Ontario, Quebec, Nova Scotia, Yukon Ter-
ritory, Northwest Territories, Nunavut and the federal govern-
ment explicitly state that workers may not refuse to work
when the hazard falls within these two categories. In provinces
where the legislation is not explicit, labour boards have some-
times interpreted the legislation as if it contained these limits.19

A commonly used analogy serves to illustrate the differ-
ence between acceptable and unacceptable hazards.19 A fire-
fighter likely would be unable to refuse to enter a burning
building simply because the building is on fire. Entering a
burning building is dangerous, but it is inherent to the work. It
is also likely that the firefighter would be unable to refuse to
enter a burning building with safety equipment that is used by
all firefighters. The use of such equipment is a normal work-
ning condition that has been established as sufficiently safe.

Similarly, it is unlikely that physicians will be able to
refuse to work because of dangers inherent to their job.16
When physicians join the health care profession, they implic-
itly accept a level of risk associated with the profession. To
determine whether a specific practice is inherent to the work,
physicians might ask themselves, “If I remove what is
claimed to be inherent, does my job continue to exist?”19 The
answer will depend on the job and the individual.

It is equally unlikely that physicians will be able to refuse
work that is part of their normal working conditions.14 Normal
working conditions tend to be questioned only when the stan-
dard safety equipment is malfunctioning18 or the existing
and established practice in the new circumstance creates an immi-

cent danger or risk.20

Only provincial and federal legislation that is aimed at pro-
tecting the health of workers will likely be viewed as establish-
ing acceptable health and safety standards.21 Hazards that remain
after these standards have been followed will likely be viewed
as normal working conditions. Physicians would probably have
not contain this limit.

Refusal endangering another person
The occupational health and safety statues of Ontario, Que-
bec, Nova Scotia, Yukon Territory and the federal govern-
ment state that workers may not refuse to work if such refusal
puts the life, health or safety of another person in danger.
There is no evidence that this limit will be applied in the
provinces whose occupational health and safety statues do
not contain this limit.

The cases where this limit will apply will depend on the per-
son’s circumstances. For example, physicians who work in large
health care facilities where someone else can easily assume their
responsibilities might not be viewed as endangering a patient or
another physician in the event of a refusal to work.23 However, a physician who works in a remote community and is the only person capable of performing certain essential tasks might be seen as endangering others if he or she refuses to work.

Ethical duty of care and legal implications

As members of a self-regulated profession, physicians have ethical responsibilities to their patients, to society, to the profession and to themselves. These responsibilities are codified in the Canadian Medical Association Code of Ethics.24 Anyone concerned about a physician breaching the Code of Ethics can lodge a complaint with the College of Physicians and Surgeons in the province in which the physician is registered or licensed.25 If a breach has occurred, the physician may be found guilty of professional misconduct and can be fined or have his or her medical licence revoked.26 During a pandemic, physicians may experience tension between their ethical responsibilities and their legal rights and duties. For example, the Code of Ethics states that physicians have a fundamental ethical responsibility to “consider first the well-being of the patient” but also to “promote and maintain [their] own health and well-being.”23 Some colleges have outlined ethical dilemmas that may occur during a pandemic and have produced policy statements specific to physicians’ ethical obligations.17–20 The issues become more complicated when one considers physicians’ legal duty of care and their legal right to refuse to work in unsafe conditions. Physicians need to know that the existence of this separate regulatory regime does not negate their right not to refuse to work in unsafe conditions, nor does it shield them from negligence liability for a breach of their legal duty of care.

Conclusion

Because of the legal uncertainty surrounding physicians’ rights and obligations during a pandemic, physicians should not rely unrealistically on existing legislation or case law. We cannot deceive ourselves into thinking that physicians have absolute autonomy with respect to the work they choose to do or that they can be forced to work under any circumstances. Physicians need to remain aware of evolving legal developments and ethical discourse. The nature of rights and obligations in various contexts will be informed by ethical, professional and legal collaboration. Physicians need to work with health care institutions, regulatory bodies and the public to ensure that those working during a pandemic feel safe and willing to work.

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Note: This paper provides information on the law that presided at the time of its publication. The information is not intended to provide legal advice to any individual or entity. Readers should consult with a legal advisor before taking any action based on information provided in this paper.

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