

# 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.<sup>1</sup> The legal duty of care is created when a physician agrees to treat a patient who has requested his or her services.<sup>1</sup> 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.<sup>2</sup>

Legal scholars suggest that duty of care comprises several catalogued duties: attending, diagnosing, referring, treating and instructing the patient.<sup>1</sup> 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.<sup>3</sup> Professional insurance may cover these costs.<sup>4</sup>

There is limited case law, literature and legislation on a physician's legal duty of care during a pandemic.<sup>5</sup> 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.<sup>3</sup>

### 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

### Key points

- Physicians in Canada owe a legal duty of care to their existing patients and, in certain circumstances, to those who are not their patients.
- Some physicians have a legal right to refuse to work if they can satisfy the four criteria defined by labour boards in Canada.
- Ethical, professional and legal collaboration is needed to address the tensions between physicians' legal rights and duties and their ethical responsibilities.

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.<sup>1</sup> 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.<sup>6</sup>

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.<sup>7</sup> 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

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or her patient, at least while the condition of the individual is serious and travel to an alternative medical facility is unrealistic.<sup>3</sup>

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.<sup>3</sup> 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

Jurisdiction	Statute	Government powers	Liable for action under the act
British Columbia	Emergency Program Act	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.	Bad faith or gross negligence
Alberta	Emergency Management Act	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.	Gross negligence
Saskatchewan	Emergency Planning Act	Authorize any qualified person to render aid of a type that the person is qualified to provide. Conscript persons needed to meet an emergency.	Bad faith or gross negligence
Manitoba	Emergency Measures Act	Authorize or require any qualified person to render aid of such type as that person may be qualified to provide.	Bad faith or negligence
Ontario	Emergency Management and Civil Protection Act	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.	Bad faith
Quebec	Civil Protection Act	Require the assistance of any person capable of assisting the personnel deployed.	Intentional or gross fault
New Brunswick	Emergency Measures Act	Authorize or require any person to render such aid as that person is competent to provide.	Only by order of Lieutenant-Governor in Council
Nova Scotia	Emergency Management Act	Authorize or require a qualified person to render aid of such type as that person may be qualified to provide.	No liability
Prince Edward Island	Emergency Measures Act	Authorize or require any qualified person to render assistance of such type as that person may be willing and qualified to perform.	Only by order of Lieutenant-Governor in Council
Newfoundland and Labrador	Emergency Services Act	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.	Bad faith or gross negligence
Yukon Territory	Civil Emergency Measures Act	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.	No liability
Northwest Territories	Civil Emergency Measures Act	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.	No liability
Nunavut	Civil Emergency Measures Act	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.	No liability

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.<sup>8</sup>

During a pandemic, physicians may be faced with conditions 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 considered a workplace hazard if the risk of contracting the virus is substantially higher in the workplace than in the community.<sup>9</sup>

### 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:<sup>10</sup>

- Workers must *honestly* believe that their health or well-being is endangered. They cannot refuse to work for a reason unrelated to safety.<sup>11</sup>
- 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 circumstances represent an unacceptable hazard.<sup>12</sup>
- Workers must communicate their concerns to their supervisor 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 immediate<sup>13</sup> and more than a matter of repugnance, unpleasantness or fear of minor injury.<sup>14</sup>

### 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.<sup>15</sup> 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 accommodation 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,<sup>16</sup> such as creating a new position or displacing another worker.<sup>17</sup>

## 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 unacceptable hazard. Policy-makers and labour boards suggest two types of acceptable hazard: those that are inherent to the occupation of the worker and those that are part of the normal working conditions.<sup>14</sup> The occupational health and safety statutes of Alberta, Ontario, Quebec, Nova Scotia, Yukon Territory, Northwest Territories, Nunavut and the federal government 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 sometimes interpreted the legislation as if it contained these limits.<sup>15</sup>

A commonly used analogy serves to illustrate the difference between acceptable and unacceptable hazards.<sup>18</sup> A firefighter 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 working 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.<sup>14</sup> When physicians join the health care profession, they implicitly 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?"<sup>19</sup> 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.<sup>14</sup> Normal working conditions tend to be questioned only when the standard safety equipment is malfunctioning<sup>18</sup> or the existing and established practice in the new circumstance creates an imminent danger or risk.<sup>20</sup>

Only provincial and federal legislation that is aimed at protecting the health of workers will likely be viewed as establishing acceptable health and safety standards.<sup>21</sup> Hazards that remain after these standards have been followed will likely be viewed as normal working conditions. Physicians would probably have to show a substantial change in circumstances to illustrate that the once acceptable safety standards now create a danger.<sup>22</sup>

### Refusal endangering another person

The occupational health and safety statutes of Ontario, Quebec, Nova Scotia, Yukon Territory and the federal government 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 statutes do not contain this limit.

The cases where this limit will apply will depend on the person'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.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup>

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.”<sup>24</sup> Some colleges have outlined ethical dilemmas that may occur during a pandemic and have produced policy statements specific to physicians’ ethical obligations.<sup>27–29</sup> 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 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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