

How Likely Are Malpractice Lawsuits From Treating COVID?

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Last May, Emily Reardon, a 19-year-old college freshman and former high school varsity swimmer, was brought by her parents to the Riverside Methodist Hospital emergency department (ED) in Columbus, Ohio, with severe respiratory distress and low pulse-oximetry readings. She was treated by an emergency physician.



It looked like a case of COVID-19. But after testing negative three times for the virus, Reardon was sent home with her parents with a diagnosis of pneumonia and prescriptions for an antibiotic and [acetaminophen](#). She returned 2 days later in respiratory distress with a dangerously low pulse-oximetry reading of 70%. She died 8 hours later.

Her death certificate listed the cause as [acute respiratory distress syndrome](#), according to a [medical malpractice lawsuit](#) filed last June against the hospital, the emergency physician, and other ED staff in state court in Franklin County. The suit alleged failure to properly diagnose and treat Reardon's symptoms and failure to adequately monitor her serious and rapidly declining condition, calling the care "negligent and/or reckless."

The facts suggest that this is the kind of coronavirus-related negligence case that has physicians, hospitals, liability insurers, and malpractice defense attorneys on high alert. [They're nervous about claims](#) for delayed or missed COVID-19 diagnoses; delayed immunizations, care, or testing because of pandemic conditions; failure to follow proper infection control procedures; improper rationing of resources; and failure to spot medical contraindications for administering COVID-19 vaccines. Given the 23 million COVID-19 cases and nearly 400,000 deaths in the United States, they fear many such lawsuits are on the way.

Plaintiff attorneys say doctors and hospitals are overreacting. Although they've brought dozens of [COVID-related negligence cases against long-term care facilities](#), they say they're seeing few potential claims involving acute-care providers. [A COVID-19 litigation tracking website](#) maintained by the law firm Hunton Andrews Kurth showed only 14 COVID-related medical negligence cases had been filed across the country through January 8, 2021. The cases mostly involved long-term care facilities.

The Doctors Company, one of the nation's largest physician liability insurers, has seen fewer than 20 coronavirus-related lawsuits against physicians nationally so far, said Peter Kolbert, senior vice president and chief claims officer at Healthcare Risk Advisors, a unit of the company.

Nevertheless, Kolbert is bracing for more COVID-related malpractice suits over the next 2 years, after the pandemic has subsided and the public has forgotten about the extraordinary pressures on frontline healthcare workers. He cited a pending case in which a patient with [obesity](#), diabetes, and [hypertension](#) who had COVID-19 arrived at the hospital, was intubated, recovered, and later sued because she developed an ulcer following her care.

Heightening Kolbert's anxiety is the fact that there are nearly 300 cases in which clients have notified the Doctors Company about potentially compensable COVID-19 situations with unfavorable patient outcomes. It's too early to predict that there won't be lots of lawsuits, he said, particularly because many states have mandatory presuit notification periods, so the number of cases in the pipeline isn't known.

"The plaintiff bar wants to get a little past the acute stage of this crisis, when memories are dulled, to file some of these claims," Kolbert said. "I would like to think the angels of our better nature will prevail and they won't bring claims, but experience shows that they will."

One factor that could lead to more claims is that families have by necessity had limited communications with patients and physicians during episodes of care, owing to the stringent infection control measures required during the pandemic. Relatives haven't been able to meet with doctors about care planning or observe the care first hand.

"That's a risky situation for physicians," said Rade Vukmir, MD, JD, a professor of emergency medicine at Drexel University, Philadelphia, Pennsylvania. "You don't get information, and you don't give information. And with no visitation, the family doesn't see and appreciate the level and intensity of care."

Joseph Osborne, a medical malpractice plaintiff attorney in Boca Raton, Florida, foresees cases coming from patients who went to a physician's office or hospital clinic to get one of the new COVID-19 vaccines but were turned down. One example is a younger person with an underlying medical condition, such as obesity, that heightens the risk for serious complications from COVID. In Osborne's view, a problem could arise if the provider decides not to vaccinate such a patient in order to reserve the vaccine for people whom federal or state authorities have classified as being of higher priority, and the patient gets sick a few weeks later.

"You'll see major questions on who gets the vaccine and who doesn't," he said. "I think that scenario will arise a lot."

Still, "I think [COVID-related] med mal claims against doctors are going to be few and far between," said Osborne, who hasn't seen any. "Cases involving delay in COVID diagnosis or acquisition of the virus are extremely difficult to prove."

Even so, physicians aren't resting easy. Pressure from medical and hospital associations has prompted 31 states to implement statutes or executive orders that shield healthcare providers and other businesses from liability suits related to prevention and treatment of COVID-19, unless gross negligence or willful or wanton misconduct is shown, according to the Medical Professional Liability Association, which represents liability insurers.

Healthcare and business groups have pushed hard for [federal legislation](#) that confers uniform national liability protections, which congressional Republicans favor. But most observers think it's unlikely President Biden or the new Democrat-controlled Congress will pass such a measure.

"We're continuing to lobby for liability protections, but it will be difficult with the Democrats controlling the Senate," said Michael Stinson, vice president for government relations at the liability insurers' group.

Ironically, the Reardon suit in Ohio could get caught up in the political battle over COVID-19 litigation even though the patient was not diagnosed with COVID-19 and the lawsuit complaint doesn't mention COVID-19. [Ohio's liability shield law](#) took effect in December and is retroactive to last March.

In Reardon's case, no autopsy was conducted, so it can't be known for sure whether or not she had the virus. In order to defend the case under Ohio's new liability shield statute, the hospital and physician could claim that Reardon died of COVID-19. Riverside declined to comment on the lawsuit or on whether it would invoke the new law.

The attorney who filed the case says it oddly illustrates what he feels is the false alarm being raised about COVID-related medical malpractice lawsuits.

"It's a strange situation where the state almost encourages healthcare providers to categorize a death as a COVID situation to wrap themselves in immunity," said Charles Cooper, Jr, a partner at Cooper and Elliott in Columbus, Ohio. "We haven't seen any COVID-19 medical negligence cases. That's why it's so surprising the legislature created this immunity for hospitals and doctors."

Even if patients and families brought COVID-19 cases to them, plaintiff attorneys say they are leery of taking them because judges and jurors who have lived through this pandemic and know the ordeals of healthcare providers are unlikely to be sympathetic unless truly egregious conduct is shown. It's a different story for nursing homes, which enjoy far less public good will.

"I wouldn't want to try to convince six people on a jury that some doctor who wants to help is responsible for a COVID-19 outcome," Osborne said. "That's a total uphill battle."

"The big question is how receptive will courts be to such claims," Stinson agreed. "I wouldn't be surprised if the plaintiff bar is skeptical about bringing cases now, but time could change their minds."

Indeed, at least one plaintiff firm that initially advertised for COVID-19 cases pulled its ads and apologized after getting fierce blowback from physicians.

Last March, the firm of Mannarino and Brasfield, in Rockford, Illinois, published an ad in the publication *Medical Malpractice* on what the public should know about medical negligence during the COVID-19 crisis. It warned of situations in which patients present with a dry cough or other coronavirus symptoms, and the doctor "refuses" to test for the virus. The ad said the medical community "was largely unprepared" for the disease.

Along with other physicians, Gita Pensa, MD, a clinical associate professor of emergency medicine at Brown University, Providence, Rhode Island, phoned the Rockford firm and left a message criticizing the ad. She said she got a call back apologizing for it.

The law firm subsequently published an ad stating that it recognized "the enormous sacrifices and risks front-line health care workers are making" during the COVID-19 crisis and that it does not intend to pursue claims against medical personnel relating to care for patients with COVID-19 during the pandemic. The firm did not respond to requests for comment for this article.

Pensa believes physician criticism convinced the Mannarino and Brasfield law firm and others to pull back ads because "the optics of it were very bad." Still, she's worried about lawsuits arising from the not uncommon cases in which patients come in with mild, flulike symptoms and adequate blood oxygen levels, are sent home, and then return very sick and, in some cases, die.

"To think somebody would blame you for an adverse event when no one knew how to best care for COVID-19 patients — and physicians were risking their own lives in providing the care — is galling," she said. "If there are egregious cases [of malpractice], they deserve to be brought. But if the patient received adequate care and it's an unexpected death, it's absurd" to sue.

There are measures in place to protect physicians. One such instrument is the [federal PREP Act](#). It covers measures to treat, diagnose, cure, prevent, or mitigate COVID-19, including approved vaccines and drugs, medical devices, equipment, and diagnostics. It allows state negligence suits only in cases of death or serious injury allegedly caused by willful misconduct. Cases must be filed in US District Court in Washington, DC, and are heard by a three-judge panel.

Providers who administer the vaccines in a manner consistent with [guidelines from the Centers for Disease Control and Prevention](#) should be protected, said Nathan Adams, a partner at Holland and Knight, in Tallahassee, Florida, who has studied the PREP Act.

There's an open legal question, however, over the extent of protection beyond that, such as in cases alleging a physician's failure to provide a vaccine or failure to identify contraindications in patients who subsequently suffer an adverse reaction to the vaccine.

Defense attorneys would like to see a broader range of COVID-related negligence cases against long-term care facilities, physicians, and hospitals handled under the PREP Act in federal court, rather than under state negligence law in state courts. They have sought to remove nearly two dozen cases against long-term care facilities across the country to federal courts.

So far, federal district judges have remanded most of these cases to state courts. In the leading case, a federal judge in New Jersey ruled in August, in a [lawsuit against an assisted-living facility](#) alleging deadly infection control failures, that the PREP Act does not preempt all state-law claims of medical negligence. That ruling and others like it have been appealed.

Healthcare providers "are trying desperately to stop the dam from bursting," said Daniel Marchese, an attorney in Newton, New Jersey, who filed the suit.

Unless the appellate courts hold otherwise, these rulings will block the efforts of physicians and hospitals to deploy the tough PREP Act shield when they face many kinds of malpractice claims, though they may still have some state protections. "I never advised anyone to assume that COVID-19 treatment [by physicians and hospitals] would get any kind of protection under the PREP Act," Stinson said. "We need Congress to pass a national liability standard for providers."

There are steps physician practices can take on their own to reduce liability risks. Practices should document how COVID-19 pandemic events unfolded in their practices and communities, advises defense attorney John Hall, founding partner of Hall Booth Smith in Atlanta, Georgia. This timeline should include any problems in obtaining personal protective equipment, the community's infection rate, and state and federal guidelines followed by the practice at particular points in time.

Stinson seconded that. "What rules were you supposed to follow on any given date?" he said. "It's always a very wise idea to keep the best possible records, to make sure you can reflect your actual interaction with the patient."

Physicians hope everyone will remember they have faced an unknown, unpredictable enemy and have had to adjust their approach to the disease over the past year as they better understood its trickery. That has required frequent revisions in the standard of care. An example is moving away from early intubation of severely ill COVID-19 patients because it often led to poor outcomes, Brown University's Pensa said.

At the same time, however, physicians should understand they will be held accountable, as usual, for providing care that meets the current standard of care, even under uniquely trying circumstances, Drexel's Vukmir noted.

"There's no blanket immunity," he said. "If you don't meet the standards, there will be litigation. But I have to feel that patients, families, and juries are reasonable and understand what the country has been through. I don't feel this will be an area where nuisance litigation will be running rampant."

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