

Healthcare Provider Liability in Disasters

Presentation to the
Joint Legislative Study Committee

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The Concept

- Healthcare system is under significant stress
- Staff shortages currently exist
- “Just in time” model is prevalent

Introduce a significant event into this environment and substantial disruptions to the delivery of care are inevitable.

Healthcare Provider Liability Concerns in a Disaster

- Failure to prepare
- Failure to respond
- Liability associated with “altered” standards of care

FAILURE TO PREPARE FAILURE TO RESPOND

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AFP

Toronto nurses launch lawsuit seeking SARS damages

Mar 25, 2004 | 323 words, 0 images

TORONTO (AFP) — Ca in frontline Toronto government failed to

The suit, on behalf of authorities were neg outbreak last year.

Boston Herald.com

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Post-Katrina question: Is lack of hospital evacuation plan medical malpractice?

By Associated Press
Thursday, April 12, 2007 - Updated: 04:03 PM EST

NEW ORLEANS - Pneumonia patient Althea Lacoste walked into Methodist Hospital with her portable ventilator a day before Hurricane Katrina struck and died there before rescuers arrived at the flooded, powerless building in eastern New

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO: *2006-234*

DIVISION:

**NAPOLEON DUNN, FELICIA DUNN, THOMAS DUNN, JANET DUNN FREIDINGER
AND ELTON DUNN, INDIVIDUALLY AND ON BEHALF OF
THE ESTATE OF JOHN DUNN**

VERSUS

**TENET MID-CITY MEDICAL, L.L.C.
D/B/A LINDY BOGGS MEDICAL CENTER**

SECTION 13

CNN.com

Powered by PR

Staff at New Orleans hospital debated euthanizing patients

Investigation continues into what occurred during Katrina ordeal

By Kathleen Johnston
CNN

NEW ORLEANS, Louisiana (CNN) — Three days after Hurricane Katrina flooded New Orleans, staff members at the city's Memorial Medical Center had repeated discussions about euthanizing patients they thought might not survive the ordeal, according to a doctor and nurse manager who were in the hospital at the time.

CTV.ca

Ontario nurse launches SARS lawsuit

CTV.ca News Staff

Updated: Mon. Feb. 23 2004 2:15 PM ET

A Toronto nurse who became ill with SARS during the second phase of last year's outbreak is suing the city, the province and the federal government for \$600 million.

Andrea Williams, who works at North York General Hospital, contracted severe acute respiratory syndrome while she was a patient at the hospital in the second SARS outbreak last May.

The New York Times
nytimes.com

EPIC SCIFI FANTASY

July 18, 2006

3 Arrested in Hospital Deaths After Katrina

By ADAM NOSSITER and CHRISTINE HAUSER

BATON ROUGE, La., July 18 — A doctor and two nurses have been arrested on suspicion of giving deadly drug injections to four patients at a medical center in New Orleans after Hurricane Katrina, the Louisiana attorney general said today.

Failure to Prepare & Failure to Respond

- Failure to prepare for SARS II
- Failure to continue use of infection control measures
- Failure to anticipate flooding and relocate generators to top floor
- Failure to evacuate in a timely manner
- Failure to have emergency power

“Altered” Standards of Care

- Has become a short-hand label for very complex concept
- Means different things to different people
- Not something people are comfortable talking about

What is an “altered” standard of care?

- No accepted definition
- Hospitals and health care practitioners will probably not be able to render the customary level of care during an emergency/disaster situation
- Components of AHRQ definition
 - Allocation of scarce resources
 - Greatest good for the greatest number
- DHS
 - Fair distribution to achieve the greatest benefit
- Joint Commission
 - Graceful degradation

What is an “altered” standard of care?

- “Altered standards of care” is somewhat misleading
 - Confusion between the “medical” standard of care and the “legal” standard of care
- Focus should be allocation of scarce critical resources
- Health care providers should plan for allocating scarce resources in disasters
- This is difficult to do in a legal vacuum

Potential Sources of Liability Protection

Volunteers

- Good Samaritan Act
- Emergency Services and Disaster Laws
- Sovereign Immunity
- Federal Volunteer Protection Act

Employees

- State Tort Law

What is the standard of care in Virginia?

- Statutory Definition

- A practitioner must use “[T]hat degree of skill and diligence practiced by a reasonably prudent practitioner in the field or specialty in this Commonwealth.”

- Jury Instructions

- A practitioner must use “the degree of skill and diligence in the care and treatment of his patient that a reasonably prudent doctor in the same field of practice or specialty in this State would have used *under the circumstances of this case.*”

Application of Current Virginia Law

- There is no case law dealing with altered standards of care
- The discrepancy between the model jury instructions and statute creates uncertainty as to what the law is and how it will be applied

Other Relevant Virginia Statutes

- “Good Samaritan” (Va. Code § 8.01-225)
- Virginia State Government Volunteers Act (Va. Code § 2.2-3600 et seq)
- Title 44 Emergency Declaration (Va. Code Ann § 44-146 et seq)

“Good Samaritan” – The Law

- Va. Code § 8.01-225
- Only applies to the provision of emergency care to ill or injured persons
- Requires that aid be rendered at the scene of an accident, fire or any life-threatening emergency
- Only applies to individual providers who provide care without compensation

“Good Samaritan” – The Gaps

- Does not protect providers rendering care in a non-emergency setting (e.g. hospital or alternate care center for victims)
- Does not protect providers rendering care as part of their job (e.g. for compensation)
- Does not protect providers rendering preventative care during an emergency
- Does not protect institutional health care providers (e.g. hospitals and health systems)

Volunteer Immunity – The Law

- Federal Volunteer Protection Act (42 U.S.C.S. § 14501 et seq)
 - Enacted to encourage volunteerism
 - Limits liability of volunteers of non-profit organizations or governmental entities for economic damages
- Virginia State Government Volunteers Act (Va. Code § 2.2-3600 et seq)
 - Offers sovereign immunity to “volunteers in state and local services”, including MRCs and CERTs

Volunteer Immunity – The Gaps

- **Federal Volunteer Protection Act**
 - Volunteer is still liable for non-economic damages
 - Volunteer remains liable to non-profit or governmental entity
 - Does not protect institutional healthcare providers
 - Only applies to *volunteers*
- **Virginia State Government Volunteers Act**
 - Does not protect institutional healthcare providers
 - Only applies to *volunteers*

Title 44 – The Law

- Commonwealth of Virginia Emergency Services and Disaster Law (Va. Code § 44-146 et seq)
- Gives Governor the authority to declare a state of emergency
- Once a state of emergency has been declared, various provisions of the statute become active and the Governor has ability to promulgate rules and regulations
 - This could include rules and regulations allocating scarce medical resources during a state of emergency

Title 44 – The Law

- Grants “immunity from liability, except in the case of willful misconduct by certain parties, for public or private entities [and their employees or representatives] engaged in emergency service activities initiated pursuant to the Commonwealth of Virginia Emergency Services and Disaster Law of 2000.” (“Section A Immunity”)
- Grants immunity for individuals who hold “a license, certificate, or other permit issued by any state, or political subdivision thereof, evidencing the meeting of qualifications for professional, mechanical, or other skills” and who gratuitously render aid in the Commonwealth during a disaster (“Section C Immunity”)

Title 44 – The Gaps

- Provides no protection pre-declaration
- It is not clear that rendering medical care during an emergency in a hospital setting qualifies for Section A immunity
- Section C immunity only applies to care rendered without compensation
- Basing liability protection on an emergency declaration which has yet to be drafted or issued leaves significant uncertainty as to the scope of the protection

Preliminary Conclusions

- Health care providers have a reasonable basis for concern about their liability for care rendered during disasters
- Health care providers are a vital component of an effective response framework
- Current Virginia law does not clearly provide liability protection to health care providers for care rendered during disasters