

# Covid-19 and medical liability: A delicate balance

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## Abstract

During the Covid-19 pandemic, many countries around the world are considering whether and how to provide liability protection to front-line healthcare staff. The guiding principle of liability protection for physicians and others is to ensure that, in a serious emergency situation, health professionals can devote themselves exclusively to their work and to patient care, without the fear of future claims for unforeseeable, but above all unavoidable, injury, loss and damage caused by their conduct. Great care is needed to balance the interests and rights of all those involved. Liability protection could have risky consequences with the final result that doctors will not be protected, but institutions such as health facilities will be even if they were in fact responsible for foreseeable and avoidable damage.

## Keywords

Covid-19, Sars-Cov-2, medical liability, liability protections

The Covid-19 pandemic is causing serious health, economic and social damage worldwide. The problem of medical professional responsibility in relation to Covid-19 has recently been considered. For example, the American Medical Association (AMA) has proposed specific liability protection for doctors engaged in the battle against Sars-Cov-2. In a letter to the National Governors Association, AMA CEO points out that doctors at the forefront of patient care in this emergency phase may be exposed to future liability claims.<sup>1</sup> In the United States, moreover, the considerable pressure that the Covid-19 is causing to the Health System has favoured the inclusion in the CARES Act of Provisions that can potentially limit specific healthcare providers from liability during the pandemic.<sup>2</sup> In addition, in the USA, several state-specific Laws/Provisions have been promulgated which are intended to protect the activities of doctors and prevent health professionals at the forefront of the Covid-19 emergency from being targeted by legal claims.<sup>3</sup> In most cases, liability protection is based on the principle that, under emergency conditions, healthcare providers are 'unable to provide the level or manner of care that otherwise would have been required in the absence of the emergency'.<sup>4</sup> In addition, liability protection is not applied in cases of gross negligence or wilful misconduct.

These measures have also been applied or envisaged in other parts of the world. These issues are also of

concern in the UK which, like Italy, has been seriously affected by Covid-19. In Italy,<sup>5</sup> a legal shield was proposed for health workers and health facilities. The hypothesis of liability protection, in the Italian Parliament, was presented with many amendments in the field of both civil and criminal medical liability.<sup>6</sup> Immediately after these amendments were distributed, there was much controversy. In particular, the proposal of legal immunity for health facilities involved in the management of the health emergency was not supported by the representatives of the Italian National Medicine Board who asked to withdraw the amendments on liability protection.<sup>7</sup> In fact, the risk of providing legal immunity to health facilities would mean no adequate punishment for any improper handling of the emergency. Therefore, the attempt to protect doctors engaged in the front line could at the same time favour impunity for those who, by managing the emergency badly and superficially, caused the infection (and sometimes death) of patients and healthcare workers. In addition, it is recalled that in Italy, as in other

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countries, doctors and all health professionals involved in the Covid-19 emergency often had to work in the absence of adequate safeguards: without personal protective equipment (PPE) and with excessive working hours due to staff shortages.<sup>8–11</sup> Obviously, under these conditions, the risk of infection is much higher. Thus, liability protection could also unduly protect healthcare facilities which – although they could have reduced the risk of spreading Covid-19 (for example, by providing PPE to doctors and nurses) – were inadequately prepared and failed to take the necessary preventive measures.

It is not easy to find a balance between the liability protection of health professionals and the need to identify and punish healthcare facilities and their administrators who had charge of management during the Covid-19 pandemic. However, the legal protection of doctors would reduce the considerable stress currently faced by health professionals. It should be remembered that the ultimate purpose of liability protection is not the exclusive protection of health professionals but the protection of the patient. In fact, reassuring healthcare workers that they are not at risk of liability suits would improve their mood and the quality of care. However, it is important that safeguards for individual health professionals are not used by health institutions as a shield and to avoid paying for their responsibilities.

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