

The medico-legal implications in medical malpractice claims during Covid-19 pandemic: Increase or trend reversal?

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Abstract

The Covid-19 pandemic caused a marked increase in admissions to intensive care units. The critically ill patients' condition from the infection resulted in their deaths. The healthcare facilities have got into trouble because of the pandemic. In fact, they had to create additional beds in a very short time and to protect health workers with personal protective equipment. Healthcare professionals fear that there will be an increase in complaints and medico-legal malpractice claims and hence they have urged politicians to discuss this. The Italian Parliament recently debated the topic of medical liability and passed the Decree-Law no. 18 of 17 March 2020 (DL – so called Cura Italia) by which they want to extend the concept of “gross negligence” to healthcare facilities. Several Extended Care Units have suffered from outbreaks of Covid-19, so the Prosecutor's Office of several cities initiated investigations against them. This situation has reached Sicily, where the Prosecutor's Office of Palermo has opened an inquiry against an Extended Care Unit. Simultaneously, the Covid-19 pandemic may change patients' attitudes towards healthcare professionals, who are risking their lives daily. So the Italian medico-legal community is debating these questions, with one last pending question remaining: is the number of medico-legal claims likely to increase or trend down?

Keywords

Covid-19 pandemic, medical malpractice claim, healthcare facilities liability

The Covid-19 pandemic caused a marked increase in admissions to intensive care unit wards which had only a limited number of beds. When looking at the figures for hospital patients' mortality, it is essential to take account of the critically ill state of patients at the time when they were admitted, as it is this which resulted in their death.¹

This situation worried healthcare professionals employed on the front line against the Covid-19 infection; they fear that there will be an increase in complaints against them.² So, with the Health Professional Orders support, they urged politicians to consider the situation.

Healthcare facilities, in addition to individual health workers, have been in trouble because of the pandemic. The problems of healthcare facilities are essentially of four types:

1. Structural issues: the need for massive organisational changes in a very short time to create additional beds. In this situation, the only way to

protect public health, allowing sudden changes, is to apply:

- derogations for structural accreditations and organic equipment;
- exceptions for the allocation of health resources for purchases;
- derogations for the recruitment of staff with professional requirements as well as restrictions on the working hours.

2. The concept change of the “suspected case”, initially secondary to the epidemiological link: there has been a rapid change of medical approach to suspected

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cases; at first, the suspected cases search was exclusively related to the epidemiological link declared by the patient. This concept was then overcome by measures; the last one dated 9 March,³ which redefined “suspected case”. The previous medical approach may have increased the risk of contagion, due to a patient’s forgetfulness.

3. Medical staff protection with personal protective equipment (PPE): all healthcare professionals at risk of infection should be protected, but a full protection for them is incompatible with the availability of PPE on the market. In fact, this is an epidemic spreading to different parts of world with an unknown duration and there is a high demand for PPE.

Therefore, there may be an increase in the number of complaints from health workers against healthcare facilities.

4. Experienced medical staff: in many places, health workers are ill or socially isolating. New hirings are not always ideal and cannot always guarantee medical staff with the necessary expertise.⁴

In fact, there are several hypotheses about an in-hospital spread because of the failure to successfully isolate patients. Viral contagion caused by health workers’ failure to comply with appropriate guidance is a breach of contract.

In Italy, the Prosecutor’s Office in several cities initiated an investigation against some Extended Care Units that have suffered outbreaks of Covid-19 infection. This has happened quite a bit in the northern part of Italy, and it is even spreading as far south as Sicily. In fact, the Prosecutor’s Office of Palermo has also opened an inquiry against an Extended Care Unit, situated in a small town which has become a “red zone” due to the recent outbreak.

The Scientific Society of Forensic and Insurance Medicine – the oldest Italian medico-legal society – has adopted a clear position on this matter and has recommended to all medical staff to work in accordance with the ethical rules of the Medical Deontology Code.⁵

The Italian Parliament debates medical practice

The recent Decree-Law no. 18 of 17 March 2020 (DL – Cura Italia)⁶ recalls “Gelli Law” (DL 24/2017),^{7,8} in which individual medical liability arises only in case of “gross negligence”. The Decree-Law Italia’s Cure (“Cura Italia”) extends this concept to healthcare

facilities. Italian parliamentarians are evaluating the opportunity of applying article no. 2236 of the civil code: “*If the performance implies the solution of especially complex technical issues, the contractor is not liable for damages, except in case of willful misconduct or gross negligence* (article no. 1176 of the civil code, article no. 2104 of the civil code)”.

However, some fear that these legislative measures will reduce the level of a patient’s protection.

The attitude of patients towards healthcare professionals is another unknown. Health workers risk their lives and also risk infecting their family members daily. This consideration may change patients’ attitudes towards healthcare professionals. On social networks, medical staff receive a lot of appreciation from patients. The pandemic could repair the relationship of trust between medical staff and patients.

Therefore, the following questions remain unanswered:

- Will these rules reduce the number of medical malpractice claims?
- In the Italian system, which is not adequately covered by insurance, will doctors really be more protected?
- After the end of the emergency state, will these rules be repealed?
- Will there be protection of patient rights?
- Will the relationship of trust between doctor and patient be repaired?

The Italian medico-legal community is debating all these questions with one last question remaining:

- The medico-legal implications: are medical malpractice claims during the Covid-19 pandemic likely to increase or trend down?

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