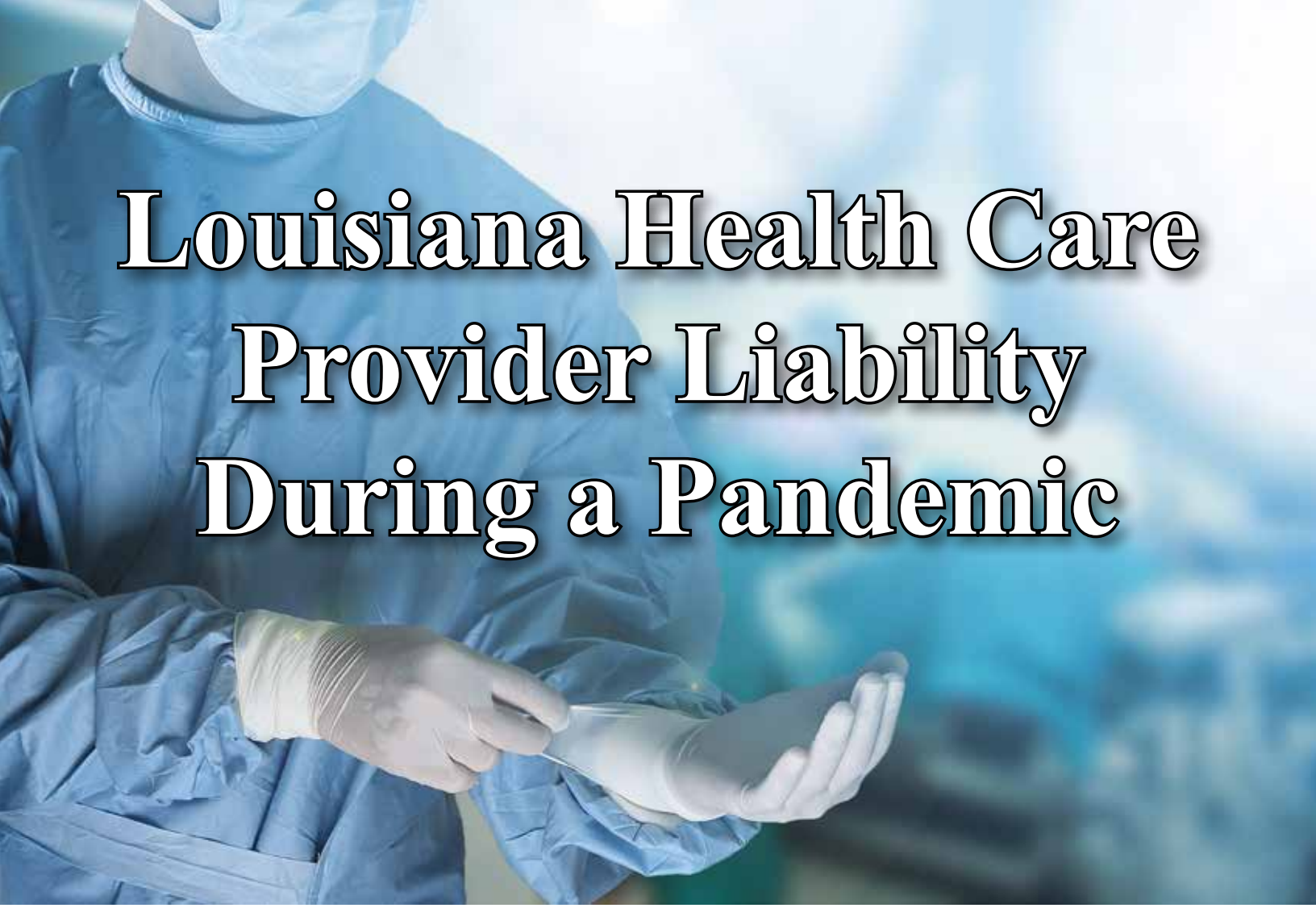

Louisiana Health Care Provider Liability During a Pandemic

By L. Adam Thames

Hospitals and individual health care providers have faced, and overcome, many obstacles in caring for patients during the coronavirus pandemic. The complexities of treating this novel disease, coupled with, in some instances, the lack of access to direct medical care for those suffering from unrelated conditions, raise many liability questions for health care providers and their insurers. While the Louisiana Medical Malpractice Act imposes a statutory cap on a qualified health care provider's financial exposure for professional negligence, Louisiana law further insulates health care providers from civil liability when medical treatment is provided during the course of a public health emergency.

The Louisiana Health Emergency Powers Act, La. R.S. 29:760, *et. seq.* (LHEPA), allows the governor to declare a state of public health emergency if he or she determines, after consultation with public health authorities, that an occurrence or imminent threat of an illness is believed to be caused by the appearance of a novel infectious disease that poses a high probability of a large number of deaths, serious or long-term disabilities and/or widespread exposure to an infectious agent that poses significant risk of substantial harm to a large number of people.[1] As a general rule, Louisiana law places civil liability on health care providers when they fail to exercise reasonable care and skill, along with their best judgment, in treating a patient's condition.[2] LHEPA, however, provides that, during a state of public health emergency "any health care providers shall not be found civilly liable for causing the death of, or, injury to, any person or damage to any property except in the event of *gross negligence* or *willful misconduct*."[3]

Gross negligence is not defined anywhere in LHEPA. The Louisiana Supreme Court has noted that "[g]ross negligence has been defined as the 'want of even slight care and diligence' and the 'want of that diligence which even careless men are accustomed to exercise'." Gross negligence has also been termed the "entire absence of care" and the "utter disregard of the prudence (sic), amounting to complete neglect of the rights of others." Additionally, gross negligence has been described as an "extreme departure from ordinary care or the want of even scant care." "There is often no clear distinction between such [willful, wanton, or reckless] conduct and 'gross' negligence, and the two have tended to

merge and take on the same meaning."[4]

There is only one reported case concerning the gross negligence standard under LHEPA. In *Lejeune v. Steck,* the trial court found that the plaintiff failed to prove that a spine surgeon leaving a foreign body (*i.e.*, sponge) in his patient during a surgical procedure in the aftermath of Hurricane Katrina rose to the level of gross negligence or willful misconduct.[5] The patient's claims were dismissed entirely prior to trial and the ruling was affirmed on appeal.[6]

On March 11, 2020, Louisiana Gov. John Bel Edwards issued Proclamation Number 25 JBE 2020, titled "Public Health Emergency-COVID-19." The proclamation, citing statistics from multiple world health agencies, declares that the coronavirus is a new respiratory disease that may be spread among the population by various means of exposure, therefore posing a high probability of widespread exposure and a significant risk of substantial future harm to a large number of Louisiana citizens. The Governor's Order was signed into law on March 11, 2020, and remained in effect through at least May 15, 2020. This Order triggers the immunity protections under LHEPA.

Following Gov. Edwards' emergency declaration, many health care providers voiced concerns to their local leaders and legislators about the pressures they faced in prescribing certain medications without further proof of its efficacy and side effects. Understandably, many health care providers also questioned whether Louisiana's immunity laws were as strong as the New York laws that garnered so much attention by the national media during New York Gov. Cuomo's daily press conferences. On April 7, 2020, Louisiana Attorney General Jeff Landry issued a memorandum to the Louisiana State Board of Medical Examiners addressing those concerns and his opinions on the scope of Louisiana's immunity laws should be welcomed news to Louisiana health care providers.

Hydroxychloroquine and Zithromax have been pushed aggressively by certain sectors of the government to combat the virus pending a vaccine, but many providers have openly questioned whether these drugs would be safe and effective in treating patients with this novel disease. Attorney General Landry's memorandum states that any doctor who prescribes Hydroxychloroquine and Zithromax to patients in Louisiana in connection with the COVID-19 epidemic, and pursuant to FDA approval guidelines, *should* fall within the immunity statutes in Louisiana protecting health care providers from liability, absent "gross negligence." Attorney General Landry does limit his opinion, to some extent, by stating that the facts and circumstances of each case must still be considered. Attorney General Landry also makes it clear that immunity under Louisiana law does not necessarily protect a provider from federal law claims concerning the use of these medications.

While it may be true that Louisiana law does not insulate a provider from a federal law claim, it is important to note that the U.S. Department of Health and Human Services (HHS) issued a Declaration, effective Feb. 2, 2020, that limited liability for companies and providers engaged in medical countermeasures against this pandemic. Specifically, the HHS Declaration provides "liability immunity to certain individuals and entities (Covered Persons) against any claim of loss caused by, arising out of, relating to, or resulting from the manufacture, distribution, administration, or use of medical countermeasures (Covered Countermeasures), except for claims involving 'willful misconduct' as defined in the Public Readiness and Emergency Preparedness Act." Licensed physicians are included within the definition of "Covered Persons" and, under the HHS Declaration, licensed physicians sued for negligence for allegedly prescribing the wrong dose of a drug to combat COVID-19 is a specific example of an action entitled to immunity. Thus, the HHS Declaration and the Public Readiness and Emergency Preparedness Act may, under certain circumstances, offer protection to Louisiana health care providers on the front lines who are later sued for negligence under federal law.

Attorney General Landry's memorandum also makes a strong case for why Louisiana immunity laws are actually more favorable for Louisiana health care providers than those recently put into effect in New York. The differences between Louisiana's and New York's immunity laws are subtle but very important. For instance, LHEPA provides that, during a state of public health emergency, "*any health care providers* shall not be found civilly liable for causing the *death of, or, injury to, any person or damage to any property* except in the event of *gross negligence* or *willful misconduct***.**" By comparison, New York's health care liability law states in pertinent part that, "*all physicians, physician assistants, specialist assistants, nurse practitioners, registered nurses, and practical nurses* shall be immune from civil liability for any *injury or death* sustained directly as a result of an act or omission by such medical professional in the course of providing medical services in response to the COVID-19 outbreak, unless it is established that such injury or death was caused by *gross negligence*."

While both state laws require a showing of "gross negligence" to prevail in a civil suit, Attorney General Landry's memorandum makes it clear that Louisiana law protects all health care providers as opposed to only the six categories of health care providers listed in New York's law. Secondly, Attorney General Landry's memorandum points out that New York's law is only triggered by or related to a health care provider's treatment in response to COVID-19 whereas Louisiana's law is written more broadly to protect all providers performing any kind of medical treatment during the duration of the public health emergency. Third, Attorney General Landry's memorandum points out that Louisiana law extends to injury, death and property damage whereas New York's law only extends to injury or death. Lastly, Attorney General Landry's memorandum states that any attempt to alter the current immunity statutes, either through statute or executive order, during the course of the public emergency could be challenged as unconstitutional.

What has not been covered as much, but what is equally concerning, is that the stay-at-home orders and governmental mandates to cease all non-emergent care

did delay or otherwise affect medical care for those with many serious conditions unrelated to COVID-19. For example, from March 11 through April 27, 2020, all "elective" surgeries were put on hold; clinic appointments were either canceled or moved to telemedicine; and imaging and test results were delayed. While the reasons for doing so may have been to aid a greater cause, direct patient care for many serious health conditions was adversely affected through no fault of the patients or their health care providers. It is reasonable to assume that some of these patients will not have as good of an outcome as they otherwise would have enjoyed but for this public health emergency. Incidentally, Attorney General Landry's memorandum recognizes the most important distinction between Louisiana and New York immunity laws, that being that Louisiana provides immunity to all providers treating patients for any condition — not just those treating COVID-19. Attorney General Landry's opinion is consistent with the only reported decision under LHEPA, *Lejeune v. Steck*,[8] where the court explained that LHEPA "does not provide for a limited set of health care providers, nor does it limit its application to only those medical personnel rendering emergency assistance voluntarily due to the emergency in the area."[7]

Louisiana's Good Samaritan Law, La. R.S. 37:1731, may also shield health care providers from civil liability during this pandemic, but the circumstances and protections are more limited than LHEPA. The statute provides, in pertinent part, that health care providers who in good faith (1) gratuitously render emergency care or services at the scene of an emergency or (2) respond to a life-threatening situation in a hospital or medical facility when their job duties did not require them to respond to such emergency shall not be liable for any civil damages as a result of their negligence in rendering such care or failure to act to provide or arrange for further medical treatment, unless the damage or injury was caused by *willful or wanton misconduct* or *gross negligence*.[8]

Similarly, House Bill 826, an "immunity bill" proposed in the current legislative session, as currently drafted, precludes recovery of civil damages against, among others, a person who gratuitously renders emergency care, first aid or rescue aid relating to COVID-19 unless such damages were caused by gross negligence or willful or wanton misconduct of that person.

Louisiana's Good Samaritan Law and House Bill 826 (if passed) offer greater protections than normal to health care providers who come to the aid of distressed patients outside of the hospital setting or health care providers who respond to patients facing an emergency in a hospital room or the ICU when it is otherwise outside of their job duties. These limitations of liability for in-patient emergency treatment, however, do not apply to any health care providers who were the attending or consulting providers prior to decline in the patient's condition which invoked the need for an emergent response.[9] The hole in those statutes, however, may well be closed by the language in LHEPA that arguably covers all medical care provided by all health care providers.

In sum, the Louisiana Legislature, in particular through LHEPA and the Good Samaritan Law, has gone to great lengths to protect individual health providers who treat patients during this public health emergency. House Bill 826, if passed into law, will further these protections. These "immunity" laws do not prevent a health care provider from being sued in civil court or provide a way to have the case immediately thrown out. However, as explained by the Louisiana Supreme Court and reiterated by Attorney General Landry, absent evidence of an "extreme departure of ordinary care," a patient's medical malpractice claim against a health care provider for treatment rendered for COVID-19, or otherwise during a government-recognized public health emergency, faces an uphill battle in the courts. Lastly, it is important to note that, even if there is a showing of gross negligence, qualified health care providers are still protected by the statutory limits of liability under the Louisiana Medical Malpractice Act.

FOOTNOTES

1. *See* La. R.S. 29:766(A) and La. R.S. 29:762(12).
2. La. R.S. 9:2794.
3. La. R.S. 29:771(B)(2)(c).
4. Rabalais v. Nash, 06-0999 (La. 3/9/07), 952 So.2d 653, 658.
5. 13-1017 (La. App. 5 Cir. 5/21/14), 138 So.3d 1280.
6. *Id*. at 1285.
7. *Id*. at 1283.
8. La. R.S. 37:1731(A)(1)-(2)(a).
9. La. R.S. 37:1731(2)(b).

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