

Assessing Liability for Health Care Entities That Insufficiently Prepare for Catastrophic Emergencies

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LAWSUITS AGAINST HOSPITALS AND OTHER HEALTH CARE entities alleging liability for patient harms are brought and settled routinely in the United States. However, the settlement by health care giant Tenet Healthcare, on the eve of trial on March 23, 2011, in *Preston v Tenet Healthsystem Memorial Medical Center*,¹ falls outside the norm of routine entity liability cases. The class of plaintiffs in New Orleans alleged not just that Tenet's emergency responses at its Memorial Medical Center during Hurricane Katrina were insufficient but that Tenet's failure to prepare for a foreseeable emergency caused their harms. Avoiding the prospect of a negative judgment at trial, Tenet's settlement implicates the increasing potential for health care entities to incur liability for deficiencies in emergency preparedness. It may renew demands to immunize entities from liability in future emergencies and requires a reassessment of the legal standard by which hospitals and other health care entities may be judged.

The Preston Case

Forty-five patients died at Memorial Medical Center, more than any other New Orleans hospital, in the aftermath of Katrina and citywide flooding.² Staff shortages, losses of power, soaring temperatures, delayed evacuations, and inadequate supplies all likely contributed to patient injuries and deaths. *Preston's* claimants, however, focused on Tenet's responsibility for patient harms arising from its failure to prepare sufficiently for the emergency.² Specifically, they alleged that Tenet created unreasonable and preventable risks of harm to patients in failing to have a viable patient evacuation plan, an adequate backup power system, or arrangements to care for patients if power was lost for extended periods.¹

Like most hospitals, Memorial had a backup power system, but that system broke down as floodwaters rose following the breach of New Orleans' levees. Tenet may have argued effectively that it was not primarily responsible for patients' damages because its backup power sys-

tem only failed due to flooding caused by the levees' structural inadequacies. Although a health care entity may be held responsible for faulty designs or dangerous conditions on its premises, normally it cannot be held liable for "acts of God" or governmental breaches that cause patient harms. Unless, as the claimants in *Preston* were prepared to show through documented evidence, Tenet knew its hospital was vulnerable to flooding after a hurricane and declined to make recommended changes to elevate backup power switches and pumps from below ground to avoid flood damage.² Reasonable juries may not expect a hospital to be prepared for every contingency in a catastrophe, but they might be more willing to assign liability if administrators foresaw potential harms and failed to address them.

Obligations for Health Care Entities to Prepare for Emergencies

Every major US hospital is aware of the need to be ready for disasters. Since September 11, 2001, hospital emergency planning and preparedness have become a national priority, mandated or encouraged by multiple federal and state laws and agencies. The Department of Homeland Security requires funded hospitals to adopt its standards within their emergency plans. The Department of Health and Human Services has allocated hundreds of millions of dollars to hospitals to improve emergency preparedness,³ mandates that they develop comprehensive emergency response plans,² and can withhold funds from hospitals that do not meet certain benchmarks.⁴ A bevy of state laws and licensing provisions also call for hospitals to be prepared for catastrophic emergencies.⁵ The Joint Commission compels accredited hospitals to demonstrate levels of emergency preparedness.⁶ However, a recent report of the Centers for Disease Control and Prevention revealed persistent, significant gaps in hospital emergency planning and preparedness.⁷

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Immunizing Health Care Entities Against Emergency Liability Claims

Although the regulatory consequences for a health care entity's preparedness flaws are already dire (eg, potential loss of licensure, accreditation, or funding), cases like *Preston* raise the stakes. When patient harms can be tied to an entity's failure to prepare sufficiently for emergencies, defending such claims may be difficult because emergency preparedness is heavily mandated by law, widely endorsed and practiced, and ultimately beneficial to patients during emergencies. These factors create a strong legal presumption that health care entities are obligated to avert preventable patient harms through sound emergency planning and preparedness.

In response, ongoing legislative or policy proposals to insulate health care entities from liability may gain traction. Congress has not meaningfully addressed entity liability protections in emergencies much beyond specific legislation concerning pandemic countermeasures.⁸ Absent federal policy, many state legislatures have passed liability protections that may apply to health care entities in emergencies.⁹ A Louisiana statute, in place prior to Katrina, immunizes health care clinicians and entities from liability for injuries or deaths during declared public health emergencies.¹⁰ These sorts of provisions may negate claims of negligence concerning active emergency responses but may not obviate actions asserting entity liability for omissions in planning and preparedness. Perhaps they should not. Denying affected patients and their families access to legal remedies against health care entities that fail to prepare sufficiently for emergencies may seem unjust, especially when these entities are uniquely positioned and expected to serve vulnerable persons in catastrophes. Unlike immunity protections covering real-time emergency responses, shielding entities from liability for their failure to prepare may diminish incentives to pursue robust preparedness activities.

Reconsidering Health Care Entities' Legal Obligations and Immunities

The decade-long goal of heightening hospital emergency preparedness is sustained by the premise that patient harms can be curtailed through advance emergency efforts. However, no amount of preparedness can eliminate all patient risks during catastrophic events. By definition, legally declared emergencies are unpredictable in how existing capacities or resources may be strained when health care entities and clinicians shift to crisis standards of care. Courts may be sympathetic to an entity's good faith efforts to respond during emergencies but may be less understanding about legal questions of what could have been done prior to the emergency to better prepare, especially for large corporate defendants that may be portrayed as valuing profits over patient welfare

when declining to take identified precautions. Any entity could always do more to prepare for an emergency, but to what end?

Tagging hospitals with liability for all patient harms that, in hindsight, could have been prevented by better preparedness creates a nearly impossible legal standard for entities to meet—principally that they be prepared for nearly every contingency in an emergency to avert preventable harms to patients. Even if a hospital saves scores of patients through sound emergency practices, if just one patient's death was preventable through enhanced preparedness, liability could ensue. This is unwarranted. Legal clarification of a standard for entity liability is needed so health care entities are not compelled to prepare endlessly for every contingency. Subject to further development, the relevant legal standard for adjudging entity liability for emergency preparedness failures should account for the foreseeability and magnitude of patient risks, the relative costs to plan and prepare, and the causal connection between preparedness lapses and specific patient harms. It is not possible to know whether Tenet would have been found liable for its alleged failures to prepare. The terms and bases for its settlement in *Preston* remain undisclosed. However, assigning liability broadly in future cases invites superfluous claims that propel defensive preparedness maneuvers without necessarily improving patient outcomes or the public's health.

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