

Litigating contagion: Vaccines, exemptions, and potential liability

By Stewart Pollock

INTRODUCTION

The recent outbreak of measles at Disneyland has put diseases that were declared effectively extinct back into the forefront of public health policy discussions. In 2000, the CDC declared that measles had been eliminated in the United States. However, last year we had the highest number of measles cases in two decades. These recent outbreaks are part of a resurgence of defeated diseases, including a 2014 outbreak when a measles-infected student used BART, inadvertently spreading the disease.

After devastating massive populations for hundreds of years, these diseases were defeated by vaccines and the resulting herd immunity resulting from widespread vaccination. The resurgence of these diseases has, in turn, been caused by parents making the conscious and intentional decision not to have their children vaccinated. Recently, two California state senators proposed closing the personal belief vaccination exemption that, if passed, might prevent future outbreaks of controlled diseases. The question then arises: is there any legal recourse for those who have already been harmed?

Although it may seem a far-fetched idea, there is reason to believe that the common law tort of negligence may provide a cause of action. A long line of cases indicates that courts impose liability for the negligent transmission of communicable diseases. Here, the most important questions will be (1) whether the plaintiff can show that a particular parent's failure to vaccinate caused the transmission of the disease and (2) whether there is a duty to vaccinate in order to avoid harm to third parties. Although there may be some legal basis for bringing a negligence claim for failure to vaccinate, such a claim would be treading in uncharted legal water and is likely to be a messy proposition.

RISE OF ANTI-VACCINATION MOVEMENT

Strangely, the resurgence of these diseases is mostly occurring in California – generally a leader in public health policy. This public health problem is arising not in impoverished areas or those lacking access to education. Rather, it is happening in particularly wealthy areas of California such as Marin County and private schools in Los Angeles. Despite access to medical treatment and education, these areas have the lowest vaccination rates in the modern world. Contrary to expectation, the highest rates vaccination rates in the U.S. are in Mississippi and West Virginia – two areas that are generally known for having ineffective approaches to public health policy, as shown by their disheartening rates of sexually transmitted diseases.

The reasons for not vaccinating children differ. Some religions prohibit

vaccinations, such as Seventh Day Adventists. Others cannot be vaccinated because they have medical problems, such as weak immune systems due to cancer and cancer treatment. Those who cannot be vaccinated benefit from what is known as “herd immunity” which describes a scenario where a disease is not spread throughout a population because the vast majority – approximately 85- 95% depending on the disease – are immune to that disease and thereby protect the rest of the population. Because vaccines are not 100% effective at immunizing individuals, herd immunity is important even for those who receive the vaccine to ensure that highly contagious diseases do not spread.

However, some simply choose not to have their children vaccinated out of concern for the health complications that vaccines cause. This argument was first proposed in the British medical journal the Lancet by Andrew Wakefield which suggested that vaccines cause autism, based largely on the post hoc, ergo propter hoc argument that concluded that because vaccine rates rose at the same that autism diagnosis rates rose, the former caused the latter. That article was retracted, the doctor lost his license, and tragically, much of the public continued to believe the premise advanced by the fraud of a doctor, particularly after the publicity given to the arguments by model turned amateur medical expert, Jenny McCarthy. Subsequently, vaccination rates fell dramatically in wealthy and educated areas of the United States. As a result of the decrease rate of vaccinations, once-defeated diseases have made a resurgence.



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PROPOSED LEGISLATION

One solution is to mandate that everyone be vaccinated. In general, vaccines are already required for students to attend public schools. However, California permits exemptions for personal and religious reasons. The breadth and ease of these exemptions varies by state. The rate of vaccinations by state generally reflects the ease with which an exemption from vaccination can be obtained. Mississippi and West Virginia – the states with the highest rates of vaccination – permit exemptions for only medical reasons.

On February 4, 2015, California state Senators Richard Pan and Ben Allen stated that they would introduce legislation to eliminate the personal belief exemption. U.S. Senators Dianne Feinstein and Barbara Boxer have proposed that state health officials should go even further and consider eliminating the religious exemption. By doing so, California could increase its vaccination rate and avail itself of the protections of herd immunity so that those who cannot be vaccinated are protected.

There are, of course, concerns about mandating vaccinations. Some object to vaccines on specific grounds as being unhealthy, based on faulty science, and propagated for the sole purpose of putting money in the pockets of Big Pharma. These concerns are generally unfounded, but it is extremely difficult to convince anyone otherwise. When shown the benefits of vaccines and the science supporting their use, members of the anti-vaccination movement only become more entrenched in their beliefs, according to a 2014 study published in *Pediatrics*, the official journal

of the American Academy of Pediatrics. Others have a deeper distrust of government-mandated injections, recalling the atrocities of the Tuskegee syphilis experiment and forced sterilizations of the 20th century. Others simply believe that compelled vaccinations are antithetical to American notions of freedom – including the right to make bad decisions.

LIABILITY FOR FAILURE TO VACCINATE

Individuals should be free to make their own decisions – even bad ones – but they should not be exempt from the consequences of their actions. Let’s take the example of the parents that brought unvaccinated children to Disneyland and caused other children to contract and spread a highly contagious disease that generally does not exist in the U.S. in 2015. Could tort law be used as a vehicle for compensating those harmed?

There is no question that a victim of an auto accident could recover for the harm caused by a negligent driver. Similarly, courts have held individuals liable for the harm caused by negligently-spread diseases: “[T]o be stricken with disease through another’s negligence is in legal contemplation as it often is in the seriousness of consequences, no different from being struck with an automobile through another’s negligence.” (*Billo v. Allegheny Steel Co.* (Pa. 1937) 195 A. 110, 114.) This application of the law of negligence to contagion has been an enduring one: “For over a century, liability has been imposed on individuals

who have transmitted communicable diseases that have harmed others.” (*Berner v. Caldwell* (Ala. 1989) 543 So.2d 686, 688. See also *Crowell v. Crowell* (1920) 180 N.C. 516 [“it is a well-settled proposition of law that a person is liable if he negligently exposes another to a contagious or infectious disease”]; see generally 39 Am.Jur.2d (1999) Health, § 99, p. 549 [“The general principle is established that a person who negligently exposes another to an infectious or contagious disease, which such other thereby contracts, is liable in damages.”] See also *John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1188.) These cases indicate that contagion is cognizable under the tort of negligence, though this line of cases notably adds notice of the contagious condition to the traditional elements – duty, breach, causation, and damages.

1. Duty

Starting with duty, a plaintiff such as a child who contracts measles from an unvaccinated child at Disneyland must show that the parent of the unvaccinated child owed a duty to protect the child who contracted the disease. Although at common law there was no general duty owed to strangers, California imposes a statutory duty to use reasonable care in avoiding harm even to strangers. Civil Code section 1714 states: “Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself.” In at least one case, this duty was extended to treating doctors: “[T]he duty

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of the physician treating a patient with a communicable disease is to prevent the spread of the disease, not for the benefit of the patient, whose health has already been compromised, but for the benefit of those third parties ‘within the foreseeable orbit

of risk of harm.” (*Troxel v. A.I. DuPont Institute*, 450 Pa.Super. 71, 675 A.2d 314 (Pa. Super. 1996) (citations omitted).)

2. Notice

However, liability for spreading a disease is only imposed where the infected person had constructive or actual notice of their contagious condition. (See e.g. *Endres v. Endres*, 2008 VT 124, ¶ 15 [185 Vt. 63, 69, 968 A.2d 336, 341] [noting that “using a constructive knowledge requirement holds responsible those who consciously avoid knowledge of infection even when suffering visible symptoms of a disease”].) California’s courts have imposed liability even where the person spreading the disease believed that they were not contagious. (See *Doe v. Roe* (1990) 218 Cal. App.3d 1538, 1541.) In that case, the court imposed liability on an individual who incorrectly believed he could not spread herpes because he was not symptomatic. That court held the defendant negligent for “either not disclosing that he was infected with herpes or taking precautions such as the use of a condom, to prevent its transmission.” Thus, the issue was not only that he should have known he could spread the disease, but that he failed to take reasonable precautions to prevent the spread of the disease. The question here would be whether the failure to take preventative measure – i.e., a vaccine – would be similarly negligent.

Thus, there is precedent to support imposing liability for negligently infecting another with a contagious disease. Our Disneyland plaintiff would struggle to show that the defendant had notice of their contagious condition, absent some additional facts. However, the notice requirement may be slightly lower: In *John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1191, the court applied the “reason to know” test in a case involving the negligent transmission of HIV:

Under the reason-to-know standard, “the actor has information from which a person of reasonable intelligence or of the superior intelligence of the actor would infer that the fact in question exists, or that such person would govern his conduct upon the assumption that such fact exists.” (Rest.2d Torts, § 12, subd. 1.) In other words, “the actor has knowledge of facts from which a reasonable man of ordinary intelligence or

one of the superior intelligence of the actor would either infer the existence of the fact in question or would regard its existence as so highly probable that his conduct would be predicated upon the assumption that the fact did exist.” (*Id.*, § 12, com. a, p. 20.)

A defendant’s membership in a group at high risk of developing a particular contagious disease and whose behavior makes it likely that they will contract a disease may be charged with constructive notice of their contagious condition. This is a factual question that should be resolved by a jury.

3. Breach

There is an important factual question as to whether it is unreasonable to not vaccinate a child. The jury should determine whether a reasonable person would have vaccinated their child to avoid harming other children. The majority of people in fact vaccinate their children, but it should not be inferred from this that a jury would necessarily consider the failure to vaccinate to be unreasonable. Whether a jury considers this a breach of the standard of care will likely depend on where and when the jury is composed and the specific facts of the case as well as the specific jurors. Given the outrage at the aftermath of the Disneyland outbreak, it is increasingly likely that a jury would be willing to hold that the parent had breached their duty.

4. Causation

The next question is one of causation. The plaintiff must show that defendant’s failure to vaccinate caused the plaintiff to contract measles. Of course, the immediate question is whether this can in fact be shown: Couldn’t be measles have been caused by someone else? Where the plaintiff has had only limited contact with one infected individual, causation should not be difficult to show. More likely, this would be a complicated issue requiring the assistance of an expert witness. Epidemiologists believe that they can trace the chain of contagion between infected individuals because the disease mutates as it is passed along. Any expert witness intending to demonstrate causation through epidemiological modeling would have to satisfy the standard for admissibility of the expert’s opinion, generally set forth by *Daubert* or *Sargon*.

5. Damages

There will be no issue showing damages – it’s only a question of what value to place on negligently infecting a child with a potentially lethal disease.

There is a legal basis for bringing a claim for negligently spreading a contagious disease. Such a claim could be brought against parents of unvaccinated children for harm caused by their failure to vaccinate. However, there are several reasons why such claims will ultimately prove difficult. First, the notice requirement remains a difficult factual inquiry if the infected child has not yet begun to show symptoms of the illness. Second, proving causation may rely on costly and complex analyses by epidemiologists. Third, a jury may be reluctant to impose liability based on the public policy arguments surrounding a general discomfort at the idea that a parent’s choice to not vaccinate their child, likely made in good faith, can give rise to civil liability. Finally, as noted by an author discussing STD litigation: “‘Unfortunately for most [of] these victims, a lawsuit over STDs can be very hard to litigate, extremely costly to pursue, and of little remedy even if they win.’ Because of these perverse incentives and barriers, tort law is also clumsy and ill-suited for addressing the pressing public health challenge.” (*Sex, Privacy, and Public Health in a Casual Encounters Culture*, 45 U.C. Davis L. Rev. 531, 576-577.)

CONCLUSION

It appears likely that California’s Legislature will act to limit the personal belief exemption which would significantly reduce the number of unvaccinated children. This approach would aim to prevent future outbreaks by increasing the percentage of vaccinated children and thereby ensuring the protections afforded by herd immunity. However, where unvaccinated children have already spread a disease, the common law cause of action of negligence could be used to pursue a claim. Such a claim would have to overcome multiple significant hurdles. There is an important question of public policy as to whether those who choose not to inject their children with vaccines should be held liable for that decision. Until the Legislature acts, this is a question that would have to be decided by a jury and different juries may come to different conclusions. ■