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## Legal and Regulatory Issues Concerning Volunteer Health Professionals in Emergencies

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### **Case Study 2: Hospital Liability for Volunteer Negligence in Pennsylvania**

***Factual Statements.*** The nerve agent sarin is released in the concession area of Beaver Stadium, during a Penn State Football game, in State College, Pennsylvania with attendance of 100,000 people. Approximately 6,000 individuals were likely exposed to the sarin gas. Mount Nittany Medical Center (MNMC) is the nearest local hospital. MNMC has an emergency department, but is not an accredited trauma center. Approximately 1000 individuals present at MNMC for care.

Dr. John Avery is a physician, specializing in emergency medicine, who works in Philadelphia, PA and is registered as a volunteer through Pennsylvania's ESAR-VHP. Dr. Avery has privileges at two hospitals in the Philadelphia area and is a member of a regional counterterrorism response team that is called to provide assistance in the response to the sarin attack at Beaver Stadium. Dr. Avery was at the Penn State football game during the sarin release. He was not exposed to the gas and immediately reported to MNMC to provide emergency medical assistance. MNMC verified Dr. Avery's credentials through the ESAR-VHP and granted him emergency privileges.

One patient presents with severe symptoms of sarin exposure, including sweating, secretions, bradycardia and pronounced miosis with pin-point pupils. Dr. Avery administered atropine to treat the patient. However, he improperly determined the proper dosage of the drug based on the patient's pupil size, resulting in atropine poisoning that led to the patient's death. The atropine was administered by a nurse on the hospital staff, who had prior training in the treatment of patients exposed to nerve agents, including sarin. According to the proper standard of care for the treatment of sarin exposure, Dr. Avery should not have used pupil size as the determinant of proper administration of systemic atropine to treat the exposure because some

patients may be experiencing hallucinations. These circumstances raise the issue of whether Dr. Avery and MNMC can be held civilly liable for the patient's death.

***Focused Legal Analysis.*** Despite the potential for claims of medical malpractice, Dr. Avery is protected from personal liability for the patient's death under Pennsylvania's Volunteer Health Services Act.<sup>1</sup> This act provides licensed health care volunteers with immunity from liability damages resulting from the provision of volunteer health services.<sup>2</sup> Volunteers are not immune from liability for acts that fall substantially below the professional standards practiced and generally accepted in the community or acts which were knowingly calculated to create a substantial risk of harm to the patient.<sup>3</sup> In this case, although Dr. Avery's acts were negligent, they did not amount to gross negligence and were not intended to cause additional harm to the patient.

Dr. Avery may also qualify for immunity from liability under Pennsylvania's Counterterrorism Planning, Preparedness and Response Act.<sup>4</sup> This act extends the protections of Pennsylvania's Good Samaritan Act<sup>5</sup> to members of counterterrorism response teams. The Good Samaritan Act provides liability protection to health professionals providing medical assistance as part of an emergency response. Since Dr. Avery is a member of these teams and he provided medical services in accordance with the team's response to the sarin attack, he is immune from liability for damages resulting from those duties.

Although Dr. Avery may receive immunity from liability, MNMC nevertheless may be liable for his negligence. The immunity provisions that protect Dr. Avery do not apply to hospitals. MNMC may potentially be exposed to liability under the theories of ostensible agency or corporate negligence.

Under the doctrine of ostensible agency, a hospital may be liable for a physician's actions when (1) the patient looks to the hospital rather than the individual physician to provide him with care, and (2) the hospital holds the physician out as its employee.<sup>6</sup> In this case, the patient is in a position where he is looking to MNMC to provide him with emergency care to treat his exposure to sarin. Additionally, the patient is unlikely to have any knowledge that Dr. Avery is providing care at that facility as a volunteer. Thus, MNMC is potentially exposed to liability for Dr. Avery's acts.

Additionally, MNMC may be exposed to liability under the doctrine of corporate negligence. Corporate negligence may subject a hospital to civil liability for the acts of negligent health professionals and for its own failures to adopt appropriate policies and procedures to protect patients. Under the theory of corporate negligence, a hospital generally has four duties: (1) a duty to use reasonable care in the maintenance of safe and adequate facilities and equipment; (2) a duty to select and retain only competent physicians; (3) a duty to oversee all persons who practice medicine within its walls as to patient care; and (4) a duty to formulate, adopt and enforce adequate rules and policies to ensure quality care for the patients.<sup>7</sup> A finding of corporate negligence typically requires a demonstration that the hospital deviated from the standard of care, had actual or constructive notice of the defects or procedures that caused the harm, and the conduct was a substantial factor in bringing about the harm.<sup>8</sup>

Corporate negligence theory may also be used to hold a hospital civilly liable for the acts of Dr. Avery. In Pennsylvania, hospital staff members must ensure the quality of patient care by reporting abnormalities in the treatment of patients.<sup>9</sup> If any staff member believes that a health professional is failing to act within the proper standard of care, she is obligated to advise hospital authorities accordingly.<sup>10</sup> In this case, a trained nurse employed by the hospital witnessed Dr.

Avery's negligence. The hospital, it may be found, had constructive notice of Dr. Avery's negligence. Because the nurse failed to act, MNMC may be liable for Dr. Avery's acts for the failure to provide adequate supervision of its staff.

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<sup>1</sup> 35 Pa. Stat. § 449.47(a) (2005).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> 35 P.S. § 2140.302 (2005).

<sup>5</sup> 42 Pa. C.S. § 8331.

<sup>6</sup> *See* Simmons v. St. Clair Memorial Hospital, 481 A.2d 870, 874 (Pa. Super. 1984); Capan v. Divine Providence Hospital, 430 A.2d 647, 649 (Pa. Super. 1981).

<sup>7</sup> Thompson v. Nason Hospital, 591 A.2d 703, 707 (Pa. 1991).

<sup>8</sup> Rauch v. Mike-Mayer, 783 A.2d 815, 827 (Pa. Super. 2001).

<sup>9</sup> Rauch, 783 A.2d at 828.

<sup>10</sup> *Id.*