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Emergency situations: The hospital is prepared, but are your critical suppliers?

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Authors: Michael Watts, David Solomon

In Ontario, hospital boards are required to ensure that the administrator, medical staff, chief nursing executive, staff nurses and nurses who are managers at the hospital, develop plans to deal with, (i) emergency situations that could place a greater than normal demand on the services provided by the hospital or disrupt the normal hospital routine, and (ii) the failure to provide services by persons who ordinarily provide services in the hospital (*Hospital Management*, RRO 1990, Reg 965, s 2(3)(e)).

These requirements confirm that hospitals owe a private duty of care during emergencies to persons affected by hospital decision-making (e.g., staff, patients, visitors, etc.), and represent one of the core expectations of the general public – that hospitals will still operate during emergencies.

This article briefly discusses how standard "force majeure" clauses in typical services agreements can excuse non-performance by critical suppliers in emergencies, even where the hospital is expected to continue to provide services. Emergencies include any event beyond a hospital's control that could impede its ability to provide services. Hospitals should therefore "flow through" the requirements above to their critical suppliers, by ensuring, (a) that they have business continuity or contingency plans in place, and (b) that force majeure clauses exclude emergencies where the hospital will be expected to continue to provide services.

The Ebola pandemic of 2015 and the SARS pandemic of 2002-2003 demonstrated that hospital emergencies are regular periodic occurrences. The class action litigation that followed the SARS pandemic confirmed that hospitals owe a private duty of care when responding to emergencies. The government, however, does not owe any such duty when acting in a "policy-making capacity" and discharging its overarching public duty of care. (see *Williams v. Canada (Attorney General)*, 2005 CarswellOnt 3785 (ONSC) and *Abarquez v Ontario*, 2005 CarswellOnt 3782 (ONSC)).

Many hospitals are dependent on private sector suppliers to provide services ranging from utilities and building systems, to medical and surgical supplies, drug supplies and pharmacy services, and food, linen, security and ambulance services. The agreements for these services often contain standard "force majeure" clauses. "Force majeure" is legalese for a "superior force" resulting in "unforeseeable circumstances that prevents someone from fulfilling a contract." A force majeure clause operates to excuse or suspend a party's performance obligations to the extent they are frustrated by the force majeure event.

A typical definition of force majeure includes "...an event or a cause beyond the control of a Party for the purposes of this Agreement, including... local or national emergency, storm, earthquake, flood, accident, fire, nuclear or other explosion, radioactive or biological or

chemical contamination, disease, epidemic, quarantine restriction…" Importantly, a force majeure event can arise even if it does not take place near the hospital – pandemics or epidemics in other countries and regions can create shortages of critical supplies (e.g., vaccines, personal protective equipment, etc.) if they are diverted to the most affected areas.

There are standard contractual exclusions from force majeure that are designed to prevent a party from using it as a shield to a breach of contract, such as events or causes (a) that are the reasonably foreseeable consequence of the negligence or deliberate act of the party in breach, (b) that could have been avoided through the exercise of reasonable diligence on the part of the party in breach or any person engaged by such party, or (c) resulting from a lack of funds. If there are known force majeure events that are likely to occur during the term of the contract, such as market fluctuations, government embargos, designated "war zones", etc., these can also be excluded from force majeure if the parties will be expected to perform the contract under such adverse circumstances.

Hospitals that adopt standard, unqualified force majeure clauses in their services contracts do so at their own peril. If a critical supplier can rely on force majeure to excuse performance in an emergency that will disrupt operations, the hospital may have no recourse against the supplier. This is why we recommend that hospitals require their critical suppliers to have and produce for inspection, business continuity or contingency plans indicating how they will continue to provide services in foreseeable emergencies. We also recommend that hospitals modify force majeure clauses to exclude emergencies where the hospital will be expected to continue to provide services.

In doing so, hospitals will at least have some comfort that their critical suppliers will be able to provide services during emergencies, and that they will have legal recourse if they fail to do so.

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