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## 'Choices have consequences': Can you sue if an unvaccinated person gives you COVID-19?

Sharon Kirkey · Postmedia News

**S**hould the wilfully unvaccinated be held liable if they infect someone with COVID-19?

As the drumbeats of a Delta-driven fourth wave grow louder, an argument is being made that people who choose not to get vaccinated should face fines, loss of such benefits as employment insurance, increased rates for life insurance and personal liability, if it could be proven their behaviour caused the hospitalization or death of others.

"Choices have consequences. Personal responsibility matters," Arthur Caplan, founding head of New York University School of Medicine's division of ethics, and Dorit Reiss, a law professor at the University of California's Hastings College of Law wrote in Barron's magazine.

"Want to reject expert opinion and the established facts about COVID and put yourself and others at risk? Then you should pay, if your choice harms others."

Others say it can be awfully difficult to confidently trace a COVID-19 infection to its source and that while someone who transmits an infection to others can

be liable if they act negligently -- say, if they take a risk that is reasonably foreseeable to hurt another -- refusing a COVID shot does not alone constitute negligence.

Caplan knows the counterarguments to holding non-vaccinators liable: There's no evidence that people who are strongly anti-vaccine are going to be moved by a fine, and many have argued people respond better to carrots than sticks. But Caplan says he has given up on incentives. "We tried them, and they didn't work."

You should pay, if your choice harms others

Arthur Caplan and Dorit Reiss

Scientists warn it may take vaccination rates nearing 90 per cent of the total population to quell a fourth wave of COVID, meaning "everyone who is currently eligible would need to get fully vaccinated," reads a paper released this week by the Canadian Institute of Actuaries. Vaccines, the group's pandemic modelling team wrote, "are the only reasonable approach to end the pandemic in the near-term."

Caplan argued that, if an unvaccinated person infects and hospitalizes someone else, lawsuits should happen, "just like when somebody doesn't adequately protect their pool with a fence or cover their well with a lid." The unvaccinated may be liable for medical bills, lost wages and "declining earning capacity."

'Kind of shocked': Judge orders man to get his COVID-19 vaccine as part of probation conditions  
Trudeau considers mandatory vaccinations for all public servants, while Quebec plans for vaccine passports  
Canada to roll out vaccine passports for foreign travel this fall

Non-vaccinators are prolonging the pandemic, increasing the risk of more variants emerging and putting others at risk of harm, including children under 12 who can't be vaccinated and those with immune disorders or people with cancer who may not have as robust a response to vaccines, Caplan and Reiss wrote.

Liability shouldn't be applied to people who can't be vaccinated for medical reasons, or age, or lack of access, they said. "Nor does it mean those who suffered vaccine failure are liable." Fully vaccinated people can still get "breakthrough" infections and spread the dis-

ease. But they're "meaningfully different" than people who willingly refuse the shots, they said, the same way a person who runs a red light is different from a person who tries to stop but is hit from behind and pushed into an intersection.

"If you make a sincere effort to follow public health guidelines, you are not liable. If you flout them and harm others you ought to be liable," Caplan said. The same holds for the vaccinated. The shots aren't foolproof.

"We've been spending months -- here, in Canada, in many parts of the world -- trying to figure out how to protect the rights of the unmasked and the unvaccinated," he said. "There are a lot of politicians, in Alberta, in Florida, in Texas, who continue to say we have to really make sure we don't force or coerce anybody. They have their freedom. It is a simplistic and flat-out stupid interpretation of freedom, and it has the moral valence all wrong."

A simplistic and flat-out stupid interpretation of freedom

Arthur Caplan, New York University School of Medicine

People are free to control what happens to their bodies, Caplan said. "No one has proposed, and I'm not, sending the vaccine police to your house to force vaccination on you and your family." But freedoms come with responsibilities, obligations and duties, he said. "There are all sorts of freedoms, and they impact when they offend or restrict the liberty of others."

He believes choosing not to vaccinate could meet a necessary degree of negligence, if the person is wandering around and not acting in a reasonable way. "If

you make a reasonable effort to be prudent, then I think, OK. You still might infect somebody, but that's different."

In Ontario, under the Supporting Ontario's Recovery Act, people can't be sued for exposing someone to COVID, provided they made a "good faith effort" to comply with public health guidelines and the "act or omission of the person does not constitute gross negligence." Nova Scotia and B.C. have similar laws.

"Basically, the statutory defence is, if you're acting in accordance with public health guidance, you're scot-free. But it is not public health guidance to go unvaccinated now," said University of Ottawa law professor Amir Attaran.

No vaccines are mandatory in Canada. Charter rights protect people from unwanted vaccination. However, if someone who intentionally forfeits vaccination "then knowingly goes out and makes absolutely no effort to protect others when they know, or ought to know, they have symptoms of COVID -- they have a fever, a cough -- those are the cases that might see the light of day in a courtroom," said Barrie, Ont., lawyer Robert Durante, who is helping lead a \$50-million class action lawsuit against Roberta Place, a long-term care home where a devastating COVID outbreak claimed 71 lives.

It's not always possible to prove the source of a COVID infection, but it sometimes is. If there aren't any "damages" there would be no point in suing. Most COVID infections are mild. However, if someone were to die, the family could be entitled to damages. "I think the bigger issue would be people who develop symptoms of long COVID and can't work," Durante said.

"We're really in the infancy stage right now, in terms of case law, and I think there will be lawsuits. And, frankly, I think it's going to be very difficult for judges."

There will be lawsuits. I think it's going to be very difficult for judges

lawyer Robert Durante

Primary and secondary schools owe a high duty of care to children, similar to the duty that a parent owes a child. Caplan believes parents would have grounds to sue an unvaccinated teacher, or the school if a child was infected with COVID and harmed. "Who would say, in the middle of a plague, round up 30 kids who can't be vaccinated, put them in a small room and sit them all day with an unmasked and unvaccinated teacher?"

There are "a whole bunch of reasons" why people aren't vaccinated, said McGill University law professor Richard Gold. "If you're being misled, or don't have proper information, or there has been historic discrimination against you or you don't simply really have access, because you can't take time off work if you get a bad reaction, then I'd be hesitant to impose personal liability," Gold said. "First we educate and we do everything we can. I do worry about the equity of it."

The evidence issue -- proving who gave a person COVID -- may not be as difficult as some think, he said. "If we have a good idea of the identify of the person who infected us, we can test the virus in that person's body and our own infection. Given the virus undergoes constant mutations, we can determine if the strain with which I was infected is the same as the infected person's."

Still, Gold thinks it would be more appropriate to go after institutions, not individuals, and that the largest risk is to institutions like universities, where there is a known and significant risk of infection.

The University of Ottawa, University of Toronto and Western University this week made vaccination, or twice weekly testing, a requirement for students, faculty and staff returning to campus. "The standard of care is emerging strongly in favour of vaccine mandates," Gold said. Universities that don't meet that standard are increasingly at risk of legal liability, he said.

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