

COVID-19: May healthcare practitioners ethically and legally refuse to work at hospitals and health establishments where frontline employees are not provided with personal protective equipment?

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The purpose of this article is not to encourage health practitioners to refuse to assist COVID-19 patients if they are not provided with personal protective equipment (PPE) at the workplace. It is to encourage them to advocate for PPE by pointing out that in South Africa (SA), health establishments that fail to provide them with PPE will be held ethically and legally responsible for the deaths of any patients – not health practitioners – if as a last resort such health professionals have to withdraw their services to protect other patients, themselves, their families and their colleagues. The article refers to the World Medical Association, World Health Organization and Health Professions Council of SA guidelines regarding the use of PPE during the COVID-19 epidemic, especially in the case of shortages. All the guidelines state that the safety of healthcare workers is a priority if they are to care for their patients properly. Mitigation measures are suggested, but do not extend to failing to provide PPE to those healthcare workers who deal directly with patients. The law protects all workers, who have a constitutional and statutory right to a working environment that is not harmful and does not threaten their health and safety. The article concludes that as a last resort, if the international and national ethical guidelines and legal rules are not being followed regarding PPE and advocacy attempts to persuade health establishments to provide PPE fail, and healthcare workers are exposed to the COVID-19 virus, they may ethically and legally withhold their services. These points should be made when health practitioners are advocating for PPE.

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This article is not aimed at encouraging health practitioners to refuse to assist COVID-19 patients if the practitioners are not provided with personal protective equipment (PPE) at the workplace. Rather, it recommends that they advocate for PPE by pointing out that in South Africa (SA), if health establishments fail to provide them with PPE, such establishments – not the healthcare practitioners themselves – will be held ethically and legally responsible for the deaths of any patients. The question arises as to whether, if refusing to work is a last resort after health practitioners' pleas for PPE have been ignored, such health professionals may ethically and legally refuse to work in order to protect other patients, themselves, their families and their colleagues. To answer this, it is necessary to consider, and for concerned health practitioners to mention in their advocacy: (i) the World Medical Association (WMA)'s attitude towards the protection of healthcare workers; (ii) the World Health Organization (WHO) interim guidelines on the provision of PPE for frontline healthcare practitioners exposed to COVID-19 infection in times of severe shortages of PPE; (iii) the attitude of the Health Professions Council of SA (HPCSA) towards the protection of healthcare workers; (iv) legal protection against life-threatening infections for frontline healthcare practitioners; (v) whether healthcare workers not provided with PPE may legally refuse to work when faced with COVID-19 virus infection; and (vi) the legal consequences of a failure by healthcare providers and health establishments to provide PPE for healthcare workers exposed to the COVID-19 virus.

WMA's attitude towards the need to protect healthcare personnel

A valuable lesson can be learned from the WMA's attitude towards the protection of healthcare personnel in times of conflict and violence. While the COVID-19 epidemic is not a violent conflict, the principles remain the same, namely, that it is 'essential to ensure the safety and personal security of healthcare workers in order to enable the provision of the highest standard of care to patients, because [if] healthcare workers are not safe, they might not be able to provide care, and patients will suffer.'^[1]

WHO interim guidelines on the provision of PPE for COVID-19 during severe shortages

The WHO interim guidelines on the use of PPE for COVID-19 during severe shortages^[2] recognise that protection of frontline health professionals and workers is 'paramount' and that PPE, including medical masks, respirators, gloves, gowns and eye protection, must be prioritised for healthcare workers and others caring for COVID-19 patients.

The WHO suggests that where there is a shortage of PPE, resources can be conserved by health providers developing a safe working environment through measures such as: (i) using telemedicine and telephone hotlines for screening; (ii) using physical barriers to reduce

exposure to the COVID-19 virus, e.g. glass or plastic windows; (iii) considering postponing the treatment; (iv) keeping confirmed COVID-19 patients without coinfection with other transmissible microorganisms in the same room; (v) designating dedicated healthcare teams only for COVID-19 patient care so that they can use existing PPE for longer periods of time; (vi) restricting the number of healthcare workers entering the rooms of COVID-19 patients, if they are not involved in providing direct care; (vii) using specific PPE only if in direct close contact with the patient or when touching the environment (e.g. wearing a medical mask and face shield, and not using gloves or gown over the scrub suit, if entering the patient's room only to ask questions or make visual checks); and (viii) not allowing visitors, or if this is urgently necessary, ensuring that they have PPE.^[2]

The HPCSA guidelines regarding PPE for health practitioners

The HPCSA has introduced guidelines on the provision of PPE for practitioners who may be exposed to the COVID-19 virus.^[3] The guidelines state that 'employers and employing institutions should take all necessary steps to ensure that staff members are always suitably equipped and afforded personal protective equipment (PPE)'. The guidelines mention that employers must provide staff with the necessary information to minimise the risk of transmission. In cases where PPE is not immediately available, the guidelines suggest that some of the factors that should be considered by employers are: (i) the possibility of using telehealth consultations where there is an established relationship with the patient; (ii) whether treatment can be delayed; (iii) whether additional steps can be taken to minimise the risk of transmission; (iv) prioritisation of practitioners at a higher risk of infection; and (v) identification of action likely to result in the least harm under the circumstances (para 6). The guidelines also mention that practitioners who have concerns regarding their conditions of work and the risk to their health should bring this to the attention of their employers, the HPCSA or the Office of Health Standards and Compliance as soon as possible (para 6). The suggestions made for when PPE is not immediately available are in some respects similar to, but not as detailed as, those mentioned by the WHO in respect of a shortage of PPE (see above).

The HPCSA guidelines are echoed in the SA Medical Association's guidelines on PPE for COVID-19 patients,^[4] which state that government and all service providers (including the private hospital groups) have a responsibility to ensure that doctors are exposed to a working environment that is as safe as is reasonably possible. This means that doctors should be supplied with the necessary resources to minimise their risk of infection, such as PPE, facilities and equipment appropriate to the treatment of COVID-19 infections and, where appropriate, medical prophylaxis. Such measures should also include training on the COVID-19 disease, providing doctors with accurate information on the disease and regular screening of doctors.^[4]

The HPCSA professional rules of conduct^[5] state that: 'A practitioner shall not permit himself or herself to be exploited in any manner' (rule 22). There is no doubt that if allegations of health workers being forced to attend to COVID-19 patients without PPE were true, this would fly in the face of the HPCSA guidelines, and would comprise gross exploitation of healthcare practitioners. On the basis of the

HPCSA rules, healthcare practitioners who are being exploited would be ethically justified in refusing to work under such conditions.

Legal protection against life-threatening infections for frontline healthcare practitioners

The SA Constitution^[6] states that everyone has the right to an environment that is not harmful to their health or wellbeing (section 24(a)), and everyone has the right to fair labour practices (section 23(1)). In addition, the Occupational Health and Safety Act No. 85 of 1993^[7] provides that every employer shall provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of their employees (section 8(1)). Similarly, the National Health Act No. 61 of 2003^[8] imposes an obligation on health establishments to implement measures to minimise: (i) injury or damage to the person and property of healthcare personnel working at the establishment; and (ii) disease transmission (section 20(3)).

Therefore, where the working environment is not safe and healthcare workers are not provided with the necessary PPE, or the healthcare providers and institutions do not follow the WHO recommendations for providing PPE when dealing with COVID-19 patients, it would be reasonable and justifiable for healthcare workers to withhold their labour, provided that they have first advocated for the provision of such PPE. Where there is a shortage of PPE, the WHO guidelines still expect healthcare providers and institutions to provide healthcare workers who are dealing with COVID-19 patients with PPE.^[2]

In the present writer's personal experience, there is no shortage in SA of basic PPE such as face masks, face shields and latex gloves, as these are freely available at local pharmacies at reasonable prices as a result of the Competition Act No. 89 of 1998^[9] COVID-19 regulations concerning price gouging.^[10] Therefore such PPE should be available to health establishments from wholesalers at even cheaper discounted prices. If, however, the shortage of PPE is as a result of financial and procurement maladministration, negligence, incompetence or indifference by administrators of health establishments, then they – not the health practitioners – will be morally, ethically and legally responsible for the deaths from COVID-19 resulting from health professionals withdrawing their services, after having unsuccessfully lobbied for the provision of PPE when treating COVID-19 patients.^[11]

May healthcare workers not provided with PPE legally refuse to work when faced with COVID-19 virus infection?

In terms of the Labour Relations Act No. 66 of 1995,^[12] the emergency services committee has designated emergency health services, nursing, medical and paramedical services, their supporting services and hospitals as 'essential services'.^[13] This means that they may not strike in a manner that puts the lives or health of patients at risk.^[14] Health practitioners necessarily endure some element of risk in their work, particularly in hospitals, where there is always the risk of infection. However, when health professionals have been unsuccessful in advocating for the provision of PPE due to dangerous working conditions, and their lives are at risk of COVID-19 infection, the common-law doctrine of 'necessity' may be used to justify their refusal to work, where they

have done so as a last resort. The doctrine states that necessity applies when people are placed in a situation of danger and the law allows them to protect their interests by violating the rights of innocent third parties.^[15] This is based on the principle that the legal convictions of the community recognise that people's own lives are considered more important than the lives of others.^[16]

The Constitution recognises that while everyone has a right to access healthcare (section 27(1)), such a right may be limited if it is reasonable and justifiable to do so.^[17] In circumstances in which healthcare workers are exposed to a life-threatening disease such as COVID-19 because of a lack of PPE, or a working environment that does not follow the WHO recommendations for dealing with shortages of such equipment, the courts may well hold that it is reasonable and justifiable for health workers to withhold their labour, after unsuccessfully attempting to advocate for the provision of such PPE (section 36(1)).

Legal consequences of a failure by healthcare providers and health establishments to provide PPE for healthcare workers

The COVID-19 regulations^[18] impose numerous duties on the general public and healthcare providers, but impose no direct duty on health providers and health establishments to provide PPE for their employees. The regulations do however, state that: 'Any person who intentionally exposes another person to COVID-19 may be prosecuted for an offence, including assault, attempted murder or murder' (regulation 14(3)). It could be argued, therefore, that if health providers or health establishments do not provide PPE for healthcare workers who are exposed to COVID-19 because of a lack of such PPE, or provide a working environment that does not follow the WHO recommendations for dealing with shortages of such equipment, such conduct amounts to intentional exposure of healthcare workers to COVID-19 infection.

In addition to being a crime in terms of the COVID-19 regulations, a failure to provide PPE in such circumstances may also be an offence in terms of the Occupational Health and Safety Act (section 38(1)(a)). Furthermore, in terms of the Compensation for Occupational Injuries and Diseases Act No. 130 of 1993,^[19] where such failure to provide PPE results in healthcare workers contracting COVID-19, or dying from COVID-19 contracted while working, such workers or their dependants may claim from the Compensation Fund.^[20]

Finally, in light of the above, under the common law, if COVID-19 patients die because as a last resort health practitioners have refused to work after their attempts to persuade the relevant health establishments to provide PPE have been ignored, it is the health establishments – not the practitioners – who may be found guilty of culpable homicide.^[21] The practitioners may raise the defence of necessity. As the health establishments were in control of a dangerous situation, they may be found guilty of culpable homicide, because they had a legal duty to prevent harm to COVID-19 patients by providing the health practitioners dealing with them with the necessary PPE.^[22]

Conclusion

The WMA, WHO and HPCSA all recognise the importance of healthcare workers being provided with PPE as protection against COVID-19 infection in order to care for their patients properly.

Health practitioners should try their utmost to lobby the health establishment concerned to provide PPE when they are exposed to COVID-19-infected patients. Only as a last resort should they refuse to work in order to protect themselves, other patients, their families and their colleagues.

Constitutionally and legally, healthcare workers have the right to a working environment that is not harmful to their health and wellbeing, which includes being protected against diseases such as COVID-19. While health practitioners are expected to carry some risks of ill health because of the nature of their profession, they are not expected to expose themselves unnecessarily to life-threatening diseases, when such exposure can be easily prevented, within their available resources, by the health establishments where they work. In such circumstances, health workers who are dealing directly with patients suffering from COVID-19, or are working in an environment where they may be exposed to COVID-19 infection, may ethically and legally withhold their labour until such time as they are provided with appropriate PPE. A failure to provide such PPE could result in a prosecution of the health establishment concerned for breaching the COVID-19 regulations. Furthermore, should patients die as a result of the healthcare practitioners, as a last resort, refusing to treat COVID-19 patients without PPE, the administrators of the health establishments – not the health practitioners – may be held ethically and legally responsible for culpable homicide.

The above information should be included in advocacy attempts by health practitioners when seeking to persuade the relevant health establishments to provide them with PPE, before they take the decision to withhold their labour. The latter should only be done as a last resort.

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