

Statute: Liability for Failure to Vaccinate

Proposal: Create a statute that would hold a parent who decides, without a valid medical reason, to not vaccinate his or her child according to the State's school immunization requirements liable if his or her unvaccinated child transmits a vaccine-preventable disease to another specifically identified individual.

Justifications:

- Assuring compensation for the injured family.
- Preventing externalities: parents who choose to not vaccinate should bear the costs of that choice, and not impose those costs on others.

Bill Text:

Title of Bill: Liability for Failure to Vaccinate

SECTION 1: It is a breach of the duty of a care for a parent to not vaccinate his or her minor child with the vaccines included in the State's childcare and school immunizations requirements. Such a parent or guardian shall be liable for damages to any person injured by such failure.

SECTION 2: **Exception:** Advisory Committee on Immunization Practices' (ACIP) recommendations

SECTION 1 will not apply when the child was not vaccinated in accordance with ACIP's recommendation because of the child's age, medical condition or other circumstances ACIP determined.

SECTION 3: **Defense:** A person may not be liable under this statute if that person proves by a preponderance of the evidence that reasonable efforts were made to vaccinate the child, but the vaccination was prevented by a vaccine shortage, lack of access to a medical facility or by any other cause beyond the control of a person who otherwise would be liable.

SECTION 4: Qualifying for a religious or personal belief exemption under state law is not a defense against liability.

SECTION 5: A notice of this potential liability will be provided to parents at each doctor visit in which vaccines should be offered according to the CDC's immunization schedule and along with the form used to obtain an exemption from the state's immunization requirements.

COMMENT: Plaintiff will need to show: failure to vaccinate, causation and damages.

Memo Explaining the Proposal – Liability for Failure to Vaccinate

The statute suggests that if a parent decides, without a valid medical reason, to not vaccinate a child according to the state’s school immunization requirement and that child transmits a vaccine preventable disease to another, the parent will be liable for the harms caused by the disease. There are two reasons for that:

- A. Assuring compensation: the harms of the disease could have been prevented with the simple, reasonable precaution of a vaccine. Health authorities, medical associations and the vast majority of medical doctors recommend this precaution. Our system normally provides that an individual who fails to take reasonable precautions and harms another must compensate them, “make them whole.”
- B. Preventing externalities: A parent or guardian should bear the cost of his or her choice not to vaccinate his or her child and not impose them on others.¹ Without liability in this situation, the costs of the parents’ decisions to not vaccinate will be borne by another family and potentially by society, in the form of healthcare costs and lost wages. Also, a parent should consider the entire costs of the decision to not vaccinate before making it. Without liability, they may not consider costs to others.

There is a potential cause of action for failure to vaccinate through the common law tort of negligence. But there is an obstacle. Courts are reluctant to impose liability for

¹ Caplan, A. L., D. Hoke, N. J. Diamond and V. Karshenboyem (2012). "Free to Choose But Liable for the Consequences: Should Non-Vaccinators be Penalized for the Harm They Do?" Journal of Law, Medicine and Ethics **40**: 606-610. Full text available at: http://www.academia.edu/2344148/Free_to_choose_but_liable_for_the_consequences_should_non-vaccinators_be_penalized_for_the_harm_they_do.

failure to act because it is seen as a greater interference with personal liberty than imposing liability on someone who acts carelessly. There is an argument for creating a legal duty in these circumstances,² but courts may still prefer that the legislature, which has a democratic mandate to balance the liberty of one family with the rights of another (in this case, the right to be free from an unreasonable risk of disease), impose that duty.

Note, that whether or not there is an actual duty to vaccinate, there is a duty for parents who do not vaccinate to take reasonable precautions, for example, not exposing vulnerable populations (e.g. infants) to a child that shows any symptoms of a vaccine preventable disease.

Details:

The statute makes failure to vaccinate a breach of duty. In other words, by adopting the statute the legislature determines that not vaccinating is presumed unreasonable unless a defendant can show strong reasons to the contrary. Therefore, if another has been harmed by that defendant's decision, the defendant will bear the costs of that harm. The evidence that the risks of not vaccinating are larger than the risks of vaccinating is overwhelming.³ The statute does not mandate vaccines. Parents and guardians can still choose not to vaccinate their children without any direct penalties. However, if the risks that their choice creates for others materialize, the costs will lie with the parent making the decision.

² Reiss, D. R. (2014). "Compensating the Victims of Failure to Vaccinate: What are the Options?" *Cornell Journal of Law and Public Policy* 23(3): Forthcoming. Full text available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2317548.

³ Calandrillo, S. P. (2004). "Vanishing Vaccinations: Why Are So Many Americans Opting Out of Vaccinating Their Children." *University of Michigan Journal of Law Reform* 37(2): 353-440. (at 369-379); Offit, P. A. and F. Destefano (2012). Vaccine Safety. *Vaccines: Expert Consult*. S. A. Plotkin, W. A. Orenstein and P. A. Offit, Saunders: 1464-1480. See also: <http://www.cdc.gov/vaccines/vac-gen/6mishome.htm#risk>.

While the statute uses the state immunization requirements as a baseline, it does not limit liability to kindergarten age: state requirements only limit which vaccines can create liability under the statute. The statute is not intended to bar a common law tort suit for vaccines not covered by it.

The statute would not apply in situations where the Advisory Committee on Immunization Practices does not recommend vaccinating. This means liability under the statute would not be available, for example, if a child is below the recommended age for a vaccine or has a medical condition that is a contraindication.

The statute adds a defense for cases where a parent's failure to vaccinate was not through fault of the parent, offering examples of those situations. It uses the catchphrase "any other cause beyond the control of the person" to permit courts to consider whether there may be additional extreme circumstances where the statute should not apply.

On the other hand, this proposed statute addresses a different set of interests than the interests addressed by statutes creating exemptions from vaccination requirements, whether philosophical or religious. Exemption statutes balance the State's interest in maintaining high levels of immunization to protect public health with parents' freedom of belief and parents' rights to make medical decisions for their children. Here, one family's freedom to make medical choices faces another family's freedom from paying for those choices. Freedom of religion is also not implicated here to the same degree. A family may still act according to its religion, but may not impose the costs of its religious beliefs on others. Accordingly, the statute expressly states that qualifying for a non-medical exemption is not a defense against liability.

The statute is silent on other aspects of the common law tort framework and leaves them in place. The burden of proof remains on the plaintiff to show that: more likely than not his or her child's harm was caused by a vaccine-preventable disease, that disease is one for which a vaccine is required under the state's school immunization requirements, and that more likely than not the unvaccinated child was the source of transmission of that disease. This means that there will be no liability when transmission is impossible to trace. It also probably means that expert testimony will be required to win under this statute, consistent with other suits involving medical issues.

However, since the proposed burden of proof is the preponderance of evidence standard ("more likely than not," or above 50%, as it is for the majority of torts suit), there are potential cases that should meet that standard (how many is unclear). For example, in the recent measles epidemics, the CDC tracked the outbreaks back to an index case. Caplan et al., cited above, point out that an argument can be made for causation in appropriate cases.

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