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Tort Law:
Liability for Anti-Vaccine Misinformation

Dorit Reiss & John Diamond¹

As outbreaks of preventable diseases spread through the United States during 2019, Congress, the media, and others focused on the role of anti-vaccine misinformation in causing people to get sick. Even in the face of the coronavirus pandemic of 2020, misinformation that can make the situation worse is spreading. While anti-vaccine activists were not behind the coronavirus outbreaks, they are sharing information now that could increase the risk. To give one example, the blog *Age of Autism*, trying to deter people from getting flu vaccines, recently argued that flu vaccines can increase the risks of coronavirus.² Further, anti-vaccine activists are planning how to deter people from getting any newly licensed coronavirus vaccine.

Can the law provide a remedy to people harmed by disease outbreaks when the outbreak generally or the specific harm can be fairly traced to misinformation? The question implicates several concerns of imposing tort liability for speech. Freedom of speech is important to a democratic society; criticizing existing beliefs is an important tool for developing knowledge and examining claims; and public health is a matter of public concern, where the need for free speech is at its strongest. However, when misinformation makes others sick, countervailing reasons—personal responsibility, the need to compensate victims, and the desire to deter harmful conduct—support tort liability for promoters of misinformation that harms others.

In 2017, Minnesota saw a large measles outbreak centered on unvaccinated children in its Somali community. The outbreak provided an especially stark opportunity to examine liability for anti-vaccine misinformation. The Somali community initially had very high rates of vaccination with the measles, mumps, and rubella vaccine (MMR). However, after concerns about rates of autism in the community surfaced,

1. Summarized and excerpted from Dorit R. Reiss & John Diamond, *Measles and Misrepresentation in Minnesota: Can There Be Liability for Anti-Vaccine Misinformation That Causes Bodily Harm?*, 56 SAN DIEGO L. REV. 531 (2019).

2. *Coronavirus Can Be Caused by Viral Interference, A Known Result of Flu Vaccines*, AGE OF AUTISM (Jan. 29, 2020).

anti-vaccine groups targeted the community with messages stating that the MMR vaccine caused autism. Anti-vaccine groups paid to send members of the community to anti-vaccine conferences, brought in anti-vaccine speakers, and wrote messages and articles targeted at the community. At the time in question, large studies covering hundreds of thousands of children from all around the world already found no causal link between MMR and autism. But the anti-vaccine activists did not include that information in the communications they made to the group. Instead, the activists used misinformation to convince the community that MMR caused autism. Within a few years, rates of MMR in the Somali community dropped from 92% to 42%. Since the community has ties to countries in Africa where measles is still endemic, the low vaccine rates created a dangerous situation. Measles is extremely contagious; nine out of ten susceptible people exposed to it will catch the disease. Twice—in 2011 and again in 2017—unvaccinated children brought back measles and started an outbreak that put children in the hospital. The 2017 outbreak was especially large: 21 children ended hospitalized, almost all unvaccinated children from the Somali community. Observers and the media pointed fingers—correctly, in our view—at the anti-vaccine groups that worked to convince the community that MMR caused autism.

The combination of strong data showing the provided information to be untrue, aggressive efforts to target a vulnerable community, and resulting serious harms made the measles outbreak in Minnesota a case where the argument for imposing liability is especially strong. In this Chapter, we consider the case for tort liability in the face of free-speech rights.

We offer a principled way to approach the question of liability for misinformation that leads to outbreaks and associated harms. We rely on the tort of negligent misrepresentation causing physical harm, as set out in § 311 of the *Restatement (Second) of Torts*.³ The elements of the tort require plaintiffs to show (1) a negligent misrepresentation; (2) reasonable reliance on the information; and (3) that reliance on the misrepresentation physically harmed the plaintiff or a foreseeable third party. In addition, courts add two other requirements: that there is a legal duty, and that the case respects the limits imposed by the First Amendment, which are strongest in relation to public utterances on matters of public concern.

We suggest two principles to assess liability that respect both added requirements. First, liability is more appropriate when anti-vaccine efforts

3. RESTATEMENT (SECOND) OF TORTS § 311 (1965).

resemble a one-on-one or limited-group consultation, and less appropriate when they resemble mass media. A closer, more individualized relationship—something approaching the counseling situation characteristic of providing medical advice—makes finding a duty of care more likely. At the same time, courts are most inclined to find First Amendment protection for mass-published materials, especially when disseminated by mass media and publishers.

The second draws on a classification suggested by Diamond and Primm in a 1987 article, in which they suggested that some statements in mass media raise stronger concerns when it comes to liability than others.⁴ Instructional statements, even when issued by media organizations, should deserve less First Amendment protection. Manufacturer liability for faulty instructions, for example, is commonly seen as outside of First Amendment protection, and some of the same arguments for it apply to instructional statements made by mass-media organizations. Similarly, media-sponsored activities raise less concerns about speech. By contrast, simulated violence or showing dangerous things deserves more protection because assessing that kind of speech requires the courts to judge value relative to risk.

These principles inform how to analyze the potential liability of three actors who spread anti-vaccine misinformation to the Somali community in Minnesota: a local organization, an individual anti-vaccine leader, and an anti-vaccine blog platform. The local organization, which engaged in individual and small-group outreach to people (in addition to broader efforts), can appropriately face liability for misleading the people in the community. The leader, who gave direct instructions to the community to avoid MMR until the age of 2 and who also interacted with individuals by flying them to anti-vaccine conferences, can also appropriately face liability for the harm. The case for liability is weakest against the blogging platform, which is closest to a media actor and which was not engaged in individually targeted efforts.

The other elements of the tort are met. Extensive evidence shows no causal link between MMR and autism. The reasons the anti-vaccine organizations reject that evidence are unreasonable. We see this as a fairly clear-cut case for arguing that there was, in fact, a negligent

4. John L. Diamond & James L. Primm, *Rediscovering Traditional Tort Typologies to Determine Media Liability for Physical Injuries: From the Mickey Mouse Club to Hustler Magazine*, 10 HASTINGS J. COMM. & ENT. L. 969, 973 (1987).

misrepresentation when the anti-vaccine groups claimed the MMR vaccine caused autism.

Further, the reliance of the community on the anti-vaccine groups was reasonable because this group of immigrants had good reason to be mistrustful of government authority and was especially vulnerable to representation by the anti-vaccine group. The anti-vaccine groups brought in Andrew Wakefield, who used to be a doctor until he was struck from the register for serious ethical violations; Wakefield's past, his eloquence, and his pedigree as a doctor could make him appear convincing and credible. In this case, the reliance of the community on friendly seeming anti-vaccine activists accompanied by a doctor was reasonable. Even individuals who did not directly rely on the misrepresentation but relied on those who did had a case, as did others infected by them, because the nature of infectious diseases is that they travel.

Another potential tort claim deserves brief mention. The tort of intentional misrepresentation that causes bodily harm is not a good fit for handling anti-vaccine misinformation in most circumstances because that tort requires that the tortfeasor knew that the information was false or knew he (or she) "has not the knowledge which he professes." Anti-vaccine activists often sincerely believe their statements about vaccines. They also sincerely believe that they are "informed" or "educated"—in fact, they believe they understand the materials better than most doctors. Under these circumstances, anti-vaccine misrepresentations are better classified as negligent rather than as intentional.

The range of realistic—even actual—situations in which the tort may or may not apply is broad and includes, for example, anti-vaccine billboards containing highly misleading information for the purpose of convincing viewers of anti-vaccine claims. Our hope is that the principles we advance in this Chapter offer useful approaches for analyzing such claims.