


CLINICAL NEGLIGENCE CLAIMS - in the context of Covid 19

Presented by Heather Beckett

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- ▶ An ethical dilemma?
 - ▶ Indemnity vs immunity from suit
 - ▶ Existing position – duty of care
 - ▶ Context, priorities, guidelines
 - ▶ Cases already “in the system”
 - ▶ Future cases

RCN – Guidance: Refusal to treat due to lack of adequate PPE during the pandemic

- ▶ Under the NMC Code, safety of nursing staff is a key consideration alongside patient and public safety.
- ▶ Weight to be placed on own safety includes effect on family and community safety if the nurse becomes infected.
- ▶ Must take part in identifying changes to ways of working that reduce risk short of refusing to provide treatment at all.
- ▶ If all other measures to reduce risk have been exhausted and there is still inadequate PPE, entitled to refuse to work
- ▶ Must be able to justify the decision as reasonable. Keep written record of safety concerns leading to decision to withdraw treatment.

Coronavirus Act 2020 – Section 11

Indemnity for health service activity: England and Wales

- (1) The appropriate authority may—
- (a) indemnify a person in respect of a qualifying liability incurred by the person, or
 - (b) make arrangements for a person to be indemnified, in respect of a qualifying liability incurred by the person, by an authorised person.

“Qualifying Liability”

A liability in tort, in respect of or consequent on death, personal injury or loss, arising out of or in connection with a breach of a duty of care owed in connection with the provision, after the coming into force of this section, of a relevant service.

“Relevant service”

A service which is provided by a person as part of the health service and which—

(a)relates to—

(i) caring for or treating a person who has, or is suspected of having, coronavirus disease, whether or not in respect of that disease,

(ii) caring for or treating a person (other than a person within sub-paragraph (i)) who has been, or is suspected of being, infected or contaminated, in respect of that infection or contamination or suspected infection or contamination, or

(iii) diagnosing or determining whether a person has been infected or contaminated,

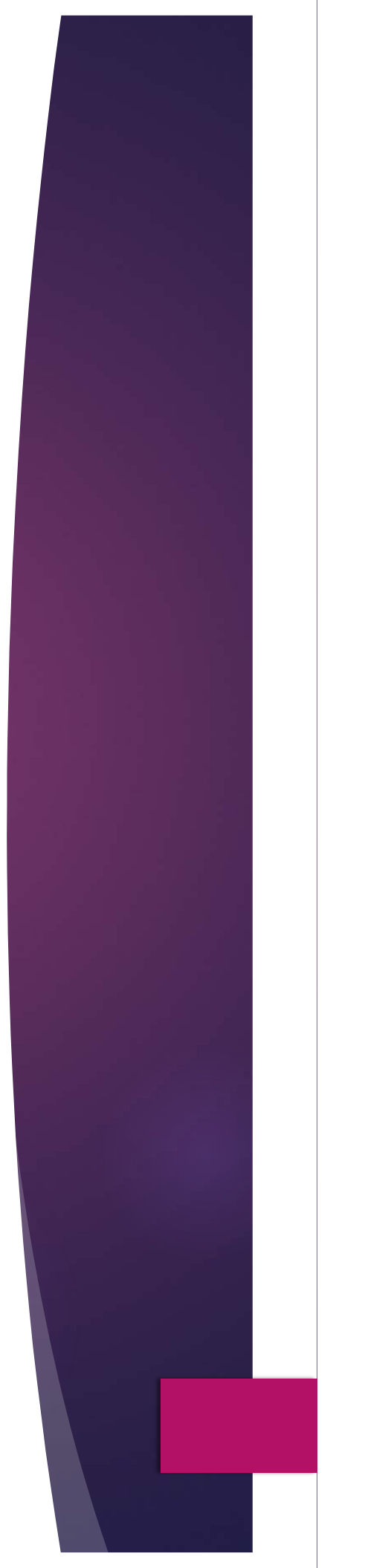
(b) relates to diagnosis, care or treatment and is provided in consequence of another person who usually provides such a service ...being unable to do so in consequence of providing a service within paragraph (a), or

(c) relates to diagnosis, care or treatment and is provided in consequence of another person ... being unable to do so because of a reason relating to coronavirus.



Indemnity vs Immunity from suit

Not a licence to act negligently

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- ▶ Exhortations to attend medical facilities if this is necessary
 - ▶ Tickle it/tackle it
 - ▶ Suggest that safety and standard of care should not fall below a reasonable basic level

Duty of Care

- ▶ Common law is the starting point
- ▶ Established duty of care – Doctors/patients
- ▶ *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50
 - duty of care engaged as soon as someone attends an A & E dept complaining of illness, staff should take reasonable care not to cause the patient further injury

Standard of care

- ▶ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582
“[A doctor] is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art...”
- ▶ *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 – in respect of consent
- ▶ *FB v Princess Alexandra Hospital* [2017] EWCA 334
 - affirmed the principle that the standard of care of a hospital doctor should be judged by the standard of skill and care appropriate to the post which he or she is fulfilling.

“Never Events”^{*}

“Serious Incidents that are wholly preventable because guidance or safety recommendations that provide strong systemic protective barriers are available at national level and should have been implemented by all healthcare providers”

- NB remember that causation must flow to establish a Clinical Negligence claim

^{*} Definition from NHS Improvement

Context

- ▶ Always important
- ▶ Was there a reasonable SYSTEM in place
- ▶ Was a reasonable (and logical) PROCESS followed when assessing PRIORITY and OVERALL SAFETY

Context

Mulholland v Medway NHS Foundation Trust [2015] EWHC 268 (QB):

"In forming a conclusion about the conduct of a practitioner working within triage within a busy A & E Department context cannot be ignored. The assessment of breach of duty is not an abstract exercise but one formed within a context...the A & E department was busy seeing up to 200 patients per day...The reasonable nurse is one who operates in a busy A & E which has a procedure which the nurse will follow for streaming and which does not contemplate an exhaustive diagnosis being formed".

Context

- ▶ *Morrison v Liverpool Women's NHS Foundation Trust* [2020] EWHC 91 (QB)

"A balance has to be struck between the needs of any given patient and any other competing professional demands placed upon the clinicians involved. Sometimes, the seriousness and urgency of a patient's presentation and the absence of any conflicting factors will mandate a swift and decisive response. On other occasions, it is equally obvious that the needs of the patient must be deprioritised to allow the clinicians to attend other demands on their time as a matter of priority".

There may be cases in which the risk to the patient is sufficiently low as to justify a postponement of treatment... However, where the risk is significant and increasing a closer consideration of the competing considerations will be called for".

Context/guidelines

Pope v NHS Commissioning Board [2015] 9 WLUK 380

Covid 19 will not, alone be sufficient reason for failure to meet an appropriate standard of care

NICE series of Covid-19 “Rapid Guidance”

- ▶ Eg Delivery of Radiotherapy
- ▶ Suggested levels of prioritization, balancing:
 - ▶ The risk of cancer not being treated optimally with the risk of the patient becoming seriously ill from COVID-19
 - ▶ Considering patient-specific risk factors, including comorbidities and any risk of them being immunosuppressed
 - ▶ service capacity issues, such as limited resources (workforce, facilities, anaesthetics, equipment).

Price v Cwm Taf University Health Board [2019] EWHC 938 (QB)

- ▶ Departure from NICE guidelines is not *prima facie* evidence of negligence.
- ▶ A clinical decision which departs from the NICE Guidelines is likely to call for an explanation of some sort. The nature and degree of detail required will depend on all the circumstances.
- ▶ Departure from the guidelines, should be adequately explained and justified.

Cases already “in the system”

- ▶ Limitation issues – still relevant
- ▶ Medical evidence issues
- ▶ Quantum issues

PD 16.4 Medical evidence

- ▶ 4.3 Where the Claimant is relying on the evidence of a medical practitioner the claimant must attach to or serve with his particulars of claim a report from a medical practitioner about the personal injuries which he alleges in his claim
- ▶ However: Failure to serve a medical report...in personal injury claims does not engage the “implied sanctions” doctrine”

Mark v Universal Coatings & Services Ltd [2018] EWHC 3206 (QB)

Quantum issues

- ▶ Effects of Covid 19 pandemic on the economy/Job losses/loss of earnings claims
- ▶ Management of client expectations
- ▶ Adequate record-keeping in relation to advice given to clients

Expert evidence in claims arising during pandemic

- ▶ Relevance of expert to claim in hand
- ▶ “Context specificity”
- ▶ Specific instructions to experts

Future

- ▶ Speculation only:
 - ▶ Decrease in claims
 - ▶ Decrease in successful claims
 - ▶ Increase of claims in a recession
- ▶ Early pragmatic investigation and advice
- ▶ Do not forget all the necessary “ingredients” – (especially causation)

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