Patient safety and litigation in the NHS post-COVID-19

John Tingle, Lecturer in Law, Birmingham Law School, University of Birmingham, discusses patient safety during the present coronavirus pandemic

We aren't living in normal times and all sorts of new and essential measures are taking place in the NHS to make sure that we can handle the COVID-19 crisis properly. The NHS is facing enormous challenges and staff are making heroic efforts. Patient safety issues, however, must never be forgotten and underestimated even in a crisis. When the pandemic dust eventually settles people will start to reflect on what has happened, this is basic human nature.

Some people may feel that they or their loved ones were treated improperly during the crisis and seek redress, raising the spectre of litigation. Patient safety and the spectre of litigation will not go away. Patients who have suffered negligent harm have a moral and legal right to sue for compensation. This right should never be compromised. However, a key issue remains of what happens when the patient's harm did not occur in normal times, but in the COVID-19 crisis? That the harm has occurred in a crisis is likened to a war zone.

Crisis clinical negligence

The COVID-19 NHS crisis plan response (NHS England and NHS Improvement, 2020a) seeks to deploy nursing and medical students, and clinical academics. It will be appropriate and necessary for UK doctors to work beyond their usual disciplinary boundaries and specialisms. All appropriate registered nurses, midwives and allied health professionals currently in non-patient facing roles will be asked to support direct clinical practice in the NHS.

Role negligence: tort law

A key issue will be how the courts would view the standard of legal care expected when NHS staff operate outside normal roles, when junior staff act up and volunteers do activities. How will they assess, for example, the legal standard of care to be adopted by final-year nursing or medical students helping in the crisis? A patient might argue that a training nurse or doctor caused them injury through their inexperience—they might have missed some key symptoms or did not properly refer them to a more senior colleague. The law of tort's normal legal framework on standard of care issues in clinical negligence would be applied and there are established applicable principles of law to this situation. The courts would take their status into account when setting out what the standard of care should be. However, it will be situation specific and all relevant circumstances will be considered:

> **'While the courts do not (usually) consider the characteristics of the individual defendant, they do consider the circumstances of the situation in which the accident or injury occurred. The standard of care does not exist in the abstract.'**
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> ***Horsey and Rackley, 2019: 234***

Past cases

There are cases of junior doctors, which would be considered if such as case was to arise, such as FB (Suing by her Mother and Litigation Friend (WAC) v Princess Alexandra Hospital NHS Trust [2017] EWCA Civ 334.

In this case, a junior doctor was found to be negligent in history note taking. The experiences of the individual nurse or doctor are left out when establishing the legal standard of care to be exercised and length of service. The test is objective. Healthcare staff are to be judged by the standard of skill and care appropriate to the post they are fulfilling, and tasks elected to be performed. Lord Justice Jackson stated in the case:

> **'Whether doctors are performing their normal role or 'acting up', they are judged by reference to the post which they are fulfilling at the material time. The health authority or health trust is liable if the doctor whom it puts into a position does not possess (and therefore does not exercise) the requisite degree of skill for the task in hand. Thus, in professional negligence, as in the general law of negligence, the standard of care which the law requires is an imperfect compromise. It achieves a balance between the interests of society and fairness to the individual practitioner.'**
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> ***FB v Princess Alexandra Hospital NHS Trust, paragraph 59***

Considering these cases and the law's approach, the importance of clinical guidelines, protocols, staff training, competence assessment and induction assumes a vital significance, and all steps need to be fully documented.

USA perspective

There are some US publications that address this issue. Rothstein (2010) discusses, within a US legal context, the concept of 'altered standards of care' in the context of malpractice liability and other related issues. He states the need for 'altered standards of care' assumes that traditional legal standards of care are inappropriate in an emergency. The concept of 'altered standards of care' is an interesting one and Rothstein contrasts this with the current standard of care, which he argues applied is sufficiently flexible and situation-specific that it need not be altered.

'Most states have enacted legislation immunizing business and non-profit entities that voluntarily assist governments during emergencies. A more comprehensive immunity provision is contained in section 11 of the Uniform Emergency Volunteer Health Practitioners Act (UEVHPA). Under this section, volunteer health practitioners are not liable for damages except in the case of willful, wanton, grossly negligent, reckless, or criminal conduct, or an intentional tort.'

Rothstein, 2010

Other litigation risks in a pandemic

Peter Rudd-Clarke (2020) discussed the litigation risks for manufacturers and healthcare providers when responding to an epidemic or pandemic. He stated several areas of possible litigation impact that could apply in our current COVID-19 crisis. Risk areas include:

- Equipment manufacturers
- Pharmaceutical manufacturers
- Hospitals and doctors.

He states that a claim against a hospital or doctor will depend on whether a breach of a duty of care can be established and this could prove difficult in practice:

'…as healthcare agencies across the world continually update their protocols for dealing with the disease. In the initial stages, the standards healthcare agencies must adhere to are not clear-cut, particularly where difficult triage decisions need to be taken. Extraordinary circumstances can make determining whether defendants were in breach of their duty of care difficult to resolve.'

Peter Rudd-Clarke, 2020

He makes the point that by appreciating where liability risks lie, manufacturers and hospitals can put policies in place to reduce the risk of being sued where errors over treatment or use of medical products could cause infection, injury or loss of life.

The issue comes back again to the adequacy of guidelines, protocols, competence assessment, protocols training and so on. This is also clearly a patient safety issue as well as a litigation avoidance issue.

The NHS patient safety form

Hopefully there will not be major patient safety issues emerging from COVID-19, but as my previous *BJN* columns have shown, the NHS has form when it comes to patient safety crises and can be seen to fail to learn the lessons from the past. This is all so hard to say when the NHS is facing unprecedented challenges and the staff are doing their best.

Never Events

Never Events are defined in the NHS England and NHS Improvement (2020b) report, as serious, largely preventable patient safety incidents that should not occur if healthcare staff or providers have implemented national guidance or safety recommendations. These are events that should never happen and, when they do, they indicate major failings in a health organisation's patient safety systems.

The report details 393 Never Events between 1 April 2019 and 31 January 2020. Sadly, Never Events continue to occur, the lessons of past adverse health events seemingly go unlearned. The report includes the Never Event type and description. There were 192 wrong site surgery Never Events, which included:

- Circumcision instead of planned frenuloplasty—1 event
- Colonoscopy intended for another patient—1 event
- Colposcopy intended for another patient—1 event
- Injection to the wrong eye—6 events
- Lumbar puncture intended for another patient—2 events
- Ovaries removed when plan was to conserve them—1 event
- Part of pancreas removed instead of adrenal gland—1 event
- Wrong toe removed—1 event
- Retained foreign object post-procedure—82 events
- Surgical swab retained—15 events
- Wrong implant/prosthesis
  - Knee—13 events
  - Lens—9 events.

The list of Never Events in NHS England and NHS Improvement (2020b) includes other concerning events, including 25 instances of unintentional connection of patients requiring oxygen to air flowmeters, and three instances of the wrong blood being transfused to patients.

The list of Never Events is like other lists that have been published over the years and sadly there are no surprises as to the nature of errors reported.

Conclusion

We are in very difficult times and NHS staff are coping heroically under tremendous pressures. The Government has also responded positively with a raft of initiatives designed to help the NHS cope with the crisis. There are initiatives such as asking nurses and doctors to return from retirement, and recruiting nursing and medical students and volunteers to the NHS. These are all innovative and good ways to help the current situation. There are, however, legal implications involved and there are past cases to guide the courts in establishing the legal standard of care expected.

What is clear is that, in the current crisis, we cannot put patient safety and risk management on the back burner. When the COVID-19 crisis passes people will have the time to reflect and explore their rights to redress if untoward adverse health events have occurred.

Today we face record levels of NHS clinical negligence claims and costs. There is no magic wand to be waved, so that this all disappears overnight. In normal times, we have acute patient safety and clinical negligence problems; in abnormal times I cannot see that these issues will be going away. The failures shown in NHS England and NHS Improvement (2020b) Never Events provide a salutary reminder that we still have a long way to go to develop an ingrained patient safety culture in the NHS. **BJN**

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