PROFESSIONAL REGULATION | ARTICLE

WALKING THE TIGHTROPE OF COVID-19 – HOW CAN DOCTORS AND OTHER HEALTHCARE PROFESSIONALS PROTECT THEMSELVES FROM FUTURE CRITICISM?

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Contact at QEB: Selva Ramasamy QC, Tom Orpin-Massey

Introduction

Recently, the “clap for the NHS” came to an end, after ten weeks. Reasons for its demise include some NHS staff feeling it had been hijacked by politicians, and some commenting that they would much rather have a properly resourced NHS than receive a weekly round of applause.

Nevertheless, it has provided a focus and a moment for the public to pause and express thanks to those who are “on the front line”. It remains to be seen whether the end of this weekly ceremony (usually accompanied by the clinking of glasses) will also mark the start of a gradual reduction in the national sense of thanks we all owe to the NHS and key workers generally.

There can be little doubt that some doctors (and other healthcare workers) will have already had to make difficult decisions under stressful Covid-19 circumstances, possibly involving concerns about shortages of equipment, and with decision-making complicated yet further by risks to themselves, arising from lack of adequate Personal Protective Equipment (PPE).

While there is some optimism that we are now “over the peak” of the Covid-19 virus, there is also a fear of a second, and larger, "spike” in cases, perhaps rendered all the more likely with the ongoing relaxing of restrictions, accompanied by lack of clarity over precise parameters, arguably exacerbated by a now notorious trip to Barnard Castle….

The reality is that doctors and other healthcare workers will remain “on the front line” for many months to come. Further, the NHS will continue to operate under the same systemic pressures with which it has struggled valiantly for years.

Doctors and healthcare workers functioning under systemic pressure are forced to make difficult decisions in stressful circumstances, and it is an inevitable consequence that in such circumstances they are at increased risk of making mistakes.

The national sense of thanks for the NHS may be strong now, but will that strength be enough to carry doctors and other healthcare workers safely through the almost inevitable public inquiry which will follow in the aftermath of the Covid-19 crisis? After all, on the night and in the immediate aftermath of the Grenfell Tower tragedy, the London Fire Brigade's efforts were seen as heroic. Just over two years later, phase 1 of the Grenfell Tower Inquiry criticised the LFB, finding serious failings in its preparation for and response to the fire, particularly in relation to command and control.

Although one needs to be careful not to stretch the analogy with the LFB's involvement with Grenfell Tower, the nature of medical practice (both before and during the Covid-19 crisis) is such that many doctors and other healthcare workers will also be in command and control roles, leading teams, and taking responsibility for decision-making processes.

There have been calls for emergency legislation to protect doctors and other healthcare workers from criminal and regulatory action arising from treatment provided under Covid-19 conditions. The Medical Protection Society (MPS) released a statement on 14 April calling for such laws. In it, Dr. Rob Hendry, MPS Medical Director said that "*It is simply not fair for doctors already under immense pressure to be asked to make difficult treatment decisions based on a hope that the courts and the GMC will treat them favourably and protect them in the future if their decisions and actions are challenged*."[1]

In the absence of any such change in the law, this article considers where doctors and other healthcare workers are left in the continuing fight to control Covid-19. How do they walk the tightrope: protecting their patients, while at the same time trying to ensure that they do not risk criticism and legal action in the wake of this crisis? We consider the new guidance that has been drafted to assist healthcare workers on the front line, and then suggest some ways in which medical professionals might seek to protect themselves from future criticism.

Guidance available to doctors and other healthcare professionals

Over recent weeks, healthcare regulators such as the General Medical Council (GMC)[2], the Nursing and Midwifery Council (NMC)[3], and others bodies such as the National Institute for Health

[1] https://www.medicalprotection.org/uk/articles/emergency-law-needed-to-protect-doctors-at-risk-of-legal-challenge-when-treating-covid-19-patients
[2] https://www.gmc-uk.org/news/news-archive/supporting-doctors-in-the-event-of-a-covid19-epidemic-in-the-uk
[3] https://www.nmc.org.uk/news/coronavirus/information-for-nurses-midwives-and-nursing-associates/

and Care Excellence (NICE)[4], the British Medical Association (BMA)[5], and the Royal College of Physicians (RCP)[6] have published guidance, with the aim of assisting registrants with this difficult balance.

The key points and common themes arising from the newly published guidance are that registrants are unlikely to face criticism for their decisions and actions during the pandemic where decisions are reasonable in the circumstances; are based on the best evidence available at the time; are made in accordance with government, NHS, or employer guidance; and are made as collaboratively as possible.

However, the guidance can be vague on obvious specifics.

The GMC guidance[7] states that "*the primary requirement for all doctors is to react responsibly and reasonably to the circumstances they face*". The guidance impresses that should decisions be called into question at a later date, they will be judged on the facts available at the time of that decision, and not viewed through the lens of hindsight.

Similarly, a joint statement from the Chief Executives of the statutory healthcare regulators[8], published on 3 March 2020, recognised that healthcare professionals may have concerns about decisions they may need to take in order to provide best care in challenging circumstances. In it, they stated that:

"We recognise that in highly challenging circumstances, professionals may need to depart from established procedures in order to care for patients and people using health and social care services."

"We recognise that the individuals on our registers may feel anxious about how context is taken into account when concerns are raised about their decisions and actions in very challenging circumstances. Where a concern is raised about a registered professional, it will always be considered on the specific facts of the case, taking into account the factors relevant to the environment in which the professional is working. We would also take account of any relevant information about resource, guidelines or protocols in place at the time."

[4] https://www.nice.org.uk/guidance/published?type=cov,coa
[5] https://www.bma.org.uk/advice-and-support/covid-19/resources/covid-19-guidance-directory
[6] https://www.rcplondon.ac.uk/news/ethical-guidance-published-frontline-staff-dealing-pandemic
[7] GMC FAQs https://www.gmc-uk.org/ethical-guidance/ethical-hub/covid-19-questions-and-answers#Working-safely
[8] Joint statement from CEs https://www.gcc-uk.org/news/entry/covid-19-joint-regulators-statement

When it comes down to specific issues, such as withdrawing life-saving treatment, perhaps in a situation in which a doctor has to decide between two patients owing to a shortage in equipment needed to treat them both, the guidance is fairly general.

The GMC has set out a list of factors to consider when prioritising treatment[9], which advises doctors: to consider local and national policies; to be sure that their decisions are based on clinical need and are not discriminatory; to take account of patient wishes; to be open and honest in such decisions; and to keep a record of such decisions. The guidance is based on the hope that such decisions will not rest on one individual alone, and should be collective, with input from colleagues and ethics committees*: "As far as practical, these decisions should not rest on individual clinicians' shoulders".* One has to wonder how realistic this is, given the systemic pressure under which the NHS operates.

Staying with the issue of prioritisation, the BMA has published guidance[10] recognising that "*it is legal and ethical to prioritise treatment among patients where there are more patients with needs than available resources can meet."* It says that decisions must be made on the basis of clinically relevant factors, and that senior leadership should establish the decision-making framework.

The guidance goes on to say that decisions must be reasonable, based on best evidence, agreed in advance, consistent, communicated clearly, and open to change if the situation changes. It states that managers and senior clinicians will set thresholds for admission to intensive care or for the use of highly limited treatment such as mechanical ventilation. It adds that treatment can be withdrawn in accordance with protocols.

The guidance also states that where medical professionals are asked to work outside their speciality, they must only do so within their competence.

Whilst this guidance has all been drawn up with the best intentions, and with the aim of giving doctors and other healthcare workers a sense of comfort in these difficult times, it is fair to say that it leaves a lot of room for flexible interpretation, and that in such circumstances, it may not provide a great deal of reassurance. It also assumes that senior management will put in place workable policies and procedures.

The Medical Defence Union clearly has its doubts, and has been clear that any decision to withdraw life-saving treatment should only be done with court approval:

[9] GMC FAQs https://www.gmc-uk.org/ethical-guidance/ethical-hub/covid-19-questions-and-answers#Decision-making-and-consent

[10] BMA FAQs https://www.bma.org.uk/advice-and-support/covid-19/ethics/covid-19-faqs-about-ethics

"…As the law currently stands, if a doctor is faced with the dilemma of competing interests between two patients, and the possibility of withdrawing treatment which is in one patient's best interests from that patient in order to treat the other patient, the doctor should first ensure their Trust makes an emergency court application for a declaration. No action to withdraw life-saving treatment which is in the patient's interests should occur unless the court first rules this is lawful…"[11]

Our basic recommendations for "walking the tightrope":

In these challenging times, in which guidance and advice may seem rather general and professionally uncomforting, we make the following suggestions, which may help doctors and healthcare professionals avoid any future criticism for their actions in this difficult context.

Read and know the relevant guidance, protocols etc: being able to show you are aware of relevant guidance and protocols, and that you applied your mind to them at the time, will provide an invaluable means of demonstrating a defensible approach. Conversely, failing to consider or apply the guidance, protocols etc. may leave you vulnerable to criticism.

Record, record, record: The importance of good record-keeping cannot be underestimated. Good records allow a practitioner to show their thinking at the time of events, and as is often said, "*if it isn't recorded, it didn't happen*". If (as is likely) you cannot record everything immediately, take time to make a full record as soon as possible after the event, making it clear that the note was written retrospectively. Include any instructions you were given or instructions given to others, protocols and guidance considered, competing factors considered, shortages or problems with equipment, facilities or staffing levels. The more detailed your notes, the better. It has to be recognised that the problem is that note keeping takes time – and if time is already short due to systemic pressure, this enhanced need to make records will only exacerbate the pressure. It adds to the difficulty of walking this tightrope.

Reporting poor or unsafe circumstances: Where you face unsafe situations, you should escalate your concerns, in accordance with the guidance relevant to you. By way of example, the RCP Covid-19 guidance says that if asked to treat without PPE you should report this to the relevant director of that clinical service. The RCN Covid-19 guidance[12] says that concerns should be reported to the individual line manager first. GMC guidance states that if you think that patients

[11] https://www.themdu.com/press-centre/press-releases/mdu-advice-for-doctors-making-difficult-decisions-about-competing-interests-during-covid-19

[12] https://www.rcn.org.uk/get-help/rcn-advice/redeployment-and-covid-19#questionsandanswers

are being exposed to avoidable risk, you should tell a senior colleague or manager and work with colleagues to find the best possible solution in the circumstances.[13]

Working outside normal scope of practice: The guidance on working outside your specialist area can be summed up as follows: Be flexible. The standards still apply. Self-evaluate. Raise concerns and seek help where appropriate. Read and know the advice specific to you and if in doubt, speak to others.

Recommendations in relation to other difficulties doctors and healthcare professionals may face during the Covid-19 crisis

Attending work when unwell or when you should have been self-isolating: Seek advice if in any doubt, do so in writing (email is ideal) and follow that advice. If you are required to attend work notwithstanding having reported symptoms, make sure that you have written proof of that – again, email is an ideal means of recording such exchanges.

Breaching Covid-19 restrictions: If you are unlucky enough to face allegations of having breached Covid-19 restrictions, immediately seek advice as to your responsibility to inform your regulator and others such as your employer[14] . This may not be entirely straightforward. It seems, for example, that accepting a Fixed Penalty Notice (FPN) for breaching lockdown may not be something that you are obliged to report to your regulator - it is not a conviction or a caution. However, it may nonetheless be a fitness to practise issue if the circumstances behind the issuing of the FPN might harm the reputation of the profession.

Conclusion

In the absence of clear legislation to protect them, there can be no guarantee that doctors and other healthcare professionals will not face regulatory or criminal prosecution arising from errors which occur during this crisis. However, there are clear steps that professionals can take to reduce the risk of facing such proceedings.

[13] https://www.gmc-uk.org/ethical-guidance/ethical-hub/covid-19-questions-and-answers#Working-safely

[14] For GMC for example: https://www.gmc-uk.org/ethical-guidance/ethical-guidance-for-doctors/reporting-criminal-and-regulatory-proceedings-within-and-outside-the-uk/reporting-criminal-and-regulatory-proceedings-within-and-outside-the-uk

This article was produced by Selva Ramasamy QC and Tom Orpin-Massey. This note should not be taken as constituting formal legal advice. To obtain expert legal advice on any particular situation arising from the issues discussed in this note, please contact our clerking team at barristers@qebhw.co.uk. For more information on the expertise of our specialist barristers in criminal and regulatory law please see our website at https://www.qebholliswhiteman.co.uk/.

QEB Hollis Whiteman
1-2 Laurence Pountney Hill, London EC4R 0EU
DX: 858 London City Telephone 020 7933 8855 Fax 020 7929 3732
barristers@qebhw.co.uk www.qebholliswhiteman.co.uk