BOHS British Occupational Hygiene Society
The Chartered Society for Worker Health Protection

Shifting Legal Issues Around Coronavirus Leave NHS Leaders Potentially Exposed

Dear Editor,

In November 2020, the little-known Independent Workers of Great Britain Union successfully judicially reviewed the government over its implementation of PPE regulations. The union, which largely represents workers in the gig economy, were able to demonstrate that the government failed to implement the direct right of all workers to have PPE, regardless of contractual status and not to be disadvantaged if they sought to avoid danger by providing their own PPE or trying to avoid places of danger.

The case was not a direct comment on whether the delivery drivers, cleaners, security guards and others who made lockdown possible should have been given PPE, but a matter of higher principle. Such workers are to be found underpinning the healthcare system and, speaking to the General Secretary of the Union, Henry Chango Lopez, it is a live issue in hospitals up and down the country.

What is significant about this case is that the government itself seemed genuinely unaware that it was in breach of the Directives on PPE that still gave rise to rights in this country during the start of the coronavirus. There was an understandable belief that s3 of the Health and Safety at Work Act 1974 had the matter covered. More importantly, there seemed no reluctance on the part of the High Court, in a public law case, to rule on the issue, despite the obvious implications at the time of the pandemic. Nor indeed did they rule out future reviews on a specific basis of the decisions of public bodies to make PPE available in specific work contexts. Fortunately, the Health and Safety Executive is currently consulting on rapid potential changes to bring all workers into the scope of this protection.

This highlights that there is a great deal of uncertainty about decisions, even at the highest levels, about what the liabilities are for employers facing potential coronavirus claims. Such uncertainty is a risk that NHS leaders need to be aware of. It is also perhaps understandable that confusion exists. We have never had to face such a challenge and not since the war so many stable legal principles been set aside by pulling the trump card of “in the interests of public health”. However, many grounds of claim against NHS employers, which may not have fallen to a sympathetic court in the midst of the pandemic, may find different outcomes in coming years and months.

The IWGB case also reinforced that the assessment of risk to workers from COVID-19 is to be done on a case-by-case basis. Blanket policies and risk assessments set down last year are likely to fail the test of legal scrutiny if they have not been rigorously revisited in the light of scientific advances, the availability of PPE and other controls and the prevailing level of infection risk within each workplace. Risk assessments need to be appropriate to the time, the circumstance, the worker and be focused on the best possible protection against the risks as they are currently understood. That is at the heart of health and safety law, which remains a statutory duty that binds NHS employers.

In addition to these general private law duties, NHS employers also have additional duties as public bodies. It is no small task balancing the complex coronavirus legal cocktail of public law duties, public health rules, health and safety laws and infection control guidance. But the expectation is that not only the right decision is made, but it is made in the right way.

At the height of the pandemic, it would have been a sound bet that that the Health and Safety Executive would decide it would not be in the public interest to use its criminal law and regulatory

powers against health service employers. However, the absence of enforcement by the regulator does not remove liability for breaches of statutory duty in private law, negligence and liability under the public law grounds of illegality, irrationality, procedural impropriety.

In respect of private lawsuits in negligence for example, it would have been safe to rely on the general indemnification of the NHS under the Coronavirus Act and the principle in *Baker v Quantum Clothing Group Limited* [2011] UKSC 17. That states that following government guidance, even if it is lower than international or other standards, can be a defence to a claim in negligence. However, *Baker*, goes on to explain that there comes a point where this will not be a defence.

"For example, it may be shown that the code of practice or regulatory instrument is compromised because the standards that it requires have been lowered…. because it covers a field in which apathy and fatalism has prevailed amongst workers, trade unions, employers and legislators….; or because the instrument has failed to keep abreast of the latest technology and scientific understanding."

In the current context, this must be of a concern for anyone with a responsibility for health risk assessment in the NHS. By and large, despite buffets and criticisms (for example in the Health Service Investigation Branch Prospective Report into Nosocomial Infections) in matters such as the distribution of PPE, there has been close adherence to the *COVID-19: Guidance for maintaining services within health and care settings Infection prevention and control recommendations.* However, the warning signs are printed in the introduction to that guidance, making clear that there are other, higher, responsibilities:

"Please note that this guidance is of a general nature and that an employer should consider the specific conditions of each individual place of work and comply with all applicable legislation, including the Health and Safety at Work etc. Act 1974."

Health professional bodies report a prevailing tendency amongst managers to regard the *COVID-19: Infection prevention and control recommendations* as definitive and standards for PPE set out in earlier versions continue to inform practices on the ground. This would fail the Baker test, but also render an NHS employer vulnerable to judicial review.

In the June 2021 update of the guidance the importance of proper risk assessment and the rigorous application of the hierarchy of controls is highlighted. What this means is that if a higher control, such as ventilation is ineffective, then there is a duty to look at the next most effective preventative measure. Ultimately, if all else fails, then that means relying on PPE and, in particular extended RPE. This is even more clearly articulated in the IPC Board Assurance Framework.

The ventilation issue is crucial because SAGE sees ventilation as necessary not only to diffuse the products of aerosol generating procedures, but the risks from "far field transmission" which is the combination of droplets and aerosols. Other than effective ventilation, only high functioning filtering face pieces (FFP) or powered respirators are demonstrated as being effective to remove the aerosol component of far field transmission. In SAGE papers, far field transmission is a phenomenon that is not restricted to the periphery of aerosol generating procedures and the IPC Board Assurance Framework does not specifically mention AGPs. Those employers not working to this interpretation of the hierarchy of control, because of a misunderstanding of the concept may also find themselves leaving challenges in both public and private law.

Where the hierarchy of controls also fails immediately for the employer is when they send workers into other settings over which they have no control, like in the community. In the absence of proper, written and evidenced risk assessment of the specific context, the law requires a precautionary approach. In the context of an "unacceptable risk", then the guidance requires consideration of

appropriate RPE. A blanket fixed policy on the type of available RPE would fail the test of rigour in this context and may either challenge able in public law or give rise to a cause of action in negligence or breach of statutory duty.

Thus, the IPC guidance is not a “get out of jail free” card. Infection Prevention guidance is designed to protect against the general spread of infection. Preventing the infection of staff is a part of that, but it is not the principal objective of the guidance. As such it should not be the main determinant of RPE decisions. RPE is a requirement for worker health protection. Health and safety law in legislation and the law of negligence is designed specifically to protect the worker from the manager who fails to correctly assess and protect workers from health exposures.

In determining whether a duty has been discharged, as public employers, NHS leaders not only need to achieve the right outcomes, but to arrive at their decisions through focus on all the relevant considerations. Any senior leader who confuses those two objectives misunderstands the role of the workplace risk assessment and their leadership duties in the context of their specific responsibility to employers. They will inevitably fall foul of the law one way or another.

At a line management level, this may be covered off by the immunity provisions of the Coronavirus Act. But at leadership levels, a failure to separately and identifiably consider the right legal principles in the right context and guide risk managers might well be outside the scope of those protections. I pity the first of the many who have to face the courtroom or boardroom question, “Was it not obvious that it is you who had the direct legal responsibility for ensuring, above all other things, the health and safety of your staff?”

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