Duty of Care and the Coronavirus Bill

Written by James Marwick

The Coronavirus Bill was published last Thursday and it is before Parliament this week.

It is an extraordinary piece of legislation which will introduce wide ranging emergency provisions aimed at addressing the unprecedented public health crisis presented by the covid-19 pandemic.

The situation is constantly evolving and this article simply serves to highlight some of the possible longer-term ramifications for healthcare and clinical risk lawyers presented by the Bill.

The priority at this stage is the well-being of the public and those workers providing essential services during this crisis.

Importantly, the Bill provides an immediate extension of indemnity cover against clinical negligence claims to those health care workers who are responding to the covid-19 pandemic whether directly or indirectly.

Whereas the Bill provide powers for the emergency registration of health professionals and social care workers together with leave and compensation for emergency volunteers, section 10 of Part 1 of the Bill provides a "health service indemnification" for health care workers responding to the covid-19 pandemic.

The provision is an important counter-balance to the emergency powers provided for registration and deployment of workers. It provides essential comfort for those workers providing support in dealing with patients with coronavirus or who are suspected to have the virus as well as those covering day to day services normally fulfilled by others but which have been impacted by the health crisis. The explanatory notes to the Bill present the indemnity as a "safety net" providing coverage for the provision of services which are not already covered by pre-existing indemnity schemes.

The relevant services are fully particularised at section 10(3):-

"Relevant service" means 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 (other than one within paragraph (a)) as part of the health 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 who usually provides such a service as part of the health service being unable to do so because of a reason relating to coronavirus.

Section 10 of the Bill itself does not address any modification to the duty of care owed to NHS patients during the currency of the outbreak and it remains to be seen precisely what approach is taken by the Courts and/or the Legislature in due course to claims for negligent treatment which arise at a time when unheard of demands are being placed on the NHS.

This is particularly in light of authorities such as Darnley -v- Croydon Health Services NHS Trust [2018] UKSC 50 where the Supreme Court considered the nature and extent of any duty of care owed by a hospital receptionist in relation to advice provided on waiting times to a patient and Bull & Another -v- Devon Health Area Authority [1989] 4 Med LR 117 where negligence was established on the basis of a failure to implement a safe system of maternity services notwithstanding the limitations imposed by available resources.

Whilst the Bill provides a health service indemnification, it goes further in relation to certain statutory duties and obligations which relevant bodies would ordinarily have to comply with in the treatment and care of patients.

The Bill expressly modifies the duties relating to continuing health care assessments with section 13 of Part 1 of the Bill allowing NHS providers to delay undertaking the assessment process for individual patients for NHS continuing health care until after the outbreak has ended.

The rationale for intervention is that such assessments for patients entitled to funded packages of care outside of hospital can lead to delays in hospital discharge as well as imposing an administrative burden on key NHS workers. NHS Trusts will therefore be able to discharge patients without having to consider continuing health care through the suspension of the relevant regulations.

Section 13 has retrospective effect and provides that relevant bodies do not have to comply with the prevailing statutory regulations in circumstances where local authorities will also not have to comply with the duties and requirements imposed by the Care Act 2014.

The NHS published a "Covid-19 Hospital Discharge Service Requirements" document on 19th March 2020 with one of the stated aims of the policy to free up 15,000 beds by

27th March 2020 with discharge flows maintained after that with comprehensive systems to manage the discharge process.

Inevitably, one of the primary concerns raised is that the suspension of assessments entirely will place vulnerable patients with complex health needs particularly at risk without appropriate ongoing care arrangements.

There is a further relaxation in the statutory provisions relating to among others the provision of mental health services and the fundamental issue in the long term will be whether the Bill has struck the right balance between devoting resources to the covid-19 pandemic and the ongoing care of other health service patients.

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