Intensive Care Society: Legal and Ethical Advisory Group (LEAG) Statement on legal liabilities of clinicians as individuals during coronavirus pandemic

Civil Claims

Doctors have a duty of care to their patients. That duty must be carried to the standards of a responsible body of clinicians working in the same specialty, acting reasonably. There may be many different reasonable ways of treating (or not treating) a patient and, as long as a responsible body of clinicians would judge that act or omission as reasonable (even a minority body), the duty of care has not been breached.

These are extraordinary times. The test outlined above (the *Bolam* test) will take into account the specific circumstances in which the clinician is working. Therefore, if the doctor's ability to provide certain treatment is hampered by limited resources available to them, they will not be at fault for acting reasonably within the confines of their resources. (These principles were established in the case of *Bolitho*).

The resources point is crucial here. Doctors should explain all available treatment options to the patient, including those they do not necessarily recommend but ones the patient would want to consider and know about, including the risks and benefits of each. (*Montgomery*). That discussion *might* but need not include treatment that is theoretically something to consider but is in fact not an option at that time for the patient anywhere. Even if a doctor considered certain treatment might help a patient but such treatment was simply not available – perhaps because there were no ventilators available in that hospital or any other reasonably and realistically proximate hospital - the doctor cannot be found at fault for not providing such treatment. It was simply not possible. The hospital Trust, the CCG or perhaps the wider NHS may be criticised for failing to ensure those resources were available but that is a different matter.

If a patient or their family decide to make a legal claim as a result of an act or omission in treatment, they will be claiming the duty of care owed to them or their relative was breached. If the clinician or clinicians involved in that patient's care and treatment were employed by or contracted to work for an NHS Trust at the time of the alleged negligence, the Defendant (the body being sued) will be the NHS Trust and not the individual clinician(s).

This is different if the clinician worked in primary care, such as a GP or community physiotherapist. In that case, the Defendant may be the individual GP, physiotherapist or possibly the GP partnership.

Either way, the management of and ultimately cost of that claim will be dealt with and paid for by NHS Resolution, which manages CNST and CNSGP ('Clinical Negligence Scheme for Trusts' and 'Clinical Negligence Scheme for General Practitioners'). These schemes are membership schemes and clinicians should have absolute confidence in being covered if a claim is made. To be clear, if a clinician is providing NHS services in a private hospital, CNST cover will still be provided.For clinicians acting privately (outside the NHS), insurance provision will vary but all will have their own insurance coverage, either through their Medical Defence Organisations (e.g. MDU, MPS or MDDUS) or through private insurers.

The new Coronavirus Act will provide indemnity for clinical negligence liabilities arising from NHS activities carried out for the purposes of dealing with, or because of, the coronavirus outbreak, where there is no existing indemnity arrangement in place. This will ensure that those providing healthcare service activity across the UK are legally protected for the work they are required to undertake as part of the COVID-19 response. This is in line with and will complement existing arrangements.

Regulatory Complaints

Clinicians are governed by their regulatory bodies. For doctors, that is the GMC. Doctors must undertake their work in accordance with the standards required of the GMC, set out in 'Good Medical Practice'. The GMC for one recognises that clinicians will need to depart from established procedures to care for patients during the Coronavirus pandemic. The GMC has set out that they "expect doctors will behave responsibly, reasonably and will be able to explain their decisions and actions if they're called on to do so." The GMC further state: "When deciding the safest and best course of action in the circumstances, doctors should consider factors including:

- what is within their knowledge and skills
- what support other members of the healthcare team could offer
- what will be best for the individual patient given available options
- the protection and needs of all patients they have a responsibility towards
- minimising the risk of transmission and protecting their own health".

Doctors must act within the law and the rules of their profession. It is when a doctor departs from this and/or acts irresponsibly or unreasonably that they may be required to explain their actions to the GMC. Even in those circumstances, the GMC will take account the extraordinary circumstances in which they were working. That is why good record keeping is so vitally important as an ability to "show your working" and reasoning for a decision and action will be key evidence in justifying what has or has not been done.

Criminal matters

Even in these extraordinary times, doctors must not break the law. They must not, for example, deliberately intervene and provide treatment that would actively bring about a patient's death. That would be euthanasia and is illegal. That is different from withdrawing or withholding life sustaining treatment, where such treatment is considered futile or no longer in a patient's best interests.

An individual doctor cannot be held criminally responsible if they recommended a treatment for a patient but, due to a lack of resources, such treatment could not be provided. It is not that individual doctor's fault nor in their control and they cannot be held responsible for that.

From ICS Legal and Ethical Advisory Group (LEAG)

Dr Stephen Webb

Dr Richard Innes

Dr Dan Harvey

Dr Aaron D'Sa

Dr Thearina De Beer

Dr Victoria Metaxa

Dr Gary Masterson

Dr Mike Brunner

Mr Rob Tobin

And endorsed by the Association of Anaesthetists (AAGBI)