

Personal Protective Equipment – The Last Frontier?

A look at the legal issues surrounding the provision of personal protective equipment to front line healthcare workers.

Last Thursday, people rightly stood in the streets and at their windows to show their thanks to the many NHS and social care workers who are on the front line of the fight against Covid-19.

On Sunday 29 March 2020, Robert Jenrick, Communities Secretary, standing in for Boris Johnson at the No 10 daily press briefing, stated that *“We simply cannot and should not ask people to be on the frontline without the right protective equipment.”*

It should go without saying that those workers are being provided with the personal protective equipment (PPE) required to keep them safe as they undertake their vital work. Sadly, reports from the very same workers, both in the press and as reported to those of us engaged in representing healthcare professionals, are that appropriate PPE is not always being provided.

On 20 March 2020, England’s Deputy Chief Medical Officer, Dr Jenny Harries, said *“The country has a perfectly adequate supply of PPE”*. However, that does not always appear to be reflected on the front line. Writing in the Lancet on 28 March 2020 Richard Horton (Editor in Chief of the Lancet), who had asked NHS workers to contact him with their experiences, reported comments such as *“I don’t feel safe. I don’t feel protected.”* He also reported that others had contacted him saying that they had been asked to assess patients with respiratory symptoms but without the necessary PPE to do so

So, what is the legal position?

Health and Safety at Work etc Act 1974 (“HSWA”)

By section 2 of the HSWA, employers owe a duty to ensure, “so far as reasonably practicable”, the health, safety and welfare at work of all their employees. This includes a duty to provide and maintain equipment, systems of work and a working environment that are, so far as reasonably practicable, safe and without risks to health. These duties enshrined in the HSWA reflect the long-standing obligation under the common law on employers to take “reasonable care” to ensure a safe system of work and safe equipment. Further, under the HSWA, a suite of health and safety regulations have been passed, putting more flesh on the bones of those specific duties on the employer, including regulations specifically for the provision of suitable PPE.

Personal Protective Equipment at Work Regulations 1992 (“the PPE Regs”)

PPE is meant to be a 'last resort'. According to Art 3 of the PPE Directive 89/656 (which the PPE Regs are supposed to implement into UK law), PPE should only be relied upon where the risks posed by work 'cannot' be avoided by other means. This means that employers need to have made a suitable and sufficient assessment of the risks their employees will encounter at work, and turned their minds to options for controlling those risks which do not involve exposure of employees to any risk, before looking at the last resort of PPE (Art 5 of the PPE Directive 89/656). However, in the healthcare context, the reality is this so-called "last resort" is often going to be the first line of defence.

Regulation 4(1) of the PPE at Work Regulations provides that:

"every employer shall ensure that suitable personal protective equipment is provided to his employees who may be exposed to a risk to their health or safety while at work except where and to the extent that such risk has been adequately controlled by other means which are equally or more effective".

To be suitable, the PPE must be appropriate for the relevant risks and the conditions under which it is used (reg 4(3)(a)); it must take account of the user's health, ergonomic requirements and his workstation (reg 4(3)(b)); it must fit the user (reg 4(3)(c)); it must be effective in dealing with the risks without increasing the overall risk (reg 4(3)(d)); and it must comply with legislation implementing PPE Directive 89/686 (reg 4(3)(e)).

In order for the PPE to be "suitable" it has been held that it need not make it impossible for the accident or harm to occur, but it must be effective in all reasonably foreseeable circumstances, having regard to the nature of the occupation. It is arguable that, the more significant the potential risk to health, and the more serious the consequences should the risk eventuate, the higher the requirement for the steps to be taken to avoid the risk.

By virtue of section 33 of the HSWA, breach of the PPE Regs may amount to a criminal act. Individuals can no longer bring a claim for civil compensation arising out of a breach of the PPE Regs by their employer (since the coming into force on 1 October 2013 of the Enterprise and Regulatory Reform Act 2013). However, given the potential criminal liability attached to breach of the PPE Regs, there is a clear argument that the regulations also inform the standard of care required under the common law – in other words, if the regulations are breached, then it is likely that the duty of care to the employee has also been breached.

Further, the NHS, as a state body, may face claims that the NHS has not abided by the PPE Directive 89/656. That Directive may have direct effect. The Directive does not apply to emergency workers (Art 2) but otherwise would apply to healthcare workers and requires PPE to be used when risks

cannot be otherwise avoided or sufficiently limited by other means (Art 3). It requires PPE to be “(a) be appropriate for the risks involved, without itself leading to any increased risk; (b) correspond to existing conditions at the workplace; (c) take account of ergonomic requirements and the worker’s state of health; and (d) fit the wearer correctly after any necessary adjustment (Art 4)”.

NHS England Guidance as to appropriate PPE

So, what is “suitable” PPE in this context? The specific details of what amounts to appropriate PPE and in what circumstances is outside the scope of this article. It is also subject to rapidly changing guidance.

However, at the time of writing, it is apparent that the key to answering the question of what is “suitable” PPE in this context is to consider when the use of FFP 3 respirators (masks) is required. FFP (“filtering face piece”) respirators protect from respirable dust, smoke, and aqueous fog (aerosols). They are graded 1 to 3, with level 3 providing the best protection.

At the time of writing, it is understood that NHS England’s advice is that FFP3 respirators are only required when managing patients with possible/confirmed COVID-19 who are undergoing an aerosol generating procedure, when there are COVID-19 patients in a high-risk unit (ICU/ITU/HDU) and in A&E “hot zones”. Aerosol generating procedures include intubation, cardiopulmonary resuscitation, surgery, dental procedures, non-invasive ventilation, continuous positive airway pressure ventilation (CPAP) and high frequency oscillatory ventilation (HFOV). The FFP3 respirator would generally be worn with a long-sleeved disposable gown, gloves and eye protection. For other procedures, a surgical face mask, gloves, apron and eye protection are recommended.

However, some healthcare workers have questioned whether it is sufficient to limit the use of FFP3 respirators to such procedures, with many commenting on how unsafe they feel with only a surgical mask, gloves and apron.

In addition, there is also the question of what to do when there are simply not enough PPE to go around. In its “*FAQs on using FFP 3 Respiratory Protective Equipment*” dated 20 March 2020, NHS England’s response to the question of “*We are running short of FFP3 masks how are we to manage our patients safely?*” was as follows: “*Masks must only be used as directed and for staff providing direct care. Masks can be worn for prolonged periods (as above) and unlike gloves and apron, do not need to be changed between patients. If a member of staff does not need to go into the risk area, they should be kept out.*”

That does not of course answer the question of what to do if there are not even enough masks for those providing direct care.

Employment Law Protections where employees are being asked to work in unsafe conditions

Normally employees face a risk of disciplinary action (up to and including dismissal) if they refuse to comply with a reasonable management instruction.

A reasonable management instruction will generally not include putting one's own health and safety in serious and imminent danger. However, what that means in the context of the current COVID-19 crisis for front line healthcare workers who were already working in difficult and dangerous situations even before COVID -19 is unclear.

Section 44 Employment Rights Act 1996 includes the following provisions:

"(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—

....

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) An employee is not to be regarded as having been subjected to any detriment on the ground specified in subsection (1)(e) if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have treated him as the employer did."

Similar protection against dismissal is contained in Section 100 Employment Rights Act 1996.

In terms of the question of "serious and imminent" in sections 44(1)(d) and(e), given that recitals to the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (SI 2020/350) refer to the regulations as being made "*in response to the **serious and imminent** threat to public health which is posed by the incidence and spread of severe acute respiratory syndrome coronavirus 2*", it might seem difficult to argue that risks arising from Covid-19 are not serious and imminent for the purposes of sections 44(1)(d) and(e) ERA 1996, although each individual situation is likely to be highly fact specific.

The reference to "*other persons*" in section 44(1)(e) is not limited to colleagues but extends others such as members of the public (as was the case in *Masiak v City Restaurants* [1999] IRLR 780). It

therefore potentially extends to the families of healthcare workers or those for whom they have caring responsibilities.

However, the question of whether such action might amount to negligence (as referred to in section 44(3) ERA 1996) is clearly potentially very relevant to health care professionals providing care to patients where such action might be detrimental to the care of patients.

Protected Disclosures – Whistleblowing

Where health and safety concerns are arising due to lack of PPE, then doctors can and should raise such concerns. If they do so in accordance with the provisions of Part IVA of the Employment Rights Act 1996 then they are protected in law from being subject to a detriment / dismissed for doing so. A “qualifying disclosure” for the purposes of s43B Employment Rights act 1996 includes “*any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following: (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject (d) that the health or safety of any individual has been, is being or is likely to be endangered*”. Broadly, “qualifying disclosures” are protected provided they are made to certain persons or bodies, including the worker’s employer and the Health and Safety Executive. Generally, the first port of call should be the worker’s employer.

Role and perspective of the Health and Safety Executive (HSE)

The HSE is the regulator of health and safety law for most workplaces in England and Wales. Hospitals and nursing homes are among such workplaces. However, care homes and sheltered accommodation are regulated by local authorities (usually the environmental health department).

The body of health and safety law that the HSE regulates is entirely statutory. As such, in terms of the provision of PPE, it is the HSE’s duty is to enforce the statutory duties under HSWA and the regulations made under HSWA referred to above, including the PPE Regs.

The method by which HSE carries out its duty is primarily by means of a body of inspectors of health and safety. These inspectors have a wide range of powers under HSWA, which include the power to enter premises, question persons and to take possession of documents and records (s.20(2) HSWA). Inspectors also have the power to take enforcement action if breaches of the law are found. The main means of enforcement is the service of improvement and prohibition notices (ss.21-23 HSWA) and the HSE can also bring criminal prosecutions for breaches of health and safety legislation, including for a failure to comply with an improvement or prohibition notice (s33(1)(g) HSWA).

Using hospitals as an example, an improvement notice could be served by an inspector if they were of the opinion that the hospital employer was breaching one or more statutory provisions concerning the provision of PPE or had contravened one or more of these provisions in circumstances that made it likely that the breach would continue or be repeated (s.21 HSWA). The notice must contain, amongst other things, details of what the hospital employer is required to do in order to comply with law and a time period in which compliance will be achieved (which must not be less than the period within which the notice can be appealed, which is 21 days from the date of service).

A prohibition notice may be served by an inspector if they are of the view that in relation to activities that are being, or are likely to be, carried on by or under the control of the hospital employer to which the legislation requiring the provision of PPE applies, the activities involve or will involve a risk of serious personal injury (s.22(1) & (2) HSWA). The notice must state that, amongst other things, the hospital employer must cease the activities until the matters giving rise to the risk are remedied (in this case, this would be by the provision of PPE or PPE that is fit for purpose) (s.22(3) & (4) HSWA).

Traditionally, HSE inspectors use their powers to visit workplaces in order to check compliance with the law. These visits are usually unannounced. Following a visit, or if the situation justifies immediate action, during the visit, an inspector may serve an enforcement notice. Inspectors also have a discretion to take informal action instead of enforcement action by, for example, by sending written advice.

Given that HSE's main method of enforcement is dependent on HSE inspectors visiting workplaces where medical care is being provided, which is currently a risk activity, it is unlikely that HSE inspectors will be conducting inspections to ensure compliance with the statutory duties to provide PPE to workers. Inspectors would in turn need to be provided with PPE in order to safely be able to observe how medical care was being provided.

Even if such visits were practicable, there is a risk that a series of inspections might prove to be unpopular with the general public because some already stretched healthcare staff would be taken away from dealing with the Covid 19 emergency in order deal with questions and request for information by HSE inspectors. In addition, it is unclear whether the public would be supportive of the HSE taking enforcement action against hospitals. In reality, an HSE inspector would probably be unlikely to serve a prohibition notice because it would prevent the healthcare provider from providing medical care.

It should also be noted that a recipient of an enforcement notice has 21 days from service of that notice to appeal against it and this appeal lies to an employment tribunal (s.24(2) HSWA & rule 105(1),

Schedule 1 of the Employment Tribunals (Constitution & Rules of Procedure) Regs 2013). The effect of initiating an appeal is that an improvement notice is immediately suspended until the appeal is determined or the appeal is withdrawn (s.24(3) HSWA). This may be a further reason that deters an HSE inspector from taking enforcement action to require healthcare providers to comply with their obligations to provide PPE to workers.

Perhaps in recognition that healthcare providers may find it difficult in the current circumstances to devote staff to deal with enquiries and inspections by regulators and/or the potential public backlash against any enforcement action that might impede the provision of medical care, the Care Quality Commission (“CQC”), which is responsible for the regulation of the provision of health care services, announced on 16th March 2020 that it would be immediately suspending inspections in order to support health care providers to increase capacity as a result of the Covid 19 emergency.

Therefore, while the HSE has the statutory duty and powers to act where employers fail to provide suitable or any PPE to workers providing medical care, such as nurses and doctors, there are practical and political impediments to the use of HSE’s powers of enforcement at the present time.

Up to now, the HSE has been silent on the issue of PPE provision. Even if enforcement action by the HSE is not considered to be feasible at this time, the HSE could make a public announcement, perhaps couched in terms of a reminder of what the law requires with regard to the provision of PPE to healthcare workers. This would show the regulator flexing its institutional muscles and could provide a nudge to healthcare employers to redouble their efforts to ensure that suitable PPE is provided to their workers.

The view of the GMC?

Whilst it is all well and good looking at the rights of doctors in these circumstances, to do so in isolation ignores the fact that healthcare professionals are dedicated and caring professionals who will want to do what is best for their patients whatever the circumstances.

Doctors are also required to work in accordance with the GMC’s “Good Medical Practice” (GMP) which requires that:

“26 You must offer help if emergencies arise in clinical settings or in the community, taking account of your own safety, your competence and the availability of other options for care.”

“58 You must not deny treatment to patients because their medical condition may put you at risk. If a patient poses a risk to your health or safety, you should take all available steps to

minimise the risk before providing treatment or making other suitable alternative arrangements for providing treatment.”

Sections 44 and 100 ERA 1996 do not apply do not extend to protection from one’s regulator. As such, doctors must continue to comply with GMP or risk proceedings before the GMC.

The GMC’s current Covid-19 online guidance for doctors provides that: *“It is likely that as the situation develops, some doctors will need to depart from established procedures to care for patients.”* It also states that *“We understand you may be concerned about the risks to your own health when treating patients with coronavirus. We don’t expect you to provide care without regard to the risk to yourself or others.”*

The meaning of *“Without regards to the risk to yourself or others”* is not entirely clear. It certainly does not suggest that concerns about personal risk trump other concerns – nor could it in light of the provisions of GMP. Instead, it seems to be simply a factor to take into account. This is likely to be of little comfort to those facing PPE shortages.

With regard to PPE specifically it states that:

“Employers and contracting bodies should take all necessary steps to make sure staff are suitably equipped (for example, with protective clothing). Employers also have a responsibility to provide staff with the right information to minimise the risk of transmission

If suitable equipment isn’t immediately available, difficult decisions may need to be made quickly about the safest and best course of action, taking account of clinical guidance.

Factors to consider include:

- ***whether treatment can be delayed, or provided differently (eg remotely)***
- ***whether additional steps can be taken to minimise the risk of transmission***
- ***whether any doctors are at a higher risk from infection than other colleagues***
- ***what course of action is likely to result in the least harm in the circumstances?***

Doctors should work with colleagues to provide the safest care possible in the circumstances. Keep a record of your decisions and how you have handled your safety concerns.

If you have particular concerns about risks to your health, you should talk to your employer or contracting body as soon as you can.”

Again, the message seems to be to *“do your best in the circumstances”* and take into account all relevant factors. As ever, proper record keeping is key: not only is this a requirement in any event,

but decisions are always far easier to defend after the event if a proper record of the decision-making process has been kept.

Of more comfort may be the following also from the GMC's guidance:

“Doctors need to feel confident that they will not be subject to unreasonable criticism by the GMC, or have their registration removed or restricted, because of the difficult decisions they are forced to make, or the standards of care they are able to provide during a pandemic. In considering any complaint made about a doctor working during a pandemic, the GMC will take into account the resources available to the doctor, the problems of working in unfamiliar areas of practice and the stress and tiredness that may affect judgment or behaviour. The primary requirement for all doctors is to respond responsibly and reasonably to the circumstances they face.”

Indeed, as the UK's brave healthcare workers continue on the front line, they should do so without fear that they will fall ill due to lack of PPE or that their difficult decisions will be subject to the sort of scrutiny that often-only hindsight can bring.

We wish them well and thank them for all that they are doing.

Cyril Adjei, Nicola Newbegin and Victoria Webb are all barristers at Old Square Chambers, with expertise in health care law. Between them they specialise in employment, discrimination, professional discipline, personal injury, clinical negligence and health and safety law.

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