All Hands on Deck – The Private Law Implications of Emergency Staffing Measures During the Coronavirus Epidemic

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The government, the NHS and regulators including the General Medical Council ("GMC") and the Nursing and Midwifery Council ("NMC") have taken extraordinary steps to bolster staffing levels in response to the ongoing coronavirus epidemic. The steps taken fall into two categories: (1) emergency registration (the so-called "Dad's Army" of retired doctors and nurses); and (2) emergency re-allocation. This short article considers the measures taken and their potential private-law implications.

Emergency registration

Doctors

Pursuant to s18A of the Medical Act 1983, if the Secretary of State advises the GMC that an emergency has occurred, is occurring or is about to occur, the GMC gains the power to temporarily register doctors in relation to that emergency. The GMC must consider those doctors to be "fit, proper and suitably experienced"[2] but the conditions of registration are at the discretion of the GMC[3] .

The GMC has now given temporary registration to 11,856 doctors who: (1) left the register or gave up their licence to practise in the last three years; (2) don't have any outstanding complaints, sanctions or conditions on their practice; (3) have a UK address; and (4) did not opt out when contacted[4].

These doctors are exempt from the usual revalidation process[5] , including the requirement to undertake "enough appropriate CPD to remain up to date and fit to practise..." [6]

There is currently no provision for the emergency registration of medical students. Rather, medical students will be able to work as medical student volunteers, as they would in any event [7].

Nurses

S2 and Schedule 1 of the Coronavirus Act 2020 amend the Nursing and Midwifery Order 2001[8] so that the NMC has the power to temporarily register nurses in those circumstances where the GMC has the power to temporarily register doctors under the 1981 Act (see above).

The NMC has registered 7,510 nurses on its Covid-19 temporary register[9] . As with the GMC, the NMC has contacted nurses who: (1) left the register or gave up their licence to practise in the last three years; (2) don't have any outstanding complaints, sanctions or conditions on their practice; (3) have a UK address. Unlike the GMC, the NMC is requesting nurses to opt-in, not to opt-out[10] .

2 *s18a(1)*
3 *s18a(3)*
4 *https://www.gmc-uk.org/news/news-archive/coronavirus-information-and-advice/temporary-registration*
5 *https://www.gmc-uk.org/registration-and-licensing/temporary-registration/information-for-doctors-granted-temporary-registration/the-registration-process*
6 *https://www.gmc-uk.org/-/media/documents/cpd-guidance-for-all-doctors-0316_pdf-56438625.pdf*
7 *https://www.medschools.ac.uk/media/2622/statement-of-expectation-medical-student-volunteers-in-the-nhs.pdf*
8 *S.I. 2002/253*
9 *https://www.nmc.org.uk/news/press-releases/nmc-covid-19-emergency-register-goes-live/*
10 *https://www.nmc.org.uk/globalassets/sitedocuments/registration/covid-19-temporary-emergency-registration-policy.pdf*

The NMC acknowledges the possibility of extending these criteria as the epidemic evolves, stating:

> *This is an unprecedented and evolving situation and we have already identified other groups of people who we consider might meet the requirements for temporary registration depending on the overall evolution of this pandemic and the severity of the resulting workforce shortages over the coming weeks. Such groups include final year nursing students, former registrants who left the register more than three years ago, and overseas qualified nursing and midwifery professionals already working or studying in the UK in other healthcare roles.* [11]

As with doctors, nurses on the Covid-19 temporary register will be exempt from revalidation[12] .

Emergency re-allocation

It is anticipated that we will see emergency re-allocation of doctors and nurses from their normal fields of practice to deal directly with Coronavirus patients (this has already been acknowledged by the GMC)[13].

One envisages – although I have been unable to find any definitive answer – that many of those doctors and nurses given temporary registration will be deployed to the "front line", and that, for many, this will be unfamiliar territory.

The GMC has already suspended the usual rotation of foundation year doctors and has indicated that it envisages that their redeployment in response to the Coronavirus [14].

The private law implications of these emergency measures

In an action for clinical negligence, a doctor or nurse will be judged by the standard of skill and care appropriate to the post which he or she was fulfilling.

This principle arises from the judgment of the Court of Appeal in Wilsher v Essex AHA[15] . The most recent restatement of the principle is in the judgment of Jackson LJ in FB v Princess Alexandra Hospital NHS Trust[16] . After considering the case law, Jackson LJ turns to the facts at [67], stating:

> *The conduct of Dr Rushd in the present case must be judged by the standard of a reasonably competent SHO in an accident and emergency department. The fact that Dr Rushd was aged 25 and "relatively inexperienced" (witness statement paragraph 5) does not diminish the required standard of skill and care. On the other hand, the fact that she had spent six months in a paediatric department does not elevate the required standard. Other SHOs in A&E departments will have different backgrounds and experience, but they are all judged by the same standard.*

In the context of the staffing measures taken in response to the coronavirus epidemic, the ramifications of this principle are as follows:

1. Doctors and nurses who have returned to practice following retirement will be held to the same standard as all other doctors and nurses.
2. Doctors and nurses working outside of their normal fields of practice will be held to the same standard as doctors and who are experienced in those posts.

The benefit and risk of these measures

The benefit of emergency registration and emergency re-allocation is obvious: an increase of (already) c. 20,000 doctors and nurses to treat patients with Coronavirus.

But these measures also entail risks. One imagines that the risk to patients of negligent treatment is increased and, as a corollary, the risk to clinicians of a successful claim is increased. This is a personal risk to clinicians – it is trite that employed professionals are themselves tortfeasors and can be sued accordingly[17] .

The approach of the Courts in Wilsher and FB, discussed above, will provide some reassurance to patients, that despite the extraordinary measures that are (or will be) in place, they can expect the same standard of care and will be compensated if that standard is missed.

The Government has sought to reassure clinicians through the inclusion of indemnity provisions in the Coronavirus Act. The guidance to the Coronavirus Bill (as it was) states that the Bill will:

11 *Ibid.*
12 *Ibid.*
13 *https://www.gmc-uk.org/news/news-archive/coronavirus-information-and-advice/our-guidance-for-doctors*
14 *https://cached.offlinehbpl.hbpl.co.uk/NewsAttachments/PGH/Rotation_announcement_letter.pdf*
15 *[1987] 1 QB 730*
16 *[2017] EWCA Civ 334*
17 *See, for example, Fairline Shipping Corp. v Adamson [1975] QB 180.*

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.[18]

At the present time, no scheme/draft scheme has been produced by the Secretary of State. If the purpose of the indemnity provisions is to reassure clinicians then this is an oddity, and s11 may not achieve what the government set out to do. In these days when there is so much outsourcing in the NHS, it is in everyone's interests that anyone working for or as an outsourced independent contractor and any returning GP has the appropriate indemnity cover. The Secretary of State should produce a scheme and make clear his intentions as soon as possible.

Christopher Johnson and **Nick Brown** are members of the Clinical Negligence and Personal Injury Team at Doughty Street Chambers[19] . All members of the Team are continuing to practise from home during this difficult time.

18 *https://www.gov.uk/government/publications/coronavirus-bill-what-it-will-do/what-the-coronavirus-bill-will-do*

19 *https://www.doughtystreet.co.uk/clinical-negligence-personal-injury-product-liability*