Browne Jacobson

Shared Insights: Preparing for 2022 – the big issues for legal teams across health and social care

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Introduction and Claims Update

Dr Nigel Sturrock, Regional Medical Director for Midlands, NHS England and Improvement Damian Whitlam, Partner, Browne Jacobson

Dr Nigel Sturrock is Regional Medical Director for the Midlands at NHS England and NHS Improvement.

Introduction – Dr Nigel Sturrock

We were delighted to be joined by Dr Nigel Sturrock, Regional Medical Director for the Midlands at NHS England and NHS Improvement. He gave an overview of the pressures placed on the NHS by the pandemic, including the impact on urgent and emergency care, elective procedures and staffing.

Claims Update – Damian Whitlam

Five things to look out for in 2022:

1. **Psychiatric damage, secondary victims and proximity.** The decision of the Court of Appeal in Paul v Royal Wolverhampton NHS Trust and Purchase v Ahmed has landed, reaffirming the approach on proximity as set out in Taylor v A Novo. Please read our article or the Judgment. The Court of Appeal have now granted permission to appeal to the Supreme Court.

2. **Vicarious liability, S33 and vulnerable witnesses.** The Judgment of TVZ and others against Manchester City FC is worth a read on 3 key issues:
    3. The treatment of vulnerable witnesses and how they gave evidence was commended (and shows PD1A in practice)
    4. Discretion to extend the limitation period under S 33 of the Limitation Act 1980 was not granted for a case where the index events dated back over 30 years, and where a key witness died in 2010. The Claimant's representatives have already indicated a desire to appeal this point.
    5. The Court did not extend vicarious liability stating that this was not a "test of intuition" but was "tightly controlled".
6. **How to handle complaints effectively.** The Complaints Standard Framework is currently being piloted but will be introduced across the NHS in 2022. You can read more here.
7. **Litigation Reform**. The Health and Social Care Select committee continues to review litigation reform and we anticipate that they will report in 2022.
8. **CPR Changes.** We expect fixed recoverable costs on non-clinical cases to be extended in cases of up to £100,000. Also, don't be surprised to see changes in respect of the use of ADR.

Mandatory vaccination of staff

Helen Badger, Partner, Browne Jacobson

Process

- New Vaccination as condition of deployment Guidance Phase 1 Planning and Preparation issued 6 December 2021 following amendments to Regulation 12 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014.

- Imposes duty on all CQC registered providers to ensure they are provided with evidence of vaccination or exemption status for those carrying out regulated activities with face to face patient contact.

- Not requiring evidence of booster status but employers are advised to strongly encourage uptake.

Key dates

- Unvaccinated need 1st dose of approved COVID-19 vaccine by 3 February 2022
- Unvaccinated need 2nd dose of approved COVID-19 vaccine by 31 March 2022
- Regulation 4 will be in force by 1 April 2022
- Phase 2 guidance in relation to redeployment expected this week

Scope

- All health and social care staff who are carrying out regulated activities and have direct, face-to-face contact with patients, as well as ancillary staff involved in such activities and who have contact with patients but are not directly involved in their care in England must be fully vaccinated against COVID-19 from 1 April 2022.
- Applies to nurses, doctors, dentists, domiciliary care workers, ancillary support staff (e.g. porters, cleaners, receptionists) and where regulatory activity delivered by agency workers, volunteers, locums, students or trainees or where activity contracted to another provider unless exempt.
- Age demographic is not relevant.

We foresee some dispute and debate on whether someone falls into scope.

Who is exempt?

- Under 18s
- Those who are clinically exempt
- Those who have taken/are taking part in a clinical trial for the COVID-19 vaccination
- Those with no face to face patient contact (e.g. telephone triage not on site)
- Those providing care as part of a shared lives agreement

Medical exemptions

- Largely related to those who have had an allergic reaction to a previous dose of the vaccine, or any of the vaccine components
- Determined by reference to COVID-19: green book, chapter 14a
- Temporary exemption for pregnant employees until 16 weeks post-partum (see below)

Who is not covered by the exemptions?

- Based on scientific advice that those who are pregnant or trying to become pregnant can be vaccinated and it won't be harmful in pregnancy / fertility; and due to the serious consequences of COVID-19 in latter stages of pregnancy, it is recommended that pregnant women are vaccinated.
- However, recognising that vaccination may not be appropriate in some circumstances during pregnancy, a short-term exemption is proposed to apply, which would expire 16 weeks post-partum.
- No exemption applies to those who object for religious, political or philosophical reasons.

Consultation requirements

In practical terms, people need to have had their first dose by 3 February 2022 and conversations need to be taking place with all staff now to:

- ascertain who is not having the vaccine
- explore their reasons
- identify if one of the exemptions applies to them
- discuss re-deployment opportunities with those who are not vaccinated or exempt, to determine if there are any alternative roles they could fill.
- discuss with them that dismissal is a possible consequence of them not getting a vaccination.

It is unlikely you will be able to issue notice and allow people to work notice in time for 1 April. Payments in lieu of notice are not recommended so you need to look at redeployment opportunities during the notice period. This can include re-deployment outside your organisation and across the social care system into non patient facing roles such as telephone triage e.g. 111, GP, ambulance. **We can help put you in touch with other organisations to facilitate collaboration on this.**

Claims risks

- Harassment arising from engagement discussions
  - ensure that the staff having discussions with staff are properly trained to deal with vaccine hesitancy in a sensitive and compassionate way without being dismissive of religious or philosophical beliefs.
- Discrimination – redeployment issues
  - ensure there is an objective selection process for redeployment to avoid claims that decisions are influenced by a worker's protected characteristics.
- Unfair dismissal
  - there is a fair reason for dismissal ("some other substantial reason" or breach of a statutory enactment)
  - claims are therefore most likely to be around process and selection for redeployment
- Whistleblowing/ H&S detriment
  - e.g. where staff have expressed concerns re safety of vaccine and argue they have not been selected for redeployment opportunities as a result

Questions

A decision not to be vaccinated leading to termination of employment is unlikely to be a matter which reaches the threshold for employers to refer employees to their professional bodies.

PAs employed by an individual budget holder (via a PHB) are not covered by this legislation as an individual budget holder is not a CQC registered person.

As to whether an organisation can decide to offer redeployment to its non vaccinated clinical staff but not offer it to its non vaccinated non clinical staff-To avoid discrimination claims, we recommend a process which is similar to that adopted in redundancy selection exercises - i.e. objective scoring exercise carried out by independent managers. Limiting any redeployment opportunity to clinical staff could create risk if it is a role that could be equally undertaken by non-clinical staff.

Useful links

ACAS guidance

Consultation process outcome

The Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) (No.2) Regulations 2021

COVID 19 Vaccinations NHS Staff Indemnity FAQs

Children and Social Care

James Arrowsmith, Partner, Browne Jacobson

Introduction

This year was always going to be a significant year for children's social care, but towards the end of 2021 we saw the tragic cases of Arthur Labinjo Hughes and Star Hobson. We are also dealing with aftermath of the pandemic. We know that when schools were closed there was lots of concern about an increased level of harm and a loss of the multiagency approach that is so heavily relied on in social

care. Issues remain: workforce challenges are cutting across all areas at the moment. If staff are stretched there is less opportunity to identify and act on concerns.

In terms of **what is coming up in 2022**:

Competition and Markets Authority have been looking at placement markets for children's social care, and the interim report confirms the market is not operating as it should. Their final report, with recommendation is due this year.

We have seen tension around placements particularly with the ban on unregulated accommodation. Underlying this is the fact that the right placements are available in many cases. More funding has been announced to create more places, though this will take time, and we must ensure that they do not suffer the same issues as are found in the existing market.

The National Review of Arthur Labinjo-Hughes case is due in May and will be an important read in a multi-disciplinary safeguarding context. We also know that when incidents like this have occurred in the past referrals and interventions have tended to increase.

The report of the Independent review into Children's Social Care is due in the spring. We can see from the case for change published last year that this is likely to include the need for more early support services which get better outcomes and lass focus on late interventions when families are already in crisis. It will be interesting to see how this is balanced against tragedies like Arthur's where intervention has not happened, but there is a general recognition that this is the right direction of travel.

We are likely to see examination of a range of topics familiar from the debate around Integrated Care Systems. This includes questions like at what level services should be delivered to get the best outcomes, and tension between procedure and relying on practitioners' instinct. This is due to come out in Spring, but may be pushed back until after publication of the Arthur Labinjo-Hughes report. You can read more about it here.

Sir Andrew McFarlane's report on transparency in the Family Court – Attendance at family court in relation to child protection issues can be challenging for practitioners. The report on transparency published in October 21 proposed more access to the family court for journalists and more published judgments which will increase the pressure for you and your staff giving evidence in court. The transparency implementation group met for the first time in December and are planning a 12 month programme to implement these changes.

We have prepared some guidance on that which we hope will help you and your colleagues to prepare for these hearings in family court. You can see it here. You may also be interested to read this article, which sets out top tips for addressing allegations against staff in child care proceedings.

Collaboration

Please do get in touch with us not only for legal assistance but also but to help connect health colleagues with social care colleagues to facilitate collaboration in relation to redeployment and any other issues.

Inquests

Ed Pollard, Partner, Browne Jacobson

COVID-19 has had a significant impact on logistics for inquests, but going forward we will see more inquests where COVID-19 is a proposed cause of death. Four points to consider about those types of inquest:

1. It is possible that inquests will look at COVID-19 in the same way as hospital acquired pneumonia, i.e. with an understanding that viruses such as pneumonia cannot be avoided, and as such are not an automatic reason to investigate infection control procedures etc.
2. However, it is very likely that the question of how local procedures have been implemented and how they have followed or diverged from national guidelines will be key.
3. The impact COVID-19 can have on an individual's physiological reserves – it may well be that this indirect impact becomes a key point. There will be interesting arguments about whether COVID-19 caused or contributed to death on the balance or probabilities.
4. The cause of death – Government numbers refer to death within 28 days of a positive COVID-19 test but COVID-19 may not be part of the cause of death at all. We will hopefully see some clarification on how that is being interpreted.

As always you need to have strong documentation on how decisions were made and how national guidance was interpreted.

Two final points to mention:

- Very recent Chief Coroner's guidance about COVID-19 – number 34 – is open to interpretation and heavily caveated throughout and it seems likely we are going to see a continuation of various approaches across jurisdictions.
- Serious Incident Investigations – some regions have a backlog as there was some allowance not to investigate serious incidents within the usual time frames due to COVID-19 pressures. Other regions (e.g. the North West) have not had a pause on SI Reporting. It will be interesting to see how that develops.

Discussion

Nicola Evans commented that across all jurisdictions we are seeing increased pressure on staff impacting on their resilience and ability to cope with claims and inquests. The additional pressure on staff to give a report to the Coroner or give evidence can be a breaking point.

We know of some areas where the Chairs of the Hospital Gold Command have written to local Coroners seeking adjournment of all inquests scheduled in the next 2 weeks, to allow the health system to direct all available resources and staff to deal with the immediate demands of the Omicron wave. Unfortunately this request has not been agreed – Coroners are coming under increasing pressure to get the courts going to clear the backlogs of inquests that has built up in many jurisdictions during the pandemic.

Manchester (west) Coroners Court (located in Bolton) has set up a user's forum which users have found helpful. This may be something that health and social care organisations could suggest to their local Coroners as a way of working together to manage the pressures across the whole system, and to seek to influence how Coroners are approaching listing to try to mitigate the pressures on services and staff.

Useful resources on inquests:

Mock Inquest film and webpage for clinical witnesses

Maternity Hub

We are also about to run our inquest training course as a series of lunchtime learning modules. Please do feel free to share this information with any health and social care professionals you think would like to attend the training.

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