



Obligated to protect

Helen Nugent, a barrister in the clinical negligence team at Temple Garden Chambers, outlines what operators need to know about the provision and use of PPE at a time of crisis

For some weeks now the Government has been under fire over the distribution of personal protective equipment (PPE). The shortages of PPE have been reported widely. For some, the guidance in its various forms arguably fails to provide the real clarity that is needed better to understand what items of equipment should be utilised and when. From a practical perspective, these issues raise a number of important questions regarding the extent to which healthcare nurses and their colleagues are exposed to occupational risks, notwithstanding health and safety protocols and procedures being in place. Within a legal framework, occupational risk is of obvious relevance to the duties and responsibilities of any employer.

In the context of acute shortages of PPE, the most recent guidance was published by Public Health England (PHE) on 17th April 2020. In summary, it recommended the sessional use and reuse of PPE for healthcare workers. The BMA was reported as describing the new guidance to be *an admission of a "dire situation"*.

In response to the shortages, a consignment of some 84 tonnes of PPE, including around 500,000 gowns, was due to arrive in the UK on 19th April 2020 for national distribution. The shipment was delayed. Niall Dickson, Chief Executive of the NHS Confederation described it as very serious. It had made a difficult situation worse.

Employer obligations

As COVID-19 raises unique clinical challenges for those working in the healthcare industry, so too does the current crisis raise new challenges for the NHS and employers of hospital and other healthcare workers. But what are the obligations of employers to provide PPE? And are those obligations presently being met?

As a starting point, statutory and common law duties are placed on employers to safeguard the health and safety of their employees in the workplace. The Health and Safety at Work Act 1974 ("the Act") is the primary piece of legislation addressing health and safety in a statutory context. The provisions of Section 1 of the Act place employers under a general duty to ensure, so far as reasonably practicable, the health, safety and welfare at work of all its employees. It is not an absolute duty, but a qualified one. In practical terms this means that where there is a risk of harm which cannot be prevented or avoided (as is the case here), an employer is expected to take appropriate steps to control, minimise or otherwise reduce the risk. The provision of PPE should be a last resort, to be deployed where methods or organisation of work systems cannot otherwise be effective in managing the risk. PPE is therefore an essential weapon in the battle against COVID-19.

The standard of health and safety in the workplace is set by a series of six regulations, commonly referred to as the "Six Pack Regulations": derived from European directives and intended to harmonise health and safety law across Europe. Germane to the coronavirus pandemic are the Control of Substances Hazardous to Health Regulations 2002 (as amended) (COSHH), applying to infectious micro-organisms and biological agents. The Provision of Personal Protective Equipment Regulations 1992 (as amended) (PPE Regulations) are also plainly of relevance in the context of work equipment more widely. ►

► The principle statutory duty on employers under COSHH is to take preventative action against the exposure of employees to a substance which is hazardous to health; and where this is not reasonably practicable, they should ensure that it is adequately controlled. Adequacy is narrowly defined by reference to the nature of the substance and the nature and degree of exposure generally. PPE is specifically identified as a control measure under the Regulations which, if deployed, is required to be suitable for the purpose it is used and compliant with any relevant provisions of the PPE Regulations.

Suitability of equipment

Under the PPE Regulations, the suitability of equipment has a broad definition. PPE must be appropriate for the risks involved and the conditions at the workplace where exposure to the risk may occur; it must take account of the ergonomic requirements of the health and safety of the employee using it and the nature of their workstation. It must fit correctly and, so far as reasonably practicable, be effective to prevent or adequately control the risk without adding to the overall risks. In *Threlfall v Kingston upon Hull City Council* [2010] EWCA Civ 1147, albeit by reference to the provision of protective gloves in the context of waste disposal, Smith LJ observed that for PPE to be suitable, it

must be effective. The extent to which an item of equipment is suitable is an assessment to be made by reference to the time when the PPE is provided. Beyond provision, the duty extends to the maintenance of suitable equipment, keeping it in good repair/working order and replacing it. Employees should also be given information, instructing and training on the use of PPE.

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Against that background, the latest guidance from PHE demonstrates a significant shift. Full PPE previously recommended for those working in high risk areas is now extended to include alternative options in the event of non-availability. As an illustration, recommended PPE for healthcare workers in acute hospital in-patient and emergency departments performing a single aerosol generating procedure (AGP) on a patient with possible or confirmed coronavirus (outside of a higher risk acute area) previously included a single use disposable

fluid resistant coverall/gown, single use FFP3 respirator and single use eye/face protection. Only one week on, the alternative options to a single use gown for AGPs now include any reserve supply; and if a reserve fluid resistant gown is not available, a disposable, non-fluid repellent gown/coverall or reusable (washable) surgical gown together with a disposable plastic apron.





In its current form, the guidance distinguishes between levels of risk by healthcare context, with AGPs of the respiratory tract being identified as posing the highest risk of transmission. No distinction is made between possible and confirmed cases of infection, or between different areas of discipline. In some ways, it places an unenviable burden on healthcare trusts who will need to agree action plans to implement the guidance and consider how to put systems in place for identifying equipment which cannot be reused; and to implement or review already existing integrity checks and decontamination processes. The onus generally is on the employer to ensure that employees understand and safely put into practice suitable PPE.

That there have been various revisions to the recommendations published over the period to date poses the risk not only of there being real confusion on the part of those to whom they apply; but of there being a lack of continuity and consistency across national practice. The doubling up of equipment as an alternative to what would otherwise be a standard provision may well bring about its own challenges, where items are left in short supply for those working elsewhere.

Striking a balance

There is a difficult balance to be struck between the use of suitable equipment and PPE availability. The nature of the occupational risk faced by healthcare nurses has not changed, but issues associated with and arising from supply and demand now appear to be key factors in assessing what may constitute suitable PPE. Where there are failures, the NHS may well face occupational illness claims on the basis the risk has not adequately be controlled. Breaches of the duties, whilst relevant in assessing the extent to which an employer has fulfilled its duty, will not in themselves automatically give rise to a civil liability (Section 69 of the Enterprise and Regulatory Reform Act 2013). A claim would need to be brought in negligence. It is obviously difficult balancing personal safety against patient safety and if an employer does not provide adequate PPE (and fails as a consequence to provide a safe working environment) individual healthcare professionals may decide to refuse to treat patients.

It remains to be seen how this will all play out in any private law personal injury claims: the Government priority and focus is clearly on dealing with the state of emergency, as opposed to protecting employers from potential claims. ■