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Shared Services Partnership
Legal and Risk Services

Personal Injury Department

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Multi-party Hydrogen Peroxide Vapour Matters

Hydrogen Peroxide Vapour Machines, also known as Deprox Machines, are manufactured by Hygiene Solutions and are machines used to decontaminate enclosed spaces. In hospitals, the machines are used to decontaminate rooms following the discharge of patients, usually with some infection, by releasing chemicals into the air including hydrogen peroxide.

The use of the machines would involve sealing the room/ward that requires decontamination to ensure that no air can escape the room and when the machine is turned on, it releases hydrogen peroxide vapour which disinfects all surfaces that it encounters.

The benefits of the use of these machines in hospitals include the reduced risk of cross-infection of patients and the assurance that all infection is removed from the area before the next patient is admitted in the same area.

One Health Board in Wales, which used these machines previously, has now received several personal injury claims from staff who came in to contact with these machines and allege that the correct Personal Protective Equipment was not provided by the NHS. The Health Board has ceased

using the machines following receipt of these personal injury claims, which are currently all in proceedings. A multi-party case, such as this one, can have a dramatic effect on a Health Board.

A multi-party case is when a group of people who have suffered the same, or similar injuries due to the negligence of the same organisation bring a claim against that organisation. These types of claims can have a significant impact on Health Boards, such as in this case the machines have been taken out of use all together at this point and alternative decontamination tools have had to be used.

Three of the cases involved in this multi-party case have been settled on an economic basis for the Health Board, in the hope that nothing further would be received due to limitation. However, the Claimant's Solicitors obtained a stay in proceedings at the beginning of the new claims in order to overcome this obstacle, therefore there are still several open claims that are ongoing at this time.

Natasha Hardy, Solicitor for the Claimant's, has stated the following to the Somerset Live;

"We believe there maybe thousands of cases where cleaners at NHS hospitals have inadvertently inhaled a hydrogen peroxide solution used to decontaminate wards and cubicles.

"When the Deprox machines are used in accordance with the instructions, there is no suggestion that they are anything other than safe.

"However, in the two cases we have settled and the other nine we are currently handling, our position is that staff were not trained to use the machines properly nor were they given the right protective gear.

"As a result, they have suffered all kinds of respiratory problems.

"It's difficult to give an accurate figure, however, we know of at least 57 NHS trusts that have used the Deprox HPV machines and they are considered to be the creme-de-la-creme of MRSA superbug killers so it is reasonable to expect that lots more hospitals are using them.

"We also suspect that many private hospitals and private care homes use them too."

Natasha concludes that they have an awareness of at least 57 NHS Trusts that have used these machines and suspect other organisations also use them, therefore an awareness is important amongst the NHS of further potential claims and possible multi-party claims in relation to these machines.

Lauren Hayes, Paralegal

NWSSP Legal & Risk Services

Repeat Claimants - What to look for?

The Personal Injury department has recently seen a rise in individuals who are pursuing multiple claims. Across the Health Boards in Wales, there are at least 20 repeat Claimants. The most common type of claims being ones involving defective equipment, slips and needlesticks. Whilst these Claimants might not always be a red flag, those who continue to pursue personal injury claims for an array of different scenarios will prompt further interest.

There are a number of red flags, which should be taken into consideration when dealing with this type of Claimant:

Willingness to accept early settlement

Whilst this does not necessarily mean the claim is fraudulent, it might be that the Claimant wants to close a claim as quickly as possible to avoid detection of fraud. Those who are also willing to accept a reduced claim without dispute will often push for early settlement. A sign of desperation could be an extremely strong red flag.

Detailed knowledge of the claims process

Whilst the Claimant will take advice from their solicitors, if an individual seems to have more knowledge than most about the compensation process this could be an indicator of potential fraudulent activity. Even if the individual has not had another claim against the Health Board, it does not necessarily mean to say that the Claimant has not pursued other personal injury claims.

History of pursuing personal injury claims

An individual, who has a history of pursuing multiple personal injury claims, is more than likely going to have enhanced knowledge. It is important to look at the previous claims and see whether these were successful. It is also beneficial to look at the Claimant's job title and see whether the incident in question, was in fact their responsibility. It is important to pick up any patterns.

'Crash for Cash'

A high profile example of repeat claims is the 'crash for cash' scam, which saw 2 million pounds being netted and more than 150 convicted for submitting bogus claims.

The Yandell family conducted a series of fake crashes and bogus compensation claims from 2009 – 2012. All involved were convicted of conspiracy to defraud. The fraud was undetected for years due to the mass of people involve.

Despite the car accidents being fake, many of the fraudsters were diagnosed with whiplash and situational anxiety.

Taking the above into consideration, the ways in which the Health Board can manage the risk are:

- Stay vigilant
- Investigate claims fully
- Take into consideration the Claimant's job
- Search for previous claims
- Obtain medical records
- Speak to witnesses

Amy Lunn, Paralegal

NWSSP Legal & Risk Services

Data Breach Claims: An evolution to follow closely

Since the introduction of the General Data Protection Regulation 2016/679 (GDPR) in 2018 we have seen a slow but certain increase in the amount of data protection claims made against our Welsh Health Boards and Trusts. There is no doubt that this new area has been targeted by Claimant lawyers as a potentially lucrative area for growth and the number of new claims is likely to continue to increase.

The claims are varied in nature and include, but are not limited to:

- breach of article 1 which concerns the failure to process the Claimant's sensitive personal data in a lawful, fair and transparent manner;
- breach of the sixth principle of the Act, the absence of appropriate security measures are in place as regards the risks that arise from processing personal data;
- breach of confidence;
- breach of articles 13 and 14, which concern the use of privacy notices.

The question now facing legal advisors is which tactics to adopt and whether a general approach to such claims, as seen with personal injury, can be prepared in anticipation for an influx of cases. It is our duty to ensure that, whilst each case is considered individually, we adopt a uniform approach. This will also help to maintain cost efficiency when dealing with the types of claim noted above.

Previously claims for this type of injury would have been dealt with under the Pre-Action Protocol for Personal Injury Claims. Last year saw the introduction of the new Pre-action Protocol for Media

and Communications Claims which is now to be adopted for all new data breach claims. Whilst the new protocol is simpler, it limits the time available to the defendant to investigate the breach in detail, which may pose some difficulty where claims are complicated in nature. This new Protocol is also not necessarily suited to complex cases where medical evidence is necessary and it is likely that it will be disregarded when the value of the claim is significant or the injuries are more than a mere distress.

In relation to liability for such claims, and similarly to other personal injury claims, the Health Boards are vicariously liable for the negligent acts of its employees committed during the course of their employment. Therefore liability for breaching GDPR will, in most circumstances, rest with the Health Board. There is limited case law to date on to what extent, and in which circumstances, the employer will be absolved of liability. The most recent case of *WM Morrisons Supermarkets Plc v Various Claimants* [2020] UKSC 12 provides some guidance on this. In this case an employee who, as part of his role, was to disclose payroll data to KPMG, also published the confidential data online and sent it to three newspapers. The Supreme Court found that Morrisons was not liable for the negligent act of its employee in disclosing data online and to the newspapers. Indeed, it found that the disclosure, achieved in this way, was not in the field of activities, which constituted his employment, nor which he was authorised to do. Further a second element considered by the Supreme Court in absolving Morrison from vicarious liability was the fact that the employee was pursuing a personal vendetta against his employer. This case illustrates the very narrow circumstances in which the defendant could potentially be exempt from liability.

In relation to damages, the Court of Appeal in the case of *Lloyd v Google LLC* [2019] EWCA Civ 1599 found that damages can be awarded to compensate an individual for loss of control of their personal data, without the need to first establish financial loss or distress. This decision, contrary to the prior decision of High Court's decision is significant as it will entice claimant lawyers to bring claims as the burden of proof, in relation to medical causation, will be minimal. However it is important to note that whilst this case concerned a claim brought under the old Data Protection Act 1998 the position is likely to be mirrored for claims brought under GDPR.

The Health Boards may be able to defend such claims as they arise. One available defence is 'de minimis' defence. Where information has been shared to a restricted number of individuals and for a limited period of time it could be argued that the breach and/or loss suffered was so small or slight that the courts should not consider it. Particularly in circumstances where the Information Commissions Office has acknowledged that the breach was minor. It remains to be seen what approach the Court wills adopt in this regard.

Further, Article 82(3) of the GDPR provides that, where the controller or processor can prove that it is not in any way responsible for the event giving rise to the damage, they shall be exempt from liability. There is not yet any case law to provide guidance on the operation of this Article. It is therefore, not clear if this defence may be relied upon by the Health Boards. However, academic commentary suggests that Article 82(3) could assist defendants where they are able to demonstrate that they have taken all reasonable steps to protect the rights of data subjects. The burden will be placed on the defendant to demonstrate through appropriate audit trails the extent to which they have complied with the requirements of GDPR and, in particular, the data protection principles.

Finally, in terms of risk management the most commonly occurring claims are: unauthorised access of medical records by employees and medical records being sent to the incorrect person or address. This risk can be managed by Health Boards ensuring that:

1. they have clear policies and procedures in place surrounding the control and processing of data;
2. adequate training is provided to all staff and this is kept up to date;
3. adequate audit records are maintained.

Following these steps will enable the Health Board to demonstrate that they have taken all reasonable measures to protect the rights of the data subjects and ensure that the service is best placed to defend any claims.

Megan Gorry, Paralegal

Georgia Stocks, Paralegal

NWSSP Legal and Risk Services

Remote Working in the Post Covid World; a Lawyers Perspective

We are certainly living in unprecedented times. The impact of Covid-19 is beyond comparison, particularly the impact on the legal world. If you told me or any of my colleagues 18 months ago, that there would be widespread closures of legal offices, that the vast majority of lawyers would be working from home, and that all but the most complex of court hearings would either be adjourned or dealt with via remote methods, they would have laughed out loud – lol. But here we are.

So, what has it meant? I am a self-confessed luddite but it’s fair to say that the British legal system is a pretty stayed and stuffy affair. Even the most modern legal offices still employ very traditional methods of communication, for example, I know conveyancing practitioners have to keep an analogue fax line to communicate with mortgage lenders! Most formal legal documents required an inked signature and face to face client meetings, conferences were the order of the day. In fact, a

good number of procedures demanded a hands-on approach. Court hearings, other than the more basic and straight forward ones, capable of being done over the telephone, were in-person.

This all changed quite dramatically following the lockdown, lawyers from all walks of the profession had to adapt very quickly to a new way of working to ensure the continuity of the judicial system.

At Legal and Risk Services, facilities for working remotely were widely available and our case management system allowed most staff to go home and continue working while being socially distant. However, even though this system had not been used widespread or for prolonged periods, significant changes had to be made to allow work to continue and use of alternative means of meeting and communicating had to be employed.

Electronic means have been quickly adapted to fill the gaps caused by social isolation. Meetings were immediately transferred to alternative methods such as Skype, Microsoft Teams, Zoom and others which are now used daily. From an office perspective, daily online meetings have meant that its "business as usual".

Courts have encouraged parties to carry on with matters which may be heard remotely and have proven that the move towards remote hearings is indeed possible. This switch has meant that all but the more complicated of hearings have continued unabated.

Our colleagues in clinical negligence have confirmed the success of RTMs using various video platforms. Settlements were reached in an efficient and smooth manner, allowing parties to discuss matters in isolation when necessary and taking instructions as and when.

One of the PI members attended a CCMC via video conference and reports that it went very smoothly. His advice was to have blank spreadsheets to hand, where he could add in the figures as they were agreed, calculating instantly the new budget. This proved to be efficient and accurate, saving time in drafting the final budget and order.

One of our preferred barristers also provided feedback following a fast track trial where breach was admitted but causation disputed.

The trial was arranged by the Claimant's solicitors and set up via Zoom. The parties and the judge were all sent a link and could simply click to log in, entering the access code and password previously provided. Recording was available and used as per the Judge's order. It must however be noted that with many of the platforms available, including Zoom, will charge a subscription fee to allow meetings to last for extended period of time, in this instance over 40 minutes. This is particularly relevant as whilst only one party needs to subscribe, it may in certain instances prevent the access to justice of certain claimants, in particular litigant in person who may not have the means to access or pay for these technologies. There has been call recently however for these platforms to ensure that their security and privacy is up to an appropriate level.

Counsel in his feedback confirmed that all parties dialled in from home and the Judge ensured that the Claimant was alone. A paginated pdf bundled had been previously distributed to all parties.

Counsel further reported that despite being behind screens, he was able to carry out his cross-examination with the Judge weighing in with questions in the usual way. He confirmed that despite the untraditional method used it all worked well. In our barristers words 'Basically, you could really get stuck in and there is no hiding for a Claimant- the immediacy of the Judge and others on screen does provide its own very real pressures; I found the Claimant was disarmed by being sat on his sofa. We even had a contempt warning mid-evidence.'

So does this mean that we can now do away with all these old methods???

Well probably not. There is no doubt that, considering the costs, efficiency and time saving of remote hearings, it is likely that these will continue to increase in number even once social distancing has become a thing of the past. Also there is certainly no question that home working will reduce traffic, and in turn reduce pollution and wasted resource.

However, it is unlikely that something like a multi-day trial involving a number of lay and expert witnesses will be dealt with remotely. At least not in the near future. There can also be no doubt about the benefits of face to face witness interviews and site inspections in particular. The levels of social interaction that is present in all office environments, has all number of benefits that cannot be replicated in quite the same way, at least not yet.

Following the adjournment of a complex trial involving multiple witnesses, including a vulnerabl e individual, our barrister told us

‘I think the Courts will drift back towards attended hearings but I can see this being a viable alternative for a lot of small claim/fast track work. There will be some cases which aren’t suited to it simply because of the amount of evidence or tech limitations/vulnerability of a party.’

But there is no doubt that this is not where is ends. The benefits of home working are far reaching and Covid-19 has proved to be a successful test case. Our barrister went on.

‘From my point of view, it is probably a good enough substitute for fast track work that I can see Counsel accepting that a lot can be done by video - it is forcing us all to work electronically so I can see it staying in the long term at least to some degree.’

Our very own Anne-Louise Fergusson told me that ‘things will never go back like they were before’.

So watch this space…

Further reading

Making Remote Hearings Work

Christopher Sharp QC

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https://www.stjohnschambers.co.uk/wp-content/uploads/2020/04/Making-remote-hearings-work-CSQC-2.pdf

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