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## **Head to Head: Should doctors fighting covid-19 be immune from negligence liability claims?**

*Litigation related to exceptional circumstances would be complicated and a drain on a staff and system already on its knees after the pandemic, says **Christine Tomkins**. But **Craig Purshouse, Rob Heywood, José Miola, Emma Cave and Sarah Devaney** argue that, despite the extraordinary times, immunity from negligence is unnecessary and sends the wrong message about standards of practice.*

### **YES**

Christine Tomkins, Chief Executive, Medical Defence Union

Every Thursday evening, people throughout the UK have been ‘clapping for carers’, recognising the efforts of NHS staff and others. But when we emerge from the covid-19 pandemic, those practitioners, many working outside their usual specialty or experience level, face being held to standards that don’t reflect current conditions including new or unfamiliar roles they are bravely taking on.

The NHS may face an avalanche of negligence claims. Members have already contacted the MDU for help with complaints related to covid-19 treatment or about its effect on the provision or availability of other care and treatment, and claims may follow.

UK clinical negligence claims are usually made years after the incident occurred. Three to five years later is usual, but the time lag can sometimes be decades. Staff responding to covid-19 are likely to be judged long after the public memory has faded, and by standards unreflective of current conditions. Anyone who says otherwise, to try to reassure doctors involved in dealing with the pandemic, hasn’t experienced the harsh reality of clinical negligence claims, which would still be inflicted on them even if they later proved defensible.

The Supreme Court<sup>1</sup> confirmed in 2018 that the standard of care is judged against the role undertaken and some legal commentators<sup>2</sup> have already suggested it is unlikely ‘the courts will relax these long established and rigid principles’.

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<sup>1</sup> *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50 at paragraph 25, reinforcing the principle established in *Wilsher v Essex Area Health Authority* [1987] QB 730 and applied recently in *Dowson v Lane* [2020] EWHC 642 (QB).

<sup>2</sup> Todd, J and Corkill, E, *Standards of Care during COVID-19*, Local Government Lawyer (24 April 2020). Available at: <https://www.localgovernmentlawyer.co.uk/healthcare-law/174-healthcare-features/43475-what-standard-of-care-should-hospitals-be-held-to-in-the-covid-19-outbreak>

The Medical Defence Union (MDU) believes that the NHS, and all NHS healthcare professionals currently making enormous personal and professional sacrifices, should be exempt from covid-19 related clinical negligence claims.

Several US states have already introduced legal protections for healthcare workers. New Jersey, for example, provides doctors and other healthcare workers with [legal immunity](#) in support of the covid-19 response, ‘from civil liability for any damages alleged to have been sustained as a result of the individual’s acts or omissions undertaken in good faith, whether or not within the scope of the licensee’s practice’. [1]

Doctors recognise they must be accountable for their actions, for example through complaints procedures or by their regulator. But clinical negligence claims are about compensation, not accountability. Although they are state indemnified and not financially responsible for claims relating to covid-19 treatment, doctors would still have to give evidence and face the distress and anxiety of having their clinical work criticised and every decision questioned, even though they were treating patients in extraordinary and trying circumstances. Why should doctors be put through this additional trauma at a time when so many will have been deeply affected by the pandemic and its psychological impact?

If compensation were paid in such cases, it would be a further massive drain on NHS finances, which is not fair to NHS patients or taxpayers when the NHS should be focused on recovering from the financial burden of the pandemic. It would only add to NHS Resolution’s claims liabilities which continue to rise steeply, with total liabilities currently [estimated at over £83bn](#).

NHS patients harmed by negligence during the pandemic should be looked after appropriately by the NHS, but that can and should be done with no need for litigation. The MDU is asking the government to introduce legislation to exempt the NHS from covid-19 clinical negligence claims. The need to ‘Protect the NHS’ and its staff won’t disappear once the pandemic ends. It will become even more pressing.

## **No**

Craig Purshouse, lecturer, School of Law, University of Leeds

Rob Heywood, professor, UEA Law School, University of East Anglia

José Miola, professor, School of Law, University of Leeds

Emma Cave, professor, Durham Law School, Durham University

Sarah Devaney, senior lecturer, Department of Law, School of Social Sciences, University of

Manchester

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Nobody could deny that doctors fighting the covid-19 pandemic are working in extraordinarily challenging conditions. Healthcare professionals have been granted an indemnity for errors deriving from covid-19 care, which means that they will not personally pay any clinical negligence damages. Such measures deserve our full support.

Nonetheless, there have been suggestions that doctors should be immune from all clinical negligence liability for covid-19 related claims, [3] as is now the case in some US states. We believe that providing such an immunity is not only unnecessary but would also send a worrying message that patients are not entitled to proper care.

### **Immunity is unnecessary**

In most cases immunity will be superfluous. To bring a negligence claim, a patient must demonstrate that the doctor failed to meet the required legal standard of care and that this failure caused the patient's injury. In cases of diagnosis and treatment, doctors must meet the standard of the reasonable doctor. [4] This means that doctors will be found negligent only if they did not comply with a responsible body of peer opinion or their actions had no logical basis. [5]

Not all errors are negligent, and context is crucial in establishing reasonableness. In a previous case, it was noted that doctors in pressurised A&E departments must make quick judgements without the luxury of consulting others. The judge confirmed that "the standard of care owed by an A&E doctor must be calibrated in a manner reflecting reality." [6]

With this in mind, it will be exceptionally difficult to establish that doctors have acted negligently during the pandemic. It is only when blatant and egregious errors have occurred that doctors should be concerned, and in such cases, any immunity would be wholly inappropriate. Most doctors therefore have nothing to fear from the law of negligence.

### **Unfair to patients**

The difficult task facing doctors is apparent for all to see, but theirs are not the only relevant interests. We must also weigh in the balance the needs of patients. They are entitled to receive proper care, and immunity would send the wrong message about the acceptability of substandard practices.

If a patient is killed or injured due to egregious errors then it is not clear why the doctor should not be held to account. Nor is it obvious that the patient should go uncompensated or without an explanation. Meagre state benefits do not adequately provide for the needs of the seriously injured. Negligence claims may lead to improved standards and help equip us to fight future pandemics.

We acknowledge that the clinical negligence system is far from perfect. [7] Nonetheless, any reform should not be a knee-jerk response that privileges one class of defendant, especially as doctors will not be paying any compensation themselves. [8] To argue otherwise could be taken to mean that patients should be thankful for any treatment in a pandemic, regardless of that fact that it may have been patently careless.

And let us not forget, doctors are patients too. The law of negligence enables employees to sue employers if they have not provided a safe system and place of work or provided appropriate tools and equipment.[9] Many healthcare workers are becoming ill or dying from covid-19 due to a lack of protective equipment. Hospital managers could easily say that they too are making difficult decisions in challenging circumstances. Should they also be immune from negligence liability? We doubt that doctors would endorse such a proposition.

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**Competing interests:**

CT is chief executive of the Medical Defence Union but has no further competing interests.

SD is Regional Liaison Service Associate at the GMC but this article is written in a personal capacity.

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