

Legionellosis Management & Control – **The “legal” Dilemma**

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A usual dilemma, faced by most Trusts, is one of competing priorities, given the financial restraints within which the Trusts are obliged to operate. Put simply, it is a case of what comes first - patient care or Health and Safety responsibilities.

The Sections that follow cover the matters which have been identified as causing Trusts particular concern:

- i. Protocol for prioritising expenditure**
- ii. Deferral of the identified works**
- iii. Individual responsibilities and liabilities for Health and Safety.**
- iv. Corporate responsibilities and liabilities for Health and Safety .**
- v. Regulatory action (Health And Safety Executive, Local Authority).**
- vi. Disclosure of Trust documents in legal proceedings.**

Prioritising expenditure

Most Trusts will not be able to prioritise expenditure to the detriment of their legal responsibilities and liabilities under Health and Safety legislation and/or at common law (e.g. negligence, nuisance).

The Department of Health and the NHS Executive have not issued any guidance to Trusts on prioritising responsibilities and associated expenditure. It would be surprising if such guidance existed for the simple reason that neither the Department of Health nor the NHS Executive can be seen to be encouraging the evasion or avoidance of legal duties and responsibilities on the part of a particular Trust.

It would be no defence to legal proceedings to plead that a Trust did not have the resources to comply with its obligations and that such resources as existed had been allocated elsewhere e.g. patient care. While such matters could be put forward by way of mitigation to a criminal charge, they would not avoid liability. Similarly, they would not assist in avoiding civil liability.

Deferral of the identified works

It follows that deferral of various works which may have been identified as being necessary to abate Health and Safety hazards is not a satisfactory option. The longer such works are put off, the greater will be the liability exposure of the Trust. Having said that, it is recognised that it is possible to seek to manage such liability exposure by means of *Risk Management* procedures. For example, where the Legionella risk assessment has placed a Trust buildings in the "High" Risk category, it would seem sensible to direct initial resources at those buildings within the Trust's estates, followed by "Significant" Risk categories and lastly "Moderate" Risk categories.

It must not be thought, however, that any form of risk management will in itself be a defence to a criminal charge - particularly under health and safety legislation where most offences are offences of strict liability, without any need to establish fault. If a Trust defers required works, they are taking a chance that nothing happens until the works are done.

Individual responsibilities and liabilities

Individual responsibilities and liabilities for Health and Safety fall under the headings of legislative liability and common law liability.

Legislative liability will be found, for example, in sections 7 and 8 of the Health and Safety At Work etc. Act 1974.

This imposes a legal obligation to, in effect, work safely so as to ensure both personal safety and the safety of others.

In the event of a health and safety offence occurring, an individual employee (this term includes a manager) may be prosecuted as well as the Trust.

The Trust's directors are in a similar position to company directors. It is possible for the directors to incur personal liability for allowing the Trust to break the criminal law and regulatory regimes of a quasi criminal nature e.g. health and safety, environmental. Gross negligence resulting in fatalities may result in manslaughter proceedings being brought.

Trust should consider taking out directors' and officers' liability insurance. This will indemnify them against civil liability (subject to policy conditions) but not criminal liability. It is not possible to insure for criminal liability.

Section 265 of the Public Health Act 1875 may provide an indemnity to Trust directors, but the matter is not free from doubt.

Common law liability will usually be for negligent acts or acts giving rise to a nuisance. Although an employee can be sued, it would be more usual to proceed against the employer where the negligent or other act of the employee was committed during the course of and in connection with his employment. In such circumstances the employer is "vicariously liable" for the wrong of the employee.

Corporate responsibilities and liabilities

A Trust, as a creature of statute, is a legal person in its own right. As such it can be proceeded against (under either criminal or civil law) in the same way as any other individual body or person. The only penalty it cannot be subjected to is, of course, imprisonment.

A Trust has specific duties under Sections 2 and 3 of the Health and Safety At Work etc. Act 1974 to ensure the health and safety of its employees and others who may be affected by the Trust's activities. Further, as with many similar statutes, any director, manager or similar officer of the Trust may be proceeded against as well as the Trust if an offence by the Trust is proved to have been committed with his consent or connivance. In other words there can be personal as well as corporate liability.

Regulatory powers.

The question has been asked about the likelihood of the Health and Safety Executive (HSE) exercising its powers, possibly to the point of shutting down a Trust.

Unfortunately, this is a very difficult question to answer. We not aware that the HSE has published an enforcement policy indicating its criteria for the initiation of enforcement proceedings. In the circumstances, a Trust must assume that any breaches of Health and Safety legislation may well give rise to regulatory Action.

As regards to closure of a Trust or any of its associated buildings, this is a technical possibility. An HSE Inspector can serve a prohibition notice and the effect of such a notice can be both immediate and far reaching. Failure to address a given state of affairs giving rise to danger in or about the Trust's premises (e.g. asbestos or Legionella) clearly courts the risk of prohibition action by the HSE.

The same applies to both the fire authority and the local authority as regards their respective jurisdictions. Any breach of legislative requirements can result in enforcement action.

Trusts should seek to develop a meaningful dialogue with the HSE (and other relevant regulatory bodies), making them aware of the problems facing Trusts and seeking to work with the regulators, rather than waiting for the regulators to approach the Trust with a list of complaints and requests for immediate action. If a Trust can demonstrate to the HSE that it is doing all it can to address health and safety problems, then at the very least it shows good faith on the Trust's part. For example, perhaps it would be possible to agree the prioritisation of the works Programme with the HSE. If this could be done, it would make it difficult for the HSE to bring proceedings and any agreement with them could be argued in mitigation.

Disclosure of the Trust's documents in legal proceedings

Trusts should be aware that risk assessment documents and similar reports and correspondence on particular hazards may well be "discoverable" (i.e. disclosable) in legal proceedings e.g. in connection with a personal injury claim. Legal privilege would not attach to documents which have neither been prepared for or in anticipation of litigation nor are communications passing between client and solicitor.

Communication and individual responsibilities

Managers need to satisfy themselves, by monitoring, that Risk Management procedures are being implemented, and it is not sufficient merely to devise procedures.

Implementation of an effective maintenance policy must incorporate the creation of fully detailed operating and maintenance documentation and the introduction of a Log-Book system.

The "Responsible Person" should be fully conversant with the design principles and requirements of water systems and should be fully briefed in respect of the causes and effects of contamination with *Legionella*. The appointment of an engineer as the Responsible Person is appropriate in that the responsibility can extend to the operation and maintenance of associated plant. It is recognised that the Responsible Person cannot be a specialist on all matters and must be supported by specialists in specific subjects. They however, must undertake responsibility for calling upon and co-ordinating the activities of such specialists.

The approach should be to remove all potential sources of seeding, growth and spread of Legionellae. Where this ideal cannot be achieved in existing situations, steps should be taken to control and prevent Legionellae by sound operational management.

Communication and management procedures are particularly important where several people are responsible for different aspects of the treatment or precautions. For example, responsibility for applying precautions may change when shift work is involved, or the person who monitors the efficacy of a water treatment regime may not be the person who applies it. In these circumstances, responsibilities should be well defined in writing and understood by all concerned. Communications should be 'fail-safe'.

This also applies to outside companies and consultants who may be responsible for certain parts of the precautionary regime. Trust management should satisfy themselves of the competence of contractors in this area of work before gaining their assistance in treating, monitoring, cleaning plant etc.

Though compliance with legislation may be delegated to staff, or undertaken by contract, accountability cannot be delegated.

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