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“Lockdown legacy – medical negligence claims emerging post pandemic – a consideration of the claims arising and potential claims to come, not related to covid, but to other loss or injury arising from services being paused or delayed during lockdown”

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Questions to be addressed

- What impact did the pandemic have on GP and hospital services?
- What effects will the pandemic have on clinical negligence litigation: both in existing cases and in cases to come?
- Will the pandemic result in any radical reform to clinical negligence litigation?
- What practical consequences will the pandemic have for practitioners?

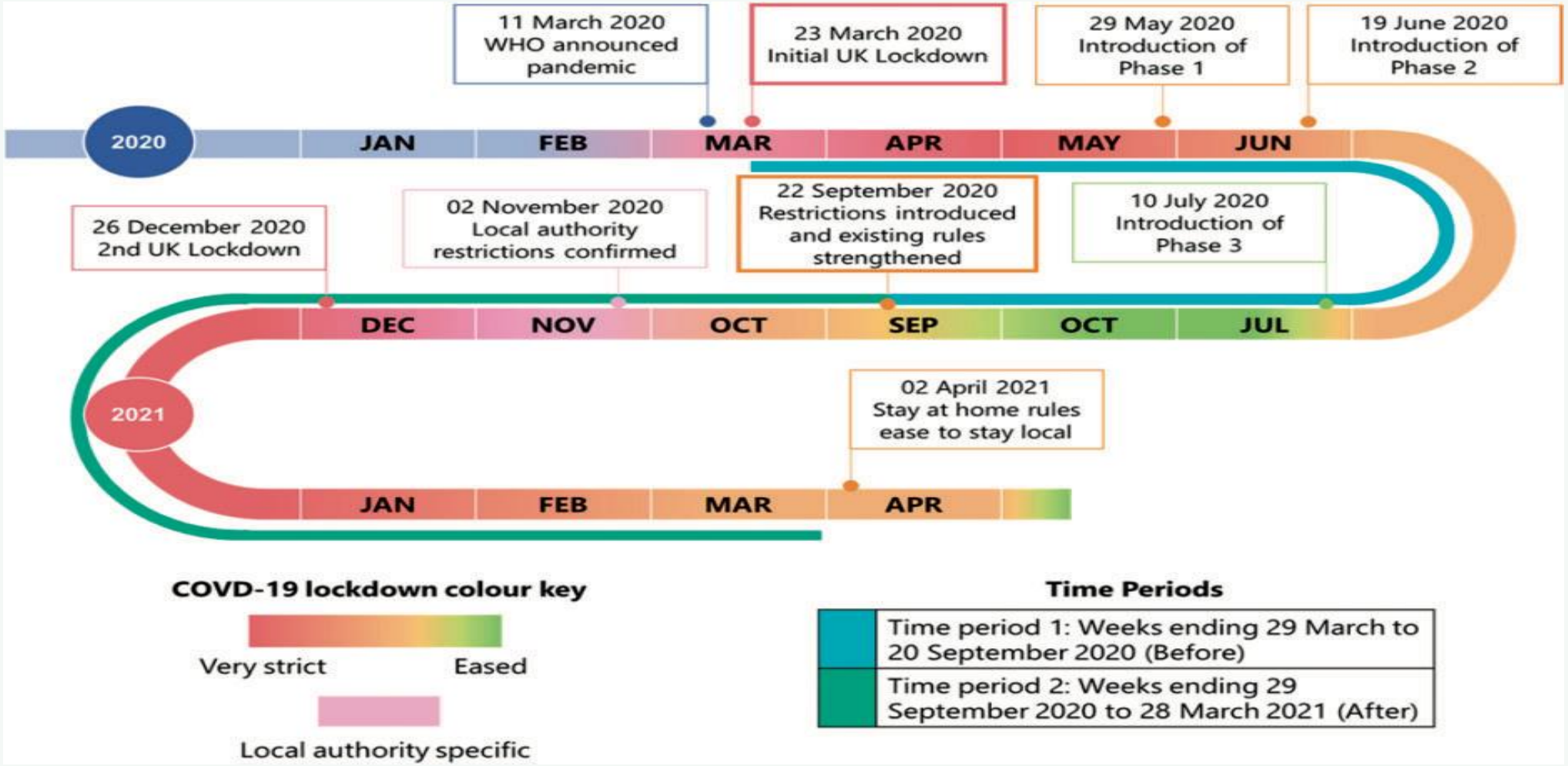
Covid-19: What is it and what was the pandemic?

Just kidding.

Timeline

- **1 March 2020**: The first positive case of Covid-19 was confirmed in Scotland.
- **11 March 2020**: The first case of community transmission in Scotland was confirmed.
- **13 March 2020**: Scotland recorded its first death from Covid-19.
- **14 – 17 March 2020**: The Scottish Government announced that all non-urgent elective care was to be postponed (excluding all vital cancer treatments, emergency, maternity and urgent care). The NHS would be placed on an emergency footing.
- **18 March 2020**: GPs were advised by the Scottish Government to triage patients by phone to avoid them presenting at practices. They were encouraged to consult remotely. Decisions on whether to continue to bring in some patients for face to face consultations was to be based on clinical judgement considering the balance of risk and benefit. GPs were told to advise patients not to attend the practice.

• **23 March 2020**: First national lockdown is announced.



Shah et al., 2020, Journal of the Royal Society of Medicine; 0(0) 1–10 DOI: 10.1177/01410768221095239

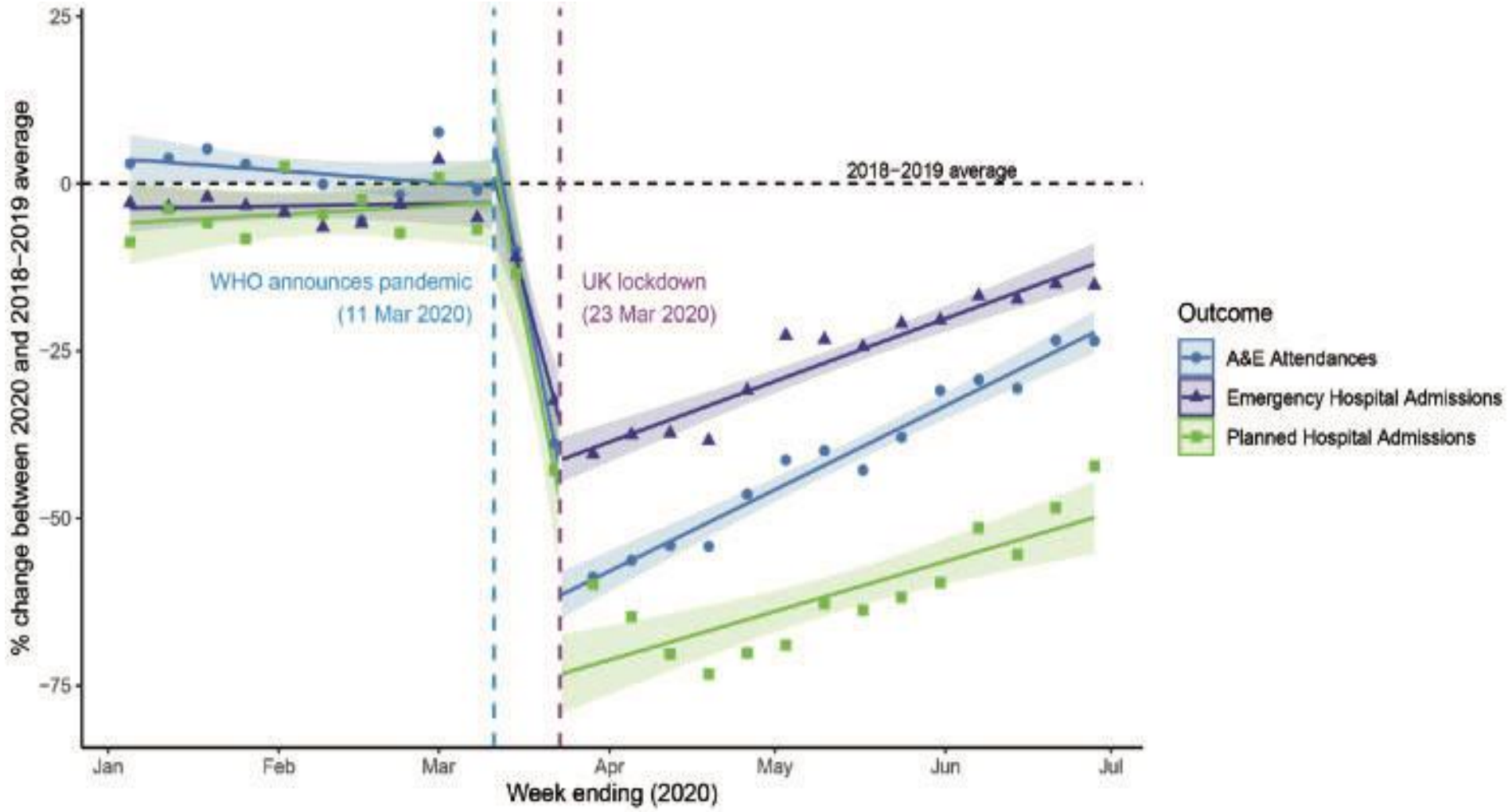
Impact on services

- In March 2020 many aspects of healthcare provision were curtailed including suspending or cancelling planned surgery and reducing the number of face-to-face clinical assessments.

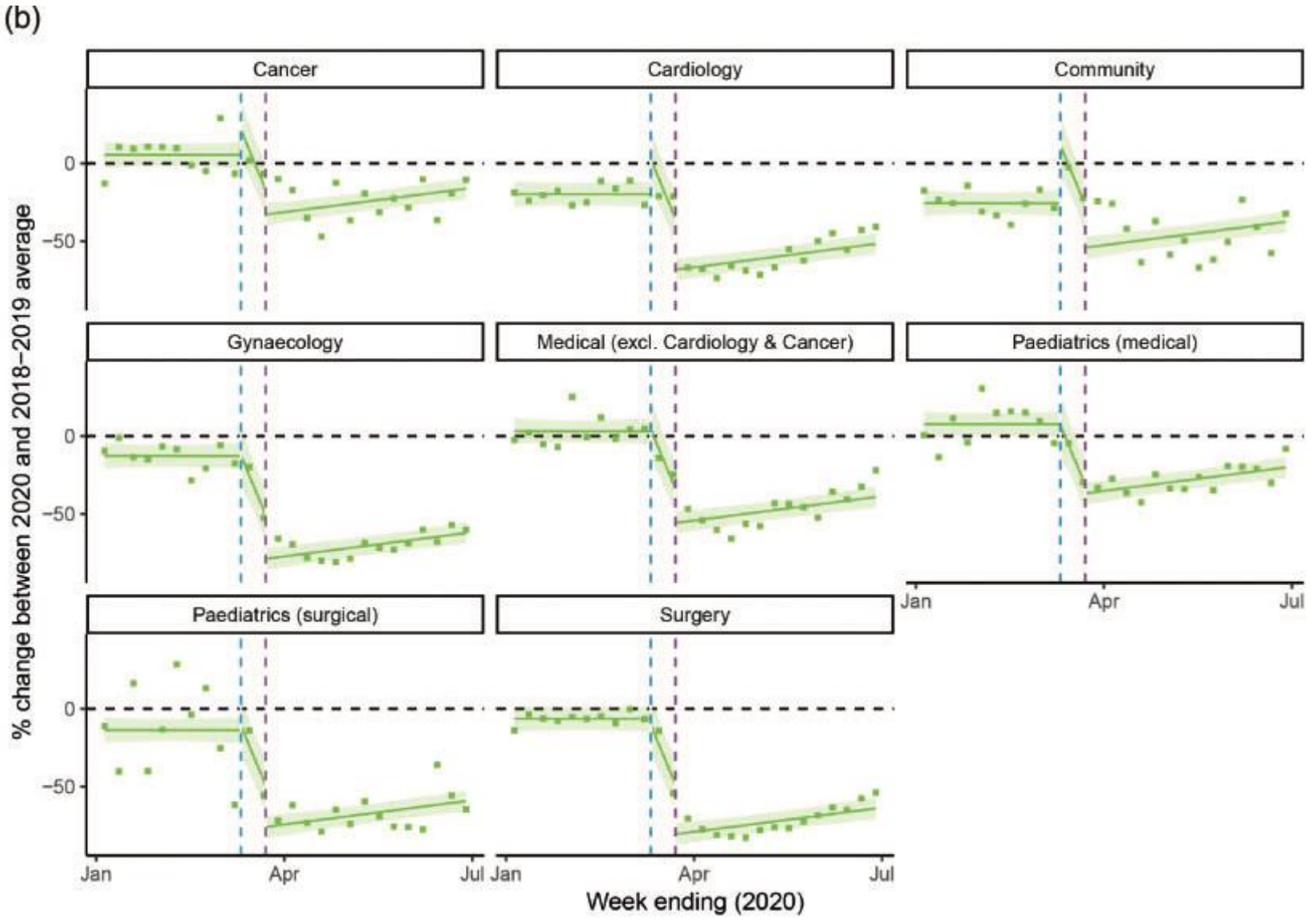
- Research has shown the following data:

  - A 41% drop in A & E attendances
  - 26% fewer emergency hospital admissions
  - 61% decrease in planned hospital appointments
  - Even by the end of June 2020, in surgery and gynaecology there was still a 50% reduction in planned procedures being undertaken.

[Mulholland, R. H. et al. (2020) 'Impact of COVID-19 on accident and emergency attendances and emergency and planned hospital admissions in Scotland: an interrupted time-series analysis', Journal of the Royal Society of Medicine. doi: 10.1177/0141076820962447]



[Mulholland, R. H. et al. (2020), Ibid, Journal of the Royal Society of Medicine. doi: 10.1177/0141076820962447]



[Mulholland, R. H. et al. (2020), Ibid, Journal of the Royal Society of Medicine. doi: 10.1177/0141076820962447]

- Previous data shows the immediate impact of the lockdown.

- Hospital healthcare provision remained enormously disrupted across Scotland 12 months after the imposition of the first national lockdown.

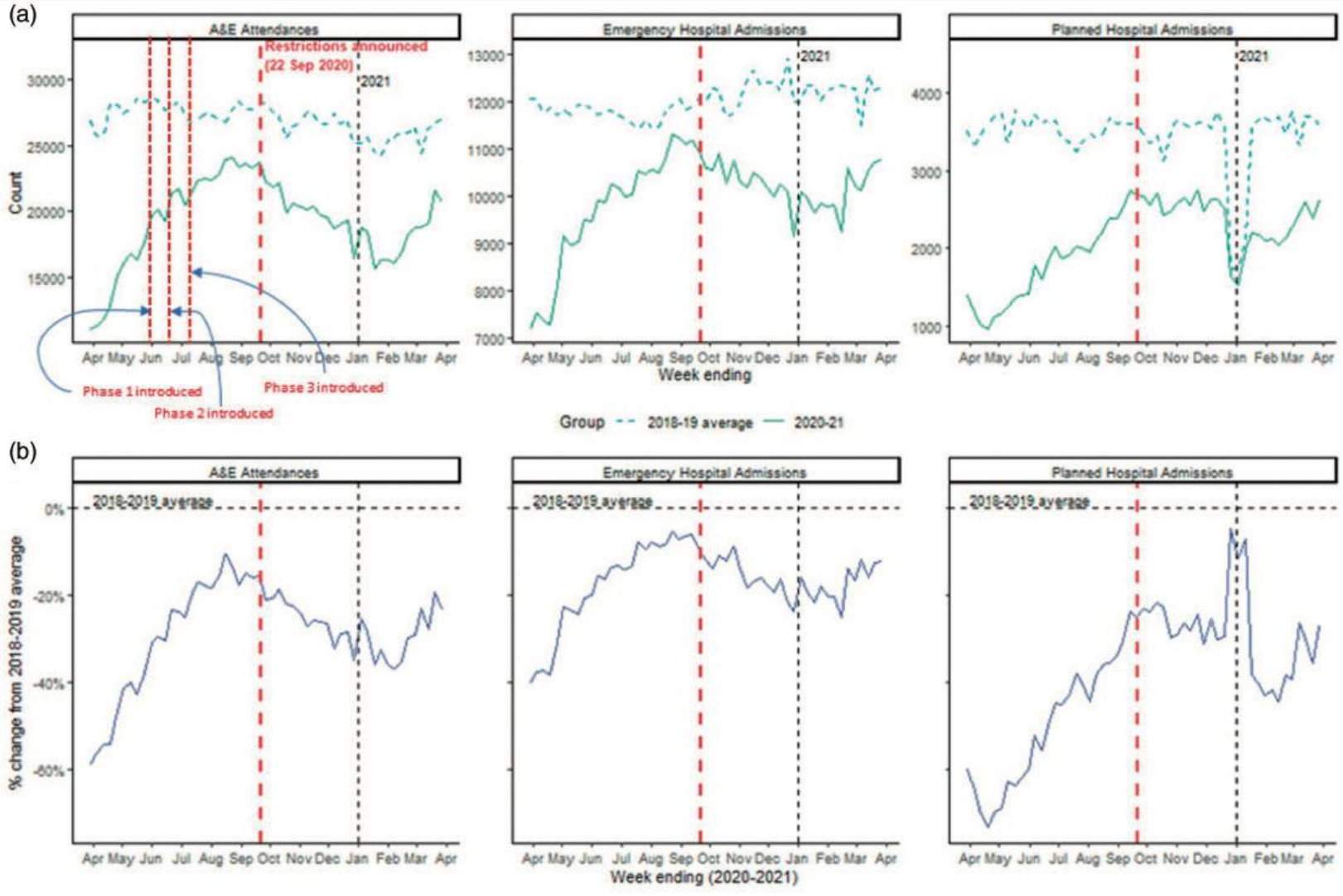
- Three key trends emerged:

    - There was an immediate and substantial reduction in numbers attending hospital starting 2–3 weeks preceding the announcement of the first UK lockdown.

    - Recovery commenced during lockdown from mid-April 2020 until September 2020 with rates of healthcare use slowly approaching pre-pandemic levels as restrictions were gradually lifted.

    - The numbers attending hospital started to decrease again following the re-imposition of restrictions on 22 September 2020. Hospital-based activity remained at well-below levels in preceding years, even when Covid-19 restrictions were most relaxed during Phase 3 from July to early September 2020.

[Mulholland, R. H. et al. (2020), Ibid, Journal of the Royal Society of Medicine. doi: 10.1177/0141076820962447]



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Conclusion on impact on services

- Fewer people were attending hospital to undergo elective treatment.
- GPs were seeing fewer people face-to-face.
- This was over a prolonged period of time.
- Potentially significant implications for medical negligence litigation.

Effects on clinical negligence: delay in treatment cases

- Due to the disruption to medical services there will inevitably be cases where arguments arise in relation to delay in treatment.

- Consider a situation where a pursuer, following an injury, requires to undergo elective surgery to facilitate a return to work (and thus mitigate an ongoing loss of earnings claim). However, that surgery was cancelled due to the pandemic and as a result the pursuer cannot work, symptoms deteriorate and there is an ongoing loss of earnings until surgery is performed.

Delay in treatment cases: negligence

- Will inevitably be a question of expert opinion. Questions about clinicians' decision making will fall to be judged with reference to familiar principles.
- Parties will need to consider the regulations in place at the time, the services that were operating and the urgency of the surgery in the context of the pandemic.
- Is there likely to be an increase in criticisms being made about allocation of resources?
- Historically it has been difficult to pursue claims of that nature. Public law challenges highlight that well.

R. v Central Birmingham HA Ex p. Walker (1987) 3 B.M.L.R. 32 CA

"*It is not for this court, or indeed for any court, to substitute its own judgment for the judgment of those who are responsible for the allocation of resources. This court could only intervene where it was satisfied that there was a prima facie case, not only of failing to allocate resources in the way in which others would think that resources should be allocated, but a failure to allocate resources to an extent which was Wednesbury unreasonable … [T]he jurisdiction does exist. But it has to be used extremely sparingly*."

Sir John Donaldson MR

Delay in treatment cases: causation

- Consider the earlier example of the pursuer being unable to work without undergoing elective surgery together with the deterioration in symptoms.
- What is the cause of the ongoing symptoms and loss of earnings?
- The question arises: who should bear the loss?

Act of God or *Novus actus interveniens*?

- Where a defender's conduct forms part of a sequence of events leading to harm to a pursuer, and another act, without which the damage would not have occurred, intervenes between the defender's wrongful conduct and the damage, the court has to decide whether the defender remains responsible or whether the act constitutes a *novus actus interveniens* (in other words, whether it can be regarded as breaking the causal connection between the wrong and the damage). Did it "obliterate" the defender's wrongdoing?

- Normal in medical negligence cases to see the argument of novus actus interveniens being deployed where the intervening act stems from the acts of the pursuer, the defender or a third party.

- Relatively rarely, an intervening natural event may operate to eclipse a defender's wrongdoing as the effective cause of the damage suffered by the pursuer.

- Is it arguable that the onset of the pandemic (and the disruption to medical services that it caused) constitutes an act of God (or otherwise a *novus actus interveniens*)?

Corr v IBC Vehicles Ltd [2008] 1 AC 884:

"*The rationale of the principle that a novus actus interveniens breaks the chain of causation is fairness. It is not fair to hold a tortfeasor liable, however gross his breach of duty may be, for damage caused to the claimant not by the tortfeasor's breach of duty but by some independent, supervening cause (which may or may not be tortious) for which the tortfeasor is not responsible*."

(Lord Bingham)

Borealis AB v Geogas Trading SA [2010] EWHC 2789 (Comm), [2011] 1 Lloyd's Rep. 482 at [47] per Gross LJ:

"*the question of whether there has been a break in the chain of causation is fact sensitive … 'it is almost impossible to generalise'.*"

(Gross LJ)

Nichols v Marsland (1876) 2 Ex. D. 1

- Claimant sought to recover damages from the defendant on account of the destruction of four county bridges which had been carried away by the bursting of some reservoirs on the defendant's land.

- There was an extraordinary rainfall which was unprecedented in that area. The rainfall caused ornamental lakes to burst their embankments, flood the adjoining land and destroy the bridges. The jury found that there was no negligence either in the construction or the maintenance of the reservoirs, but that if the flood could have been anticipated, the effect might have been prevented.

- On appeal, it was held a defence of act of God applied and the defendant was not liable.

- Would this reasoning be applicable in modern day clinical negligence actions?

Delay in treatment cases: causation

- We may see interesting arguments in the wake of the pandemic.
- It will inevitably be a question of fact as to the effective cause of the loss.
- This would be a relatively novel argument in the context of clinical negligence. The Court may be slow to entertain it.

Missed (or delayed) diagnoses cases

- It is likely that we are going to see an increase in missed diagnoses cases.
- This could apply in both primary and secondary care but may be more commonly encountered in the primary care setting.
- Consider a patient who reports common (and not necessarily concerning) symptoms but who is suffering from more serious underlying pathology. Pre-pandemic, is a GP more likely to have undertaken a physical examination given that they had the patient in front of them in any event?

Missed (or delayed) diagnoses cases: negligence

- Going to be a question for expert evidence.

- The question will require careful consideration of the regulations in place, the reported symptoms and the presentation of the pursuer. There may be issues of credibility and reliability in relation to what symptoms were reported remotely. May be harder for clinicians to rely on normal practice without an examination having been undertaken.

- Consider the position in relation to referrals. Were the hospitals accepting referrals at the time? What is the position where different health boards were offering different services? May pose interesting questions in relation to what was expected in the exercise of ordinarily competent skill and care.

Missed (or delayed) diagnoses cases: causation

- There may be consequences for causation.

- Even if there was a delay in diagnosis, would timeous diagnosis have prompted treatment?

Conclusion on existing and new cases

- Likely to see more cases relating to delayed treatment and missed diagnoses.

- May see interesting and novel arguments about allocation of resources, negligence and causation.

Covid-19: immunity (legal, not medical)

- The Medical Defence Union suggested introducing legislation granting healthcare professionals immunity against clinical negligence claims arising from the period of the Covid-19 pandemic.

- Is that reasonable?

- Is that something we will see in Scotland in due course?

Mulholland v Medway NHS Foundation Trust [2015] EWHC 268 (QB):

"In forming a conclusion about the conduct of a practitioner working within triage within an A&E Department context cannot be ignored. The assessment of breach of duty is not an abstract exercise but one formed within a context."

(Green J)

Morrison v Liverpool Women's NHS Foundation Trust [2020] EWHC 91 (QB)

"Of course, in the clinical context a balance has to be struck between the needs of any given patient and any other competing professional demands placed upon the clinicians involved. Sometimes, the seriousness and urgency of a patient's presentation and the absence of any conflicting factors will mandate a swift and decisive response. On other occasions, it is equally obvious that the needs of the patient must be deprioritised to allow the clinicians to attend other demands on their time of as a matter of priority."

(Turner J)

- In law, context is everything. Doctors' duties will be considered in the context in which they are working: an unprecedented pandemic. Negligence principles have been developed and refined through the common law over several decades and are sufficiently comprehensive and flexible to cover the range of circumstances in which clinicians interact with patients.

- The standard of care is judged by reference to the role that the clinician is undertaking; not by their individual experience and qualifications. However, the courts will likely take into account the exceptional circumstances in which professionals were being asked to act.

- Doctors still owe a duty of care and if they fall below the standards expected of them (even in a pandemic) then that will provide a basis upon which to found a cause of action. That is consistent with tried and tested principles.

Conclusion on legal immunity

Contrary to principle and not necessary?

Practical consequences: expert evidence

- The importance of expert evidence cannot be overstated. It will be necessary to have in place expert evidence which considers matters in the context of the pandemic.

- To that end, consider whether the expert is able to assist the court.

- The courts will want to ensure that an expert witness has properly considered the context in which the doctor was acting. What were the resource implications at the time? What sort of decisions were being made in relation to the prioritisation of patients? How many patients was a clinician responsible for at the time? How much time did they have to spend with patients?

Practical consequences: limitation

- There could be consequences for the limitation period. It will be important to consider on what date the triennium started and how the pandemic, or delay in obtaining legal advice, might impact that.

- How readily will the Courts allow cases to proceed under s.19A of the Prescription & Limitation (Scotland) Act 1973 because of the pandemic? Consider somebody who is shielding and so doesn't seek legal advice timeously.

- The pursuer must persuade the Court that it is equitable to allow the action to proceed out of time.

Questions?